सीमा शुल्क के प्रधान आयुक्त का कार्यालय
सीमा शुल्क सदन, मुंद्रा, कच्छ, गुजरात
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
CUSTOMS HOUSE, MUNDRA, KUTCH, GUJARAT
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62, Email-adj-mundra@gov.in

A. File No.	:	GEN/ADJ/COMM/208/2024-Adjn Adjn-O/o Pr Commr-Cus-Mundra
B. Order-in-Original No.	:	MUN-CUSTM-000-COM-005-25-26
C. Passed by	:	**Nitin Saini,** **Commissioner of Customs,** **Customs House, AP & SEZ, Mundra.**
D. Date of order and Date of issue:	:	21.05.2025 21.05.2025
E. SCN No. & Date	:	GEN/ADJ/COMM/208/2024-Adjn Adjn-O/o Pr Commr-Cus-Mundra, dated 22.05.2024.
F. Noticee(s) / Party / Importer	:	**M/s Electrothem (India) Ltd.**, Survey No 325, Village Samkhiyali, Near Toll Tex Booth, Bhachau, Kutch, Gujarat- 370140 (IEC- 0889000093)
G. DIN	:	20250571M0000000DCF9

1. यहअपीलआदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।

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

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सीए3-में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

   Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

   "केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर, बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद- 380 004"

   "Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004."

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।
   Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के साथ -/ 1000 रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो5000/- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्ड पीठ बेंचआहरितट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं°-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

6. अपील ज्ञापन के साथ ड्यूटि/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.

7. अपील प्रस्तुत करते समय, सीमाशुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों मे पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

8. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall flie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE

Whereas, based on the intelligence developed it appeared that **M/s Electrothem (India) Ltd**., Survey No 325, Village Samkhiyali, Near Toll Tex Booth, Bhachau, Kutch, Gujarat- 370140 (IEC- 0889000093) *(hereinafter referred to as M/s. **Electrotherm** for the sake of brevity)* is engaged in import of e-scooters/e-bikes in CKD condition by declaring the imported goods as parts/spare parts and components of e-scooters/e-bikes and classifying the same under Chapter Tariff Heading (CTH) 8714 and others of Custom Tariff Act, 1975. The said goods appear to be classified under CTH 8711 attracting duty @ 50% ad-valorem, as per Rule 2(a) of General Rules of interpretation for Import Tariff.

1.1 Rule 2(a) of General Rules of Interpretation for Import Tariff of the First Schedule to the Customs Tariff Act, 1975 reads as under:

> In terms of Rule 2(a) of General Rules of Interpretation for Import Tariff which reads as, *"Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."*

2. Accordingly, search was conducted at the factory premises of M/s Electrothem (India) Ltd situated at Survey No 325, Village Samkhiyali, Near Toll Tex Booth, Bhachau, Kutch, Gujarat- 370140 under Panchnama dated 03.06.2022.

2.1 During the Panchnama proceedings, Shri Rajesh Hariprasad Trivedi, Vice President (Commercial) of M/s. Electrotherm (India) Pvt. Ltd informed that the procurement/purchase/customs, sales and accounting departments operate in their office at Survey No. 72, Palodia, Near Shilaj, Ahmedabad, and that staff related to operations and dispatch operates from the plant in Samkhiali.

2.2 Shri Himanshu Sharma, Production Co-ordinator of e-bike plant informed that they have two models of e-bikes by the name 'Yo Drift DX' and 'Yo Edge DX'. Shri Himanshu Sharma, Production Co-ordinator explained the whole work of assembling of e-scooter and informed that there are two separate assembly lines in the same shed, divided with a partition. Shri Himanshu Sharma further informed that first of all, chassis is punched/embossed with VIN/Chassis Number, after punching VIN, the parts namely rear fender, rear reflector, round reflector, rear fork, shock absorber, side stand, main stand, ignition lock, controller, converter, horn, seat lock plate and seat lock cable. Thereafter, the assembled chassis is brought to the conveyor line and in conveyor line, rear wheel fitment, front fork fitment, front wheel fitment, handle fitment, harness fitment and battery fitment are done. Thereafter, glove box, floor panel, paddle cover, side body parts, front mould and headlight cover are fitted on the vehicle. Thereafter, the vehicle is bought down from the conveyor line and seat fitment, rear carrier and swing arm cover are fit on the vehicle to make it a complex vehicle. Thereafter, quality check is done and the e-bikes are ready for dispatch.

2.3 Shri Himanshu Sharma explained the flow chart of assembling process of e-bikes which is as under:

						(Stage-1 assembly)
Chassis	→	Chassis is punched/embossed with VIN/Chassis Number. Then the parts namely rear fender, rear reflector, round reflector, rear fork, shock absorber, side stand, main stand, ignition lock, controller, converter, horn, seat lock plate and seat lock cable are fitted on chassis.	→	Ready Chassis to take up on conveyor/ assembly line	→	Rear wheel fitment, front fork fitment, front wheel fitment, handle fitment, harness fitment and battery fitment are done.

	(Stage-2 assembly)		(Stage-3 assembly)	
→	Glov box, floor panel, paddle cover, side body parts, front mould and headlight cover are fitted on the vehicle.	→	The vehicle is bought down from the conveyor line and seat fitment, rear carrier and swing arm cover are fit on the vehicle.	→

(Stage-4 assembly)				
Quality/Inspection check	→	Servicing if any fault is there	→	E-bike is ready to dispatch

Shri Himanshu Sharma further informed that all the parts of e-bikes are imported except Lithium Ion Battery, Tyres and Battery Charger and he also informed that in Batteries, all Lead Acid Batteries are imported.

3. Another search was conducted at office of M/s Electrotherm (India) Ltd situated at Survey No. 72, Village- Palodia, Ahmedabad (Gujarat), and relevant documents were withdrawn under the Panchnama dated 03.06.2022 .

4. Statement of **Shri Himanshu Sharma,** Production Co-ordinator of M/s. Electrotherm India Ltd. (Auto Division) was recorded under Section 108 of Customs Act, 1962 on 03.06.2022, wherein he inter-alia, stated that:

- He is a Diploma holder in Mechanical Engg.
- He joined M/s. Electrotherm India Ltd. in the month of November, 2015 as Production Co-ordinator. He is reporting to Shri Parag Vaja, Plant Head. He is looking after the assembly line in the production department of Electric bikes- "Yo Bikes". There are two models of "Yo bikes" namely, "Yo

Drift Dx" and "Yo Edge Dx".

- Most of the parts of these bikes are imported from China. Two types of battery, namely Lithium and Lead acid are being used in the bikes, as per the requirement of the dealers. Lithium batteries are being procured from the domestic market and Lead Acid batteries are being procured from the suppliers from China as well as India. The supplier of Lithium as well as Lead Acid batteries in India is M/s. Amptek. Further, tyres are also being purchased locally only.

- The orders for purchase are placed to the suppliers, by their purchase department at Palodia, Ahmedabad office. The parts are normally imported, as per the number of bikes ordered, in Knock Down Condition.

- First they punch Chasis Number on each of the chasis, serially, which indicates the month and year of production and the model number. Last five digits of the chasis number (VIN Number-Vehicle Identification Number) are given serially.

- After punching the VIN Number on the chasis, the parts, namely rear fender, rear reflector, round reflector, rear fork, shock absorber, side stand, main stand ignition lock, controller converter, horn, seat lock plate and seat lock cable are fitted during chasis assembly. All these parts are imported from China. Thereafter, the assembled chasis is brought to the Conveyor line.
- In the conveyor line, rear wheel fitment, front fork fitment, front wheel fitment, handle fitment, harness fitment and battery fitment are done. Thereafter, glow box, floor panel, paddle cover, side body parts, front mould and headlight cover are fit on the vehicle. They put the same last five serial number of the VIN of a bike on the controller and converter of the said bike. Further they also put their code numbers on the batteries as well. Thereafter, the vehicle is brought down from the conveyor line and seat fitment, rear carrier and swing arm cover are fit on the vehicle to make it a complete vehicle. After initial testing at the production unit, the bike is sent for final Quality Inspection. After inspection of the bike the same is ready for dispatch.

- In the case of lithium battery operated bike, only one lithium battery is used in one bike, whereas in the case of lead acid battery operated bike, they use four or five lead acid batteries in one bike, as per the requirement of the dealers. They also purchase chargers from Indian local market and supply along with the bikes.

- All the parts except battery and tyre are imported from China. The brand logo of their bike- "ET" is affixed on the big front panel connecter (Front Mould) by the supplier themselves before exporting the same from China, and the said part is brought to the factory, along with the logo on it, duly affixed. No other logo is affixed on the bike from their factory. After the Final Quality Inspection, the dispatch staff does the packing of the bikes and dispatches as per the sales invoice.

5. Statement of **Shri Shivkumar Amar Singh,** Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd. was recorded under Section 108 of Customs Act, 1962 on 27.07.2022, wherein he inter-alia, stated that:

- He is a B.Tech. Graduate. He joined M/s.Electrotherm (India) Ltd. in the year 2004 and working as Manager (Purchase), Auto Division in the company.

- He is reporting to Shri Joji John, Business Head. He is looking after import purchase and domestic purchase relating to Auto Division.

- M/s Electrotherm (India) Ltd. is engaged in the manufacturing of Induction Furnace, Induction heating and hardening equipments, Continuous Cast Machine, transformers at their Palodia factory. They have a plant at Samkhyali, where the manufacturing of TMT Iron rods, DI pipes and Electric bikes is done.

- **Shri Shailesh Bhandari is the Managing Director** and around 6 to 7 other Directors in the company.

- Electrotherm (India) Ltd. started manufacturing E-bikes in the year 2006. The manufacturing takes place at their Samkhyali factory.

- They sell the E-bikes under their brand name "Yo". They are manufacturing two models of E-bikes, namely, Driftdx, Edgedx. They are having variants of these models with lead acid battery fitted and Lithium battery fitted. Dirftdx and Edgedx are manufactured having 60volt capacity with lithium as well as Lead acid batteries. Edgedx is having another variant with 78 volt capacity with Lead Acid variant.

- He produced a duly signed list of all the parts imported and used for assembling E-bikes. Apart from these items, they use electronic components, tyre, paint used for powder coating of the chasis, and lithium battery.

- They import most of the items, as per list given by him from two vendors in China, namely M/s.Peerless Automotive Co. Ltd., Zhejiang Province and M/s.Mega Enterprise Co. Ltd., Zhejiang.

- They are importing parts of E-bikes from Mundra Port, since 2019. Prior to that they used to import the same at Nhava Sheva Port.

- They themselves file the BoEs for import of parts of E-bikes; and at times they use the services of the CHA M/s.Navigators.

- They are classifying the parts of E-bikes under CTH 8714 of the Customs Tariff.

- They prepare purchase orders for parts of E-bikes corresponding to the number of vehicles planned to manufacture, but do not send the purchase orders to their vendor abroad. Against their message sent by wechat (earlier) and whatsapp to the vendor, the vendor send them Proforma Invoice quoting the price of all the parts of E-bikes as requested. On receipt of Proforma Invoice, they make full payment to the vendor abroad and after that Vendor ship the material to them. The purchase orders are prepared for their record and for SAP accounting purpose.

- He produced a file containing copies of all the Purchase Orders for 2021-22 during the statement.

- Having perused the Proforma Invoice-PI No.PAUTO-EX20211004, dated 02-Nov-2021 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 231-233 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, he agreed that the order is for parts of E-bikes corresponding to 120 E-bikes.

- Having perused Proforma Invoice-PI No.PAUTO-EX20211003, dated 02-Nov-2021 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 235-237 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, he agreed that the order is for parts corresponding to **180** E-bikes, without battery and tyres.

- Having perused the email correspondences between Shri Jignesh Patva and Shri Joji John dated 17 November, 2021 available at page 249 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, he stated that the said email was sent by Shri Jignesh Patva regarding Auto Division payment planning relating of M/s.Electrotherm (India) Ltd. to M/s.Peerless Automotive Co. Ltd., against PI Nos. PAUTO-EX20211003 & PAUTO-EX20211004 for 180 Nos. driftdx & 120 Nos. Edgedx parts import (USD 40849.20 + 27499.20 – 68348.40 * 75) for an amount of Rs.51,26,130/- via swift mode, Shri Joji John has given approval by reply email dated 17 November 2021 12.24hrs by saying OK.

- He further agreed that the abovementioned payment planning shows that the payments are made for the parts meant for 180 Nos. Driftdx & 120 Nos. Edgedx.

- Having perused the Proforma Invoice-PI No.MAUTO-EX20211002, dated 02-Nov-2021 issued by M/s.Mega Enterprise Co. Ltd., Zhejiang, China, available at pages 253-255 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad he agreed that the order is for meant for manufacturing **300** E-bikes.

- Having perused the Proforma Invoice-PI No.PAUTO-EX20220403, dated 07-Apr-2022 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 289-290 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad he agreed that the order is for parts correspond to **300** E-bikes, without battery and tyres. Further he also agreed with the fact that w.r.t the email correspondences between Shri Pratik Joshi and Shri Joji John dated 19-04-2022 confirms the payment of total Rs.58,04,387/- including payment against 300 Nos. Driftdx imported parts against PIs No. PAUTO-EX20220403.

- Having perused the Proforma Invoice No. PI No.PAUTO-EXP20220101, dated 29-Nov-21 available at page No.331-333 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, he agreed that the said PI is for parts correspond to **300** E-bikes.

- Further having perused the payment planning confirmation email dated 20-01-2022 between Shri Jignesh Patva and Shri Joji John, available at page 339 of

File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, which speaks about 300 Ns. Driftdx parts import against PI No. PAUTO-EXP20220101, and the Bank debit voucher dated 01-02-2022 (page 341 of the same file) in respect of the said payment which speaks about payment against USD 70299.00 @ 74.86 300 Drift PAUTO-EXP20220101 he agreed that these payment confirmation are for purchase of parts meant for assembling **300** E-bikes.

- Having perused the Proforma Invoice PI No.PAUTO-EX20220201, dated 10-Mar-22 issued by M/s.Peerless Automotive Cp. Ltd., Zhejiang Province, China, available at page 347-349 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., he confirmed that this proforma Invoice is showing the price in respect of parts meant for **900** driftdx E-bikes.

- Further having perused the email correspondences between Shri Jignesh Patva and Shri Joji John dated 21-03-2022; seeking payment planning approval and confirmation, available at page 353 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., he agreed that said email from Shri Jignesh Patva is regarding seeking approval for part payment planning against import of parts in respect of **900** nos. driftdx model E-bikes each against Pls No.PAUTO-EX20220201, MAUTO-EX20220202 and PAUTO-EX20220203.

- Having perused Proforma Invoice No.PAUTO-EX20220404, dated 07-Apr-22 issued by M/s.Peerless Automotive Co. Ltd., Zhejiang Province, China, available at page 361-363 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., and also the corresponding Bank debit voucher dated 05-May-2022 issued for payment against USD 71460 @ 76.37 300 Drift PAUTO-EX20220404, which is available at page 369 of the same File, he agreed that these are documents relating to purchase of parts meant for **300** Drift E-bikes.

- Having perused Proforma Invoice No.MAUTO-EX20211201, dated 07-Apr-22 issued by M/s.Mega Enterprise Co. Ltd., Zhejiang, China, available at page 397, 403 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd. and also the corresponding Bank debit voucher dated 21-Dec-2021 issued for payment against USD 70101 @ 75.90 300 Drift PI MAUTO/EX20211201, which is available at page 411 of the same File he agreed that these are documents relating to purchase of parts correspond to **300** Drift E-bikes.

- He used to send messages in a whatsapp group naming "ORA CAP Group". One of the member in the said whatsapp group is Ms. Echo Rui of China (Mob.+86 13646790215), who is the owner of both the main suppliers firm for M/s Electrotherm for parts of E-Bike i.e. M/s.Peerless Automotive Co. Ltd. and M/s. Mega Enterprise Co. Ltd. both based at China.

- He exported the entire chat messages to his own email account and submitted print of the entire chat messages running into 1 to 72 pages under his initials on each odd pages.

- He perused *and put his dated signature on* Explanatory notes of First Schedule to Chapter 87 of the Customs Tariff with regard to *"incomplete or unfinished vehicle", wherein it is mentioned that-*

An incomplete or unfinished vehicle *is classified as the corresponding complete or finished vehicle* ***provided*** *it has the essential character of the latter (see Interpretative Rule 2 (a)), as for example :*
A motor vehicle, not yet fitted with the wheels or tyres and battery.
A motor vehicle not equipped with its engine or with its interior fittings.
A bicycle without saddle and tyres.

- *He perused and put his dated signature on Rule* 2(a) of the General Rules for the interpretation of first Schedule to the Customs Tariff, wherein the principles governing classification of goods in the said schedule is given as below

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

- After going through the above Rules of Interpretation and the Explanatory Notes of Chapter 87 of the first Schedule to the Customs Tariff, he agreed that if a vehicle is imported in a dismantled condition, even without tyres and battery, the same has to be classified as the corresponding finished or complete vehicle.

- He perused and put his dated signature on the item description given in First Schedule to Customs Tariff, against CTH 8711 and 8711.60 which reads as

> The item description against the sub-heading 8711 is - *"Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars"*
> The item description against the sub-heading 8711.60 is *"With electric motor for propulsion"*.

- He further agreed that the E-bikes imported by M/s.Electrotherm (India) Ltd. in knock down condition merits classification under 8711.60 of the First Schedule to the Customs Tariff.

- He perused the Sl. No.531A of the Customs Notification. No.50/2017-Cus, dated 30-06-2017, amended vide Not. No.01/2020-Cus, dated 02-02-2020, effective from 01-04-2020 under which the effective rates applicable for the goods under CTH 8711 are as under:

Sl. No.	Customs CTH	Description of Goods	Standard rate
"531 A.	8711	Electrically operated motor cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, . (1) As a knocked down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with,- (a) disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy	

		Monitor Contractor, Brake system, Electric Compressor not mounted on chassis; (b) pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor not mounted on a chassis or a body assembly (2) in a form other than (1) above	15% 25% 50%

- He agreed that the classification done by M/s.Electrotherm (India) Ltd. for import of parts of E-bikes in sets under CTH 8714 is wrong.

- He agreed that Customs duty has been short-paid on import of parts of E-bikes in sets.

- They have been classifying this product under CTH 8714 since 2006. Hence, they continued the same till now. However, ultimate decision with regard to all matters of the company lies with their Managing Director Shri Shailesh Bhandari. The final decision with regard to Customs Tariff classification of parts of E-bikes in sets meant for vehicles on import in their case also will be taken by their Managing Director only.

6. **Relation between M/s. Electrotherm (India) Ltd. and Shri Shailesh Bhandari.**

It appeared that Shri Shailesh Bhandari was the main person in the company M/s. Electrotherm (India) Ltd. Shri Shailesh Bhandari is Managing Director in M/s. Electrotherm (India) Ltd. Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd. in his statement dated 27.07.2022 accepted that the company is being managed by Shri Shailesh Bhandari alone and all other directors are/ were not looking after any business related activities in the company M/s. Electrotherm (India) Ltd. Shri Shiv Kumar further accepted that they have been classifying this product under CTH 8714 since 2006. However, ultimate decision with regard to all matters of the company lies with their Managing Director Shri Shailesh Bhandari. The final decision with regard to Customs Tariff classification of parts of E-bikes in sets meant for vehicles on import in their case also will be taken by their Managing Director only. Accordingly it appeared that being Managing director of the import company M/s Electrotherm, all decisions related to purchase, sales, procurement, international business related to the E bike/ E scooter business of the company are being taken by Shri Shailesh Bhandari.

EVIDENCES OF IMPORT OF ALL NECESSARY PARTS IN CKD FROM THROUGH IMPORT PATTERN

7. From the discussion hereinabove and from the Statements of Shri Himanshu Sharma Engineer-Service, Production Co-ordinator of M/s. Electrotherm India Ltd. (Auto Division) and Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd., it appeared that M/s Electrotherm had hatched a conspiracy to evade Customs Duty on import of e-bike/ e-scooters in CKD condition.

7.1. M/s.Electrotherm (India) Ltd. had declared imported goods as "Parts of E-Bike (Model name) (Parts' Name)" under Customs Tariff Heading 8714 and others at Mundra, Nhava Sheva, ICD Sabarmati and ACC Ahmedabad port. They were importing goods under CTH 8714 and others. A sample list of some Bills of Entry showing pattern of import by M/s.Electrotherm (India) Ltd. wherein same/similar number of sets/pieces have been imported are shown below:

Table-1 (Import by M/s. Electrotherm (India) Ltd.)

BE NUMBER & Date	ITEM DESCRIPTION	CTH	QUANTITY	BCD_ Rate
4844919/10-09-19	PART OF E-BIKE (YO DRIFT)-<Part Name> (400 PCS) DTLS AS PER INV & P.LIST ,BL)	87141090	400 numbers	15
8407124/07-08-20	PARTS OF E-BIKE (YO DRIFT DX) <Part name>	87141090	280 numbers	15
	PARTS OF E-BIKE(YO EDGE DX) <Part Name>	87141090	120 numbers	15
8504109/17-08-20	PARTS OF E-BIKE (YO DRIFT DX) <Part name>	87141090	280 numbers	15
	PARTS OF E-BIKE(YO EDGE DX) <Part Name>	87141090	120 numbers	15
9128218/10-10-20	PARTS OF E-BIKE (YO EDGE DX) <Part Name>	87141090	300 numbers	15

To further demonstrate, how goods imported by M/s. Electrotherm (India) Ltd. consist of all the essential parts required to assemble e-bike/e-scooter, description of the parts imported vide above said Bills of Entry are reproduced as under:

Table-2

Description of goods under BE No. 9128218 dated 10-10-20 imported by M/s. Electrotherm (India) Ltd.			
S. No.	ITEM DESCRIPTION	QUANTITY	UQC
1	PARTS OF E-BIKE (YO EDGE DX) FRONT HANDLE COVER	300	Pcs
2	PARTS OF E-BIKE (YO EDGE DX) FRONT PANEL COVER	300	Pcs
3	PARTS OF E-BIKE (YO EDGE DX) FRONT PANEL	300	Pcs
4	PARTS OF E-BIKE (YO EDGE DX) SIDE LOWER COVER (LH & RH)	300	Pcs
5	PARTS OF E-BIKE (YO EDGE DX) SIDE BODY COVER (LH & RH)	300	Pcs
6	PARTS OF E-BIKE (YO EDGE DX) FRONT MUDGUARD	300	Pcs
7	PARTS OF E-BIKE (YO EDGE DX) BACKREST	300	Pcs
8	PARTS OF E-BIKE (YO EDGE DX) REAR CONNECTOR	300	Pcs
9	PARTS OF E-BIKE (YO EDGE DX) LUGGAGE BOX	300	Pcs
10	PARTS OF E-BIKE (YO EDGE DX) SWING ARM COVER (LH & RH)	300	Pcs
11	PARTS OF E-BIKE (YO EDGE DX) REAR HANDLE COVER	300	Pcs
12	PARTS OF E-BIKE (YO EDGE DX) TOOLBOX UPPER	300	Pcs
13	PARTS OF E-BIKE (YO EDGE DX) TOOLBOX LOWER	300	Pcs
14	PARTS OF E-BIKE (YO EDGE DX) FRONT MOULD	300	Pcs
15	PARTS OF E-BIKE (YO EDGE DX) BOTTOM FLOOR COVER	300	Pcs
16	PARTS OF E-BIKE (YO EDGE DX) FOOT BOARD	300	Pcs
17	PARTS OF E-BIKE (YO EDGE DX) CENTRE COVER	300	Pcs
18	PARTS OF E-BIKE (YO EDGE DX) CONTROLLER COVER	300	Pcs
19	PARTS OF E-BIKE (YO EDGE DX) FOOT BOARD COVER	300	Pcs
20	PARTS OF E-BIKE (YO EDGE DX) REAR FENDOR	300	Pcs
21	PARTS OF E-BIKE (YO EDGE DX) REAR MUDGUARD LOWER	300	Pcs
22	PARTS OF E-BIKE (YO EDGE DX) SMALL COVER OF LUGGAGE BOX	300	Pcs
23	PARTS OF E-BIKE (YO EDGE DX) BAG HOOK	300	Pcs
24	PARTS OF E-BIKE (YO EDGE DX) HEADLIGHT	300	Pcs
25	PARTS OF E-BIKE (YO EDGE DX) FRONT INDICATORS	300	Pcs
26	PARTS OF E-BIKE (YO EDGE DX) TAILLIGHT	300	Pcs
27	PARTS OF E-BIKE (YO EDGE DX) FRONT FORK	300	Pcs
28	PARTS OF E-BIKE (YO EDGE DX) REAR SHOCK ABSORBERS	300	Pcs
29	PARTS OF E-BIKE (YO EDGE DX) DIGITAL SPEEDOMETER	300	Pcs
30	PARTS OF E-BIKE (YO EDGE DX) MAIN WIRING HARNESS	300	Pcs

31	PARTS OF E-BIKE (YO EDGE DX) D C MOTOR CONTROLLER	300	Pcs
32	PARTS OF E-BIKE (YO EDGE DX) D C MOTOR 250 W	300	Pcs
33	PARTS OF E-BIKE (YO EDGE DX) CHARGING SOCKET	300	Pcs
34	PARTS OF E-BIKE (YO EDGE DX) SWITCH SET	300	Pcs
35	PARTS OF E-BIKE (YO EDGE DX) CABLE TIES	300	Pcs
36	PARTS OF E-BIKE (YO EDGE DX) FASTENERS	300	Pcs
37	PARTS OF E-BIKE (YO EDGE DX) THROTTLE	300	Pcs
38	PARTS OF E-BIKE (YO EDGE DX) BACK COVER	300	Pcs
39	PARTS OF E-BIKE (YO EDGE DX) REAF REFLECTOR (RED)	300	Pcs
40	PARTS OF E-BIKE (YO EDGE DX) REAR VIEW MIRRORS	300	Pcs
41	PARTS OF E-BIKE (YO EDGE DX) FOOT MAT	300	Pcs
42	PARTS OF E-BIKE (YO EDGE DX) BATTERY WIRING HARNESS	300	Pcs
43	PARTS OF E-BIKE (YO EDGE DX) FRONT WHEEL	300	Pcs
44	PARTS OF E-BIKE (YO EDGE DX) BACKREST SPONGE	300	Pcs
45	PARTS OF E-BIKE (YO EDGE DX) BACKREST BRACKET	300	Pcs
46	PARTS OF E-BIKE (YO EDGE DX) USB CHARGING SOCKET	300	Pcs
47	PARTS OF E-BIKE (YO EDGE DX) HANDLEBAR	300	Pcs
48	PARTS OF E-BIKE (YO EDGE DX) O RING	300	Pcs
49	PARTS OF E-BIKE (YO EDGE DX) CONVERTER	300	Pcs
50	PARTS OF E-BIKE (YO EDGE DX) FRONT DISC BRAKE PUMP	300	Pcs
51	PARTS OF E-BIKE (YO EDGE DX) FRONT BRAKE DISC	300	Pcs
52	PARTS OF E-BIKE (YO EDGE DX) FRONT AXLE	300	Pcs
53	PARTS OF E-BIKE (YO EDGE DX) BRAKE LEVER (LHS)	300	Pcs
54	PARTS OF E-BIKE (YO EDGE DX) HORN	300	Pcs
55	PARTS OF E-BIKE (YO EDGE DX) MCB	300	Pcs
56	PARTS OF E-BIKE (YO EDGE DX) FLASHER	300	Pcs
57	PARTS OF E-BIKE (YO EDGE DX) BRAKE CABLE	300	Pcs
58	PARTS OF E-BIKE (YO EDGE DX) ALARM	300	Pcs
59	PARTS OF E-BIKE (YO EDGE DX) SEAT LOCK PLATE	300	Pcs
60	PARTS OF E-BIKE (YO EDGE DX) SEAT LOCK CABLE	300	Pcs
61	PARTS OF E-BIKE (YO EDGE DX) IGNITION LOCK	300	Pcs
62	PARTS OF E-BIKE (YO EDGE DX) BALL RACE SET	300	Pcs
63	PARTS OF E-BIKE (YO EDGE DX) HEADLIGHT LED	300	Pcs
64	PARTS OF E-BIKE (YO EDGE DX) REAR BRAKE PLATE ASSEMBLY	300	Pcs
65	PARTS OF E-BIKE (YO EDGE DX) FRONT FORK CUP	300	Pcs
66	PARTS OF E-BIKE (YO EDGE DX) REAR CAARIER	300	Pcs
67	PARTS OF E-BIKE (YO EDGE DX) SEAT	300	Pcs
68	PARTS OF E-BIKE (YO EDGE DX) FRAME	300	Pcs
69	PARTS OF E-BIKE (YO EDGE DX) MAIN STAND	300	Pcs
70	PARTS OF E-BIKE (YO EDGE DX) REAR FORK	300	Pcs
71	PARTS OF E-BIKE (YO EDGE DX) SIDE STAND	300	Pcs
72	PARTS OF E-BIKE (YO EDGE DX) PANEL SUPPORT	300	Pcs
73	PARTS OF E-BIKE (YO EDGE DX) SMALL METAL PARTS	300	Pcs
74	PARTS OF E-BIKE (YO EDGE DX) BATTERY CLAMP	300	Pcs
75	PARTS OF E-BIKE (YO EDGE DX) AIR VALVE (FRONT)	300	Pcs
76	PARTS OF E-BIKE (YO EDGE DX) AIR VALVE (REAR)	300	Pcs
77	PARTS OF E-BIKE (YO EDGE DX) FOOT REST	300	Pcs
78	PARTS OF E-BIKE (YO EDGE DX) SWING ARM DECORATION	300	Pcs

7.2. Similar pattern also emerges for other Bills of Entries filed by the importer M/s. Electrotherm (India) Ltd.

7.3. From all the parts/components/assemblies/sub-assemblies imported by M/s. Electrotherm (India) Ltd. (under Bills of Entry as listed in Annexure-A) and

comparing the same with the list of Goods submitted by Shri Shiv Kumar under his statement dated 27.07.2022, and also the main parts mentioned in the assembling process explained by Shri Himanshu Sharma, Production Co-ordinator of e-bike plant of M/s.Electrotherm (India) Ltd. under Panchnama dated 03.06.2022, it appeared that their import results in import of all the necessary components, parts or sub-assemblies, for assembling a complete vehicle i.e. e-bike/e-scooter which fulfil the essential character of the complete or finished e-bike/e-scooter.

EVIDENCES OF IMPORT OF ALL NECESSARY PARTS IN CKD FROM THROUGH STATEMENT OF SHRI HIMANSHU SHARMA, SHRI SHIVKUMAR AMAR SINGH AND PANCHNAMA

8. During the Panchnama dated 03.06.2022 drawn at factory premises of M/s. Electrotherm (India) Limited, Shri Himanshu Sharma, Production Co-ordinator of e-bike plant informed that all the parts of e-bikes are imported except Lithium Ion Battery, Tyres and Battery Charger and he also informed that in Batteries, all Lead Acid Batteries are imported by their company.

8.1. Shri Himanshu Sharma, Production Co-ordinator of M/s. Electrotherm India Ltd. (Auto Division) in his statement dated 03.06.2022 accepted that **most of the parts of these bikes are imported from China**. Lithium batteries are being procured from the domestic market and Lead Acid batteries are being procured from the suppliers from China as well as India. These parts are normally imported, as per the number of bikes ordered, in Knock Down Condition. All the parts except battery and tyre are imported from China. From his statement it emerges that the brand logo of their bike- "ET" is already affixed on the big front panel connecter (Front Mould) by their supplier themselves before exporting the same from China, and the said part is brought to the factory, along with the logo on it, duly affixed.

8.2. Shri **Shivkumar Amar Singh**, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd. was directly involved in the purchase process of the imported goods related to the E-Bike/ E-scooter as the same is evident from his statement dated 27.07.2022. Further it emerges from the said statement that M/s Electrotherm imports majority of the parts of E-bike from China in Sets (CKD Consition). Shri Shiv Kumar further stated that he used to place order through a whatsapp group naming "ORA CAP Group" to his Chinese Supplier Ms. Echo Rui of China (Mob.+86 13646790215), who is the owner of M/s.Peerless Automotive Co. Ltd. and M/s. Mega Enterprise Co. Ltd. He accepted that **they prepare purchase orders for parts of E-bikes corresponding to the number of vehicles planned to manufacture** He also agreed that the E-bikes imported by M/s.Electrotherm (India) Ltd. **in knock down condition merits classification under 8711.60 of the First Schedule to the Customs Tariff.** He agreed that the classification done by M/s.Electrotherm (India) Ltd. for import of parts of E-bikes in sets under CTH 8714 is **wrong. He agreed that Customs duty has been short-paid on import of parts of E-bikes in sets.** Further on perusal of the various Performa Invoices, Email Correspondence perused withdrawn under Panchnama dated 03.06.2022 it is evident that the orders under those Performa invoices and approval of payment under the those Email communications were being made for a particular set of E Bike Parts in CKD Conditions without battery and tyres. This clearly indicates that M/s Electrotherm was importing E Bike in CKD condition as the order of the parts of E-bike were being placed by M/s Electrotherm through Shri Shiv Kumar were being placed in no. of Sets of E-bike.

8.3. Shri Himanshu Sharma in his statement dated 03.06.2022, stated that Most of the parts of these bikes are imported from China.

DOCUMENTARY EVIDENCES IN SUPPORT OF IMPORT OF ALL NECESSARY PARTS IN CKD FROM BY M/S. ELECTROTHERM (INDIA) LTD.

During the recording of the statement dated 27.07.2022 Shri Shiv Kumar had perused following Performa Invoices and Email Communications etc.

9.1. The Proforma Invoice-PI No.PAUTO-EX20211004, dated 02-Nov-2021 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 231-233 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, which indicates that the order is for parts E-bikes correspond to 120 E-bikes. (RUD-7)

9.2. The Proforma Invoice-PI No.PAUTO-EX20211003, dated 02-Nov-2021 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 235-237 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, which indicates that the order is for parts corresponding to **180** E-bikes, without battery and tyres. (RUD-7)

9.3. The email correspondences between Shri Jignesh Patva and Shri Joji John dated 17 November, 2021 available at page 249 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, which was sent by Shri Jignesh Patva regarding Auto Divisiion payment planning relating of M/s.Electrotherm (India) Ltd. to M/s.Peerless Automotive Co. Ltd., against PI Nos. PAUTO-EX20211003 & PAUTO-EX20211004 for 180 Nos. driftdx & 120 Nos. Edgedx parts import (USD 40849.20 + 27499.20 – 68348.40 * 75) for an amount of Rs.51,26,130/- via swift mode. Shri Joji John has given approval by reply email dated 17 November 2021 12.24hrs by saying OK. Shri Shiv Kumar confirmed that that vide PI Nos. PAUTO-EX20211003 & PAUTO-EX20211004 order for import of Parts of 180 Nos. driftdx & 120 Nos. Edgedx parts were placed and approval of an amount of Rs.51,26,130/- via swift mode was given by Shri Joji John by reply email dated 17 November 2021 12.24hrs by saying OK. Shri Shiv Kumar further categorically agreed that the abovementioned payment planning shows that the payments are made for the parts meant for 180 Nos. Driftdx & 120 Nos. Edgedx. (RUD-7)

9.4. The Proforma Invoice-PI No.MAUTO-EX20211002, dated 02-Nov-2021 issued by M/s.Mega Enterprise Co. Ltd., Zhejiang, China, available at pages 253-255 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, clarifies that the order is meant for manufacturing **300** E-bikes. (RUD-8)

9.5. The Proforma Invoice-PI No.PAUTO-EX20220403, dated 07-Apr-2022 issued by M/s.Peerless Automotive Co., Ltd., Zhejiang Province, China, available at pages 289-290 of File No.3, withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, shows that the order is for parts correspond to **300** E-bikes, without battery and tyres. Further Shri Shiv Kumar agreed that the email correspondences between Shri Pratik Joshi and Shri Joji John dated 19-04-2022 confirms that the payment of total Rs.58,04,387/- was against 300 Nos. Driftdx imported in Sets against PIs No. PAUTO-EX20220403. (RUD-9)

9.6. The Proforma Invoice No. PI No.PAUTO-EXP20220101, dated 29-Nov-21 available at page No.331-333 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, clearly shows that the said PI is for parts corresponding to **300** E-bikes. Further the payment planning confirmation email dated 20-01-2022 between Shri Jignesh Patva and Shri Joji John, available at page 339 of File No.3 withdrawn vide Panchnama dated 03-06-

2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., Palodia, Ahmedabad, speaks about 300 Nos. Driftdx parts imported against PI No. PAUTO-EXP20220101, and the Bank debit voucher dated 01-02-2022 (page 341 of the same file) in respect of the said payment which speaks about payment against USD 70299.00 @ 74.86 300 Drift PAUTO-EXP20220101. Shri Shiv Kumar agreed that these payment confirmation are for purchase of parts meant for assembling **300** E-bikes. (RUD-10)

9.7. The Proforma Invoice PI No. PAUTO-EX20220201, dated 10-Mar-22 issued by M/s.Peerless Automotive Cp. Ltd., Zhejiang Province, China, available at page 347-349 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., clearly shows that this proforma Invoice is showing the price in respect of parts meant for **900** driftdx E-bikes. Further the email correspondences between Shri Jignesh Patva and Shri Joji John dated 21-03-2022; seeking payment planning approval and confirmation, available at page 353 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd., shows that said email from Shri Jignesh Patva is regarding seeking approval for part payment planning against import of parts in respect of **900** nos. driftdx model E-bikes each against PIs No.PAUTO-EX20220201, MAUTO-EX20220202 and PAUTO-EX20220203. (RUD-11)

9.8. The Proforma Invoice No. PAUTO-EX20220404, dated 07-Apr-22 issued by M/s.Peerless Automotive Co. Ltd., Zhejiang Province, China, available at page 361-363 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd. and also the corresponding Bank debit voucher dated 05-May-2022 issued for payment against USD 71460 @ 76.37 300 Drift PAUTO-EX20220404, which is available at page 369 of the same File, again clearly shows that these are documents relating to purchase of parts meant for **300** Drift E-bikes. (RUD-12)

9.9. The Proforma Invoice No.MAUTO-EX20211201, dated 07-Apr-22 issued by M/s. Mega Enterprise Co. Ltd., Zhejiang, China, available at page 397, 403 of File No.3 withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd. and also the corresponding Bank debit voucher dated 21-Dec-2021 issued for payment against USD 70101 @ 75.90 300 Drift PI MAUTO/EX20211201, which is available at page 411 of the same file, clearly shows that these are documents relating to purchase of parts correspond to **300** Drift E-bikes. (RUD-13)

9.10. On perusal of these above mentioned Performa Invoices/ commercial invoices/ email correspondences etc., Shri Shiv Kumar himself agreed that the order is being placed by the importer company M/s Electrotherm in no. of sets and the payment confirmation for those many number of sets is also being done to the overseas suppliers. Thus, it appeared that the entire E-bike in CKD condition is being imported by the importer M/s Electrotherm. There are various other Performa Invoices/ commercial invoices which have been issued by both the Chinese Supplier of Parts of E Bike to M/s Electrotherm (India) Limited which were withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd. Performa Invoices/ commercial invoices/ email correspondence clearly indicates that the order of these parts of E Bikes have been placed by the Importer M/s Electrotherm in Sets (CKD) condition. Mere perusal of the said Performa Invoices/ commercial invoices/ Email communications shows that the order are being placed by M/s Electrotherm in no of E-bikes and not w.r.t. Parts of E-bike. For illustration one such Performa invoice is affixed as under:

MEGA ENTERPRISE CO.,LTD

[illegible]

COMMERCIAL INVOICE

[illegible]

SR NO	DESCRIPTION&SPECIFICATION	QTY (pcs)	UNIT PRICE FOB Shanghai	AMOUNT USD
	PARTS OF E-BIKE[illegible]			
[illegible]	Front Fork	[illegible]	[illegible]	[illegible]
[illegible]	Rear Shock Absorber	[illegible]	[illegible]	[illegible]
[illegible]	Digital Speedometer	[illegible]	[illegible]	[illegible]
[illegible]	Main Wiring Harness	[illegible]	[illegible]	[illegible]
[illegible]	Controller	[illegible]	[illegible]	[illegible]
[illegible]	Motor	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Cable Tie	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Battery Wire Harness	[illegible]	[illegible]	[illegible]
[illegible]	Front Wheel	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	USB Charging Port	[illegible]	[illegible]	[illegible]
[illegible]	O Ring	[illegible]	[illegible]	[illegible]
[illegible]	Connector	[illegible]	[illegible]	[illegible]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Front Brake Disc	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Rear Brake Cable	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	PARTS OF E-BIKE[illegible]			
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	TOTAL			[illegible]

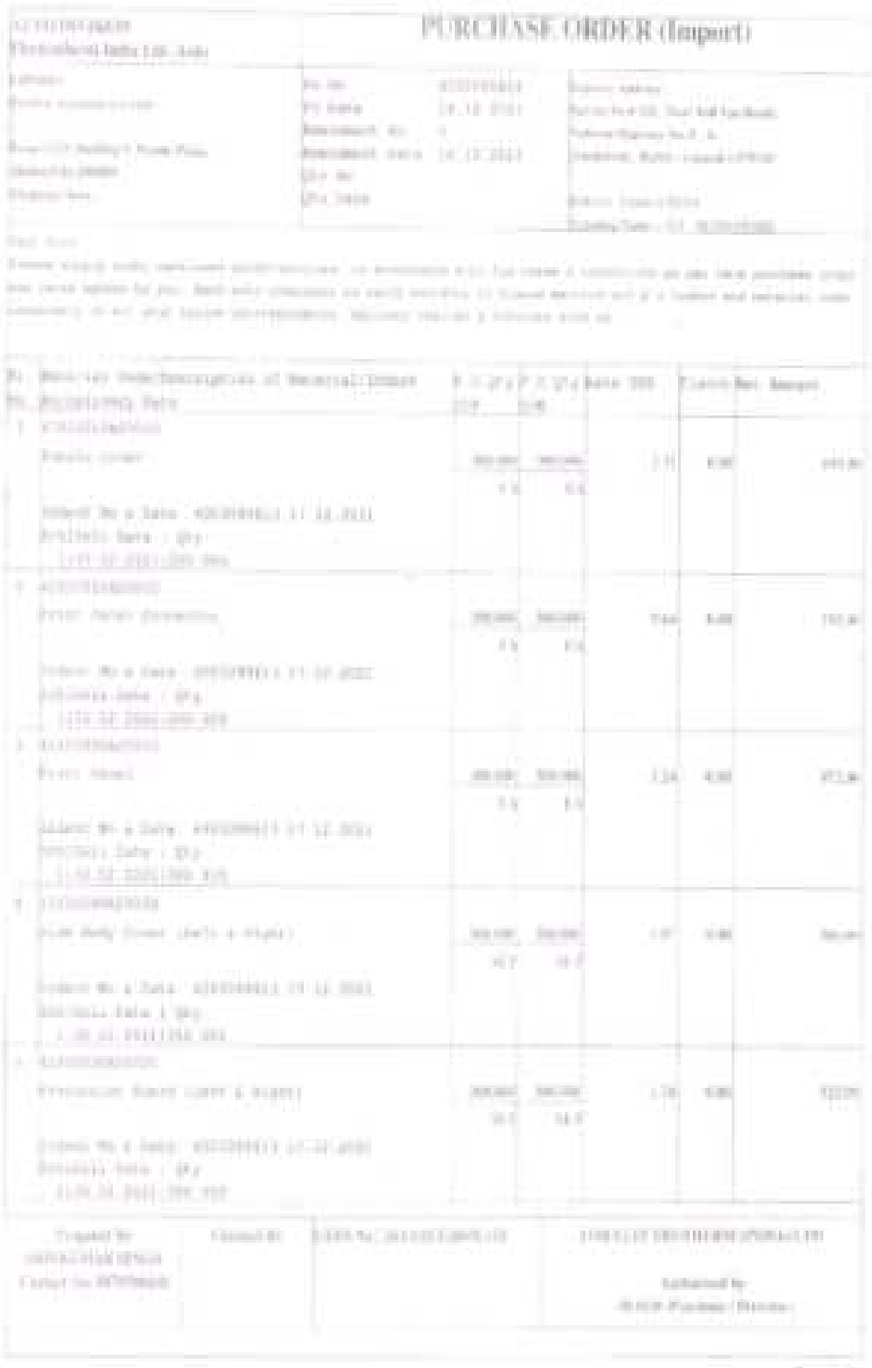
[illegible]

9.11. Further the Bill of Lading No NB2012B85523 dated 14.12.2020 issued by Zhejiang Jet Logistics Corporation Limited for the Exporter M/s Peerless Automobiles Co.. Ltd having consignee M/s Electrotherm (India) Limited for 586 packages of Parts of E Bike, available at page 401 of File No.1 was withdrawn vide Panchnama dated 03-06-2022 drawn at the office premises of M/s.Electrotherm (India) Ltd. The **HS code for the said parts of E Bike has been mentioned in the said Bill of Lading by the supplier is 8711600090**. However, to evade the payment of the Customs Duty, in the corresponding Bill of Entry against the said Bill of Lading, having BE number 2214143 dated 02.01.2021 filed by the importer, the CTH has been declared by M/s Electrotherm as 8714. This clearly indicates that the importer has intentionally been mis classifying the imported goods in order to avail the duty benefit and mislead the exchequer.

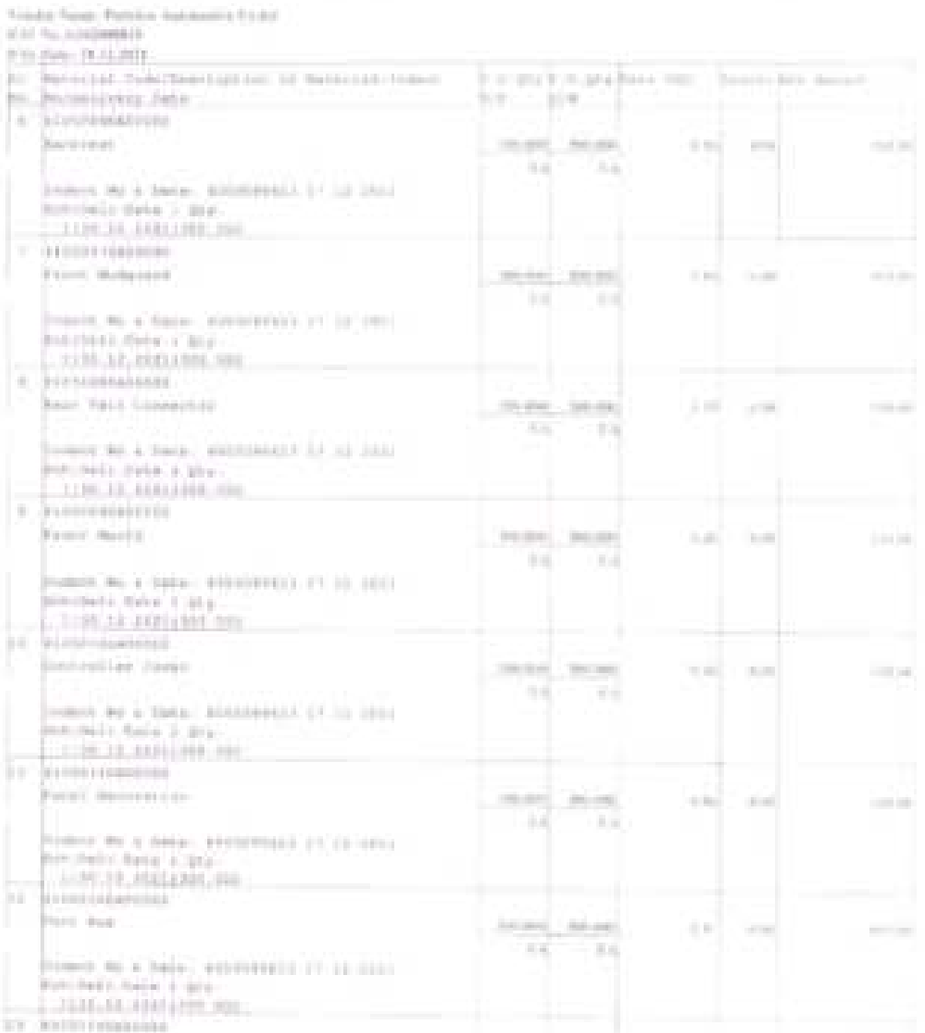
For illustration one such Performa invoice is affixed as under:

9.12. Similar to Performa Invoices/ commercial invoices/ email correspondences etc, the Purchase Orders placed to the overseas Suppliers based at China submitted by Shri Shiv Kumar during the statement dated 27.07.2022 clearly indicates that these

Purchase orders have been placed by the Importer M/s Electrotherm in Sets (CKD) condition. Mere perusal of the said purchase orders shows that the order are being placed by M/s Electrotherm in no of E-bikes and not w.r.t. Parts of E-bike. For illustration first two pages of one such Purchase order No 6102000818 dated 18.12.2021 placed to Supplier M/s Peerless Automotive Co Ltd China is affixed as under:



PURCHASE ORDER (Import)



Thus, it appeared that the entire E-bike in CKD condition is being imported by the importer M/s Electrotherm. There are various other such purchase orders which have been issued by the importer in the name of both the Chinese Supplier of Parts of E Bike, which were submitted by ShriShiv Kumar under his statement dated 27.07.2022.

9.13. Shri Shiv Kumar submitted the printout of WhatsApp chat of the whatsapp group naming "ORA CAP Group"chat during his statement dated 27.07.2022. It is clear that from the said whatsapp chat that the orders are being placed on behalf of M/s. Electrotherm in sets condition.

9.13.1 One part of the said Whatsapp chat between Ms. Echo Rui of China and Shri Shiv Kumar is affixed herein below:

26/04/21, 10:58 am - Echo Rui China: (Red/Black 76sets+ Blue/Black 40sets + White/Grey 60sets + Black/Grey 70sets + Dark green/Grey 60sets)

It is clear that from the above chat dated 26.04.2018 (10.58 am) that the supplier Ms. Echo Rui of China is referring to Red /black 76 sets+ blue/ black 40 sets+ white /grey 60 sets +Black/ Grey 70Sets+ Dark Green/Grey 60 sets.

9.13.2 Further one such WhatsApp chat between Shiv Kumar and China supplier is

affixed as under:

05/05/21, 5:54 pm - Echo Rui China: Electrol DX
05/05/21, 5:54 pm - Echo Rui China: 300sets
06/05/21, 2:26 pm - Echo Rui China: 300D/Rifda can be loaded on 9th, please arrange forwarder to do booking
06/05/21, 2:26 pm - Shiv Kumar Singh: Ok
07/05/21, 7:47 pm - Shiv Kumar Singh: You deleted this message
07/05/21, 7:47 pm - Echo Rui China: waiting for forwarder
07/05/21, 7:48 pm - Echo Rui China: <Media omitted>
07/05/21, 7:48 pm - Echo Rui China: can you help them to do the booking?
07/05/21, 7:49 pm - Shiv Kumar Singh: Ok
07/05/21, 7:49 pm - Shiv Kumar Singh: Good

The above dated 06.05.21 clearly shows that the supplier is here referring to loading of 300 drift DX model on 9th and asking the importer to arrange forwarder for the booking, and Shiv Kumar is saying okay for the same vide his reply.

9.13.3 Further one such WhatsApp chat between Shiv Kumar and China supplier is affixed as under:

02/07/21, 11:09 am - Echo Rui China: yes, ready to dispatch
02/07/21, 11:18 am - Shiv Kumar Singh: Okay
02/07/21, 11:18 am - Shiv Kumar Singh: I am giving you forwarder details kindly dispatch
02/07/21, 11:19 am - Shiv Kumar Singh: I also want to speak for other than electrotherm businesses
02/07/21, 11:23 am - Echo Rui China: OK
02/07/21, 11:25 am - Echo Rui China: 300 Drifida and 300 Electronda load together?
02/07/21, 11:25 am - ChiTu HR5: No
02/07/21, 11:26 am - Shiv Kumar Singh: Only electron 300 load
02/07/21, 11:26 am - Echo Rui China: OK
02/07/21, 11:41 am - Echo Rui China: we can discuss now if you free
02/07/21, 11:41 am - Shiv Kumar Singh: Yes I m free
02/07/21, 11:43 am - Echo Rui China: today loading 180+120, the CTN number is more than actual we load

From the above chat dated 02.07.2021, it is clear that the supplier is confirming to load 300 sets of drift model.

These Whatsapp chats again re-confirms that the entire E-bike in CKD condition is being imported by the importer M/s Electrotherm. There are various other chats between Shri Shivkumar Amar Singh and Ms. Echo Rui of China which clearly indicates that the order of these parts of E Bikes have been placed by the Importer M/s Electrotherm in Sets (CKD) condition. Mere perusal of the complete chat of the whatsapp group submitted by Shi Shiv Kunar under his statement shows that the order are being placed by M/s Electrotherm in no of E-bikes and not w.r.t. Parts of E-bike.

10. From the above discussion it appeared that few items which are not being imported by these importers independently viz. Battery, Charger, Tyres etc., are not at all essential for giving e-scooter its essential character in terms of Rule2(a) of General Rules of Interpretation for Import Tariff. Attention is invited to HSN explanatory notes for Chapter 87. The relevant part of the explanatory notes of chapter 87 is as under: -

"An incomplete or unfinished vehicle is classified as the corresponding complete or finished vehicle provided it has the essential character of the latter (see General Interpretative Rule 2 (a)), as for example:

(A) ***A motor vehicle, not yet fitted with the wheels or tyres and battery.***

(B) A motor vehicle not equipped with its engine or with its interior fittings.

(C) A bicycle without saddle and tyres."

From Para (A) above to HSN explanatory notes for Chapter 87, it is amply clear that the import in CKD from would be considered import of complete/finished vehicle

by application of General Interpretative Rule 2 (a) even if wheels, tyres, battery are not imported.

11. It appeared from the above discussion that M/s Electrotherm (India) Ltd. had imported all the major/essential parts required to make complete e-scooters/e-bikes from China and paid import duty on the same by classifying them as parts/spare parts under chapter heading 8714 and other headings. However, Rule2(a) of General Rules of Interpretation for Import Tariff reads as, *"Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled"*. Therefore, the said goods imported by M/s. Electrotherm (India) Ltd. appeared to be a complete e-scooter/e-bike in CKD condition, which appeared to be classifiable under Chapter Heading 8711.

12. LEGAL PROVISIONS IN RESPECT OF GOODS IMPORTED UNDER CKD FORM & CLASSIFICATION OF IMPORTED GOODS:

(A) Rule 2(a) of General Rules of Interpretation for Import Tariff of the First Schedule to the Customs Tariff Act, 1975:

In terms of Rule 2(a) of General Rules of Interpretation for Import Tariff which reads as, *"Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or /finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."*

It appeared that as per Rule 2(a) of General rules of interpretation for Import Tariff, any heading for a particular article should include reference to such goods whether unfinished/incomplete if such unfinished/incomplete goods give essential characteristics of the complete article of that heading. For instance, if a mobile phone is imported without a battery, it appeared that such a mobile phone would be classified under the Chapter heading as a complete mobile phone as that unfinished mobile phone would give essential characteristics of a mobile phone even without a battery. Similarly, it appeared that automobiles without their battery or without wheels belong in Chapter Heading 8703 appeared to be classified as automobiles only. Therefore, the said goods imported by M/s. Electrotherm (India) Ltd. **appeared to be a complete e-scooter/e-bike in CKD condition, which appeared to be classifiable under Chapter Heading 8711.**

(B) Further, it appeared that HSN explanatory notes for Chapter 87 also specifically focus on the unassembled/incomplete article, which gives essential characteristics of a finished article falling under the chapter heading of a finished article only. The relevant part of the explanatory notes of chapter 87 is as under: -

"An incomplete or unfinished vehicle is classified as the corresponding complete or finished vehicle provided it has the essential character of the latter (see General Interpretative Rule 2 (a)), as for example:

(A) ***A motor vehicle, not yet fitted with the wheels or tyres and battery.***

(B) A motor vehicle not equipped with its engine or with its interior fittings.

(C) A bicycle without saddle and tyres."

(C) From the goods imported by M/s. Electrotherm (India) Ltd. (under Bills of Entry

as listed in Annexure-A), it appeared that all the essential parts like Chassis, Motor, Controller, etc. have been imported and very few parts like battery, charger, tyres etc. are locally procured. Further, the parts which had been imported from China were essential parts of the e-scooter/e-bike. Hence, the imported parts constitute the majority of the e-scooter/e-bike and when assembled together, they appear to give the essential character of an e-scooter/e-bike. Therefore, the said goods imported by the importer appeared to be a complete e-scooter/e-bike in CKD condition, which appeared to be classifiable under Chapter Heading 8711.

12.1. It appeared that the **electrically operated motor cycles (including mopeds)** and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, fall under CTH 8711 and attract effective rate of duty in terms of Sr. 531A of the Notification No. 50/2017 dated 30/06/2017, as amended by Notification No. 03/2019-Cus dated 29/01/2019. After this said amendment, Sr. No. 531A was inserted in Notification No. 50/2017-Cus for electrically operated vehicles. The following duty structure was made applicable: -

S. No.	**Chapter or Heading or sub-heading or tariff item**	**Description of Goods**	**Standard rate**
"531 A.	8711	Electrically operated motor cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, -	
		(1) As a knocked down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with,-	
		(a) disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake system, Electric Compressor not mounted on chassis;	10%
		(b) pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor not mounted on a chassis or a body assembly	15%
		(2) in a form other than (1) above	50%

12.2. From the above, it can be seen that Sr. No. 531A of Notification No. 50/2017-Cus mentions about electrically operated vehicles. In the instant case, it appeared from the list of the imported goods that the importer has not imported parts in form as specified in condition 1(a) and 1(b), hence condition 1(a) and 1(b) as mentioned above are not applicable in the instant case. In view of the above, it appeared that imports of e-bike/e-scooter in CKD condition by the importer in the instant case falls under the category *"in a form other than (1) above"* where standard rate of Customs Duty is 50%.

12.3 The serial number 531A was further amended vide Notification No. 01/2020-Cus dated 02/02/2020 and Sr. No. 531A was modified as given below after this amendment. However, this change was made effective from 01/04/2020. The rate of 50% is still applicable on sub-entry (2) and only the rates against the sub-entry (1) were changed vide the said Notification No. 01/2020-Cus.

S. No.	Chapter or Heading or sub-heading or tariff item	Description of Goods	Standard rate
"531 A.	8711	Electrically operated motor cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, - (1) As a knocked down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with,- (a) disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake system, Electric Compressor not mounted on chassis; (b) pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor not mounted on a chassis or a body assembly (2) in a form other than (1) above	15% 25% 50%

13. Hence, it appeared that in the instant case, the duty structure on e-bike/e-scooter in CKD condition imported is to be considered as goods falling under the category *"(2) in a form other than (1) above"* where standard rate of Customs Duty is 50%.

13.1 Further, in the instant case, as the Importer is engaged in import of e-scooters/e-bikes in CKD condition by declaring the imported goods as parts and components of e-scooters/e-bikes appeared to be classified under CTH 8711 attracting duty @ 50% ad-valorem, as per Rule 2(a) of General Rules of interpretation for Import Tariff, The IGST duty applicable on the same is 5% in terms of Sl. No. '242 A' of 'Schedule I' of Integrated Goods and Services Tax Act, 2017, inserted vide Notification No. 12/2019-Integrated Tax (Rate) dated 31.07.2019, effective from 1st August, 2019.

The Sl. no 242A of the said notification reads as under-

Sl No	Chapter Heading	Description of Goods
242A	87	Electrically operated vehicles, including two and three wheeled electric vehicles. Explanation .- For the purposes of this entry, "Electrically operated vehicles" means vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles and shall include E- bicycles.";

Before 01.08.2019, the IGST duty applicable on the same would be 12% in terms of Sl. No. '206' of 'Schedule II' of Integrated Goods and Services Tax Act, 2017, omitted vide Notification No. 12/2019-Integrated Tax (Rate) dated 31.07.2019, effective from 1st August, 2019 (since few Bills of entry have been filed by M/s Electrotherm before 01.08.2019 as mentioned in Annexure A of the IR the IGST payable would be 12%).

The Sl. no 206 of Schedule II of Integrated Goods and Services Tax Act,

2017 reads as under (Effective till 31.07.2019)-

Sl No	Chapter Heading	Description of Goods
206	87	Electrically operated vehicles, including two and three wheeled electric motor vehicles.

Hence the rate of IGST before 01.08.2019 would be 12% and rate of IGST 01.08.2019 onwards would be 5%.

14. **DIFFERENTIAL DUTY CALCULATION:**

PORT WISE SUMMARY OF DIFFERENTIAL DUTY CALCULATION: As detailed in "Annexure A"

TABLE – 3 (Value in Rs.)

Port Name	Total Ass. Value of the imported Goods	Differential Duty
Ahmedabad Air Cargo	2,98,314/-	1,14,850/-
Mundra	33,98,55,691/-	14,33,72,113/-
Nhavasheva	8,41,00,708/-	3,77,89,256/-
ICD Sabarmati	6,41,470/-	2,46,966/-
Total	**42,48,96,182/-**	**18,15,23,185/-**

15. MAIN LEGAL PROVISIONS UNDER CUSTOMS ACT, 1962 APPLICABLE IN THE CASE

The following legal provisions appear applicable in the instant case:

SECTION 28(4) OF THE CUSTOMS ACT, 1962:

"Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

a) collusion; or

b) any willful mis-statement; or

c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

SECTION 28AA OF THE CUSTOMS ACT, 1962:

Interest on delayed payment of duty

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

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

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

where —,

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

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

SECTION 46 (4) OF THE CUSTOMS ACT, 1962:

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

4(A) The importer who presents a bill of entry shall ensure the following namely:-

a) the accuracy and completeness of the information given therein;

b) the authenticity and validity of any document supporting it; and

c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

RULE 2(a) OF GENERAL RULES OF INTERPRETATION FOR IMPORT TARIFF:

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

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: -

.

.

.

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

.....

SECTION 112 OF CUSTOMS ACT, 1962:

Penalty for improper importation of goods, etc.-

Any person -

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

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, shall be liable, —

SECTION 114A OF THE CUSTOMS ACT, 1962

Penalty for short-levy or non-levy of duty in certain cases. –

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been

erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under [sub-Section (8) of Section 28] shall also be liable to pay a penalty equal to the duty or interest so determined

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

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

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

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

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

SECTION 114AA OF CUSTOMS ACT, 1962:

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

SECTION 117 OF CUSTOMS ACT, 1962:

Penalties for contravention, etc., not expressly mentioned: - Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding [four lakh rupees].

CHAPTER NOTES TO CHAPTER 87 ITC (HS)

An incomplete or unfinished vehicle is classified as the corresponding complete or finished vehicle provided it has the essential character of the latter (see General Interpretative Rule 2 (a)), as for example:

(A) ***A motor vehicle, not yet fitted with the wheels or tyres and battery.***

(B) A motor vehicle not equipped with its engine or with its interior fittings.

(C) A bicycle without saddle and tyres."

16. MAIN LEGAL PROVISIONS UNDER FOREIGN TRADE LAWS APPLICABLE IN THIS CASE:

The Foreign Trade (Development and Regulation) Act, 1992

SECTION 3.Powers to make provisions relating to imports and exports.—(1) *The Central Government may, by Order published in the Official Gazette, make provision for*

the development and regulation of foreign trade by facilitating imports and increasing exports.
(2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the 1[import or export of goods or services or technology]
(3) All goods to which any Order under sub-Section (2) applies shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.

SECTION 11. Contravention of provisions of this Act, rules, orders and foreign trade policy. —

(1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the foreign trade policy for the time being in force.

Foreign Trade (Regulation) Rules, 1993

RULE 11 - Declaration as to value and quality of imported goods: *On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall, in the bill of entry or the shipping bill or any other documents prescribed under the Customs Act, 1962, state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe to a declaration of the truth of such statement at the foot of such bill of entry or shipping bill or any other documents.*

17. WILFUL MISSTATEMENT AND SUPPRESSION OF FACTS BY M/S.ELECTROTHERM (INDIA) LTD. AHMEDABAD

17.1. Section 17 of the Customs Act, 1962 provides for self-assessment of duty on import and export goods by the importer or exporter himself by filing a Bill of Entry or Shipping Bill, as the case may be, in the electronic form, as per Section 46 or 50 of the Customs Act, 1962, respectively. Thus, under self-assessment, it is the importer or exporter who will ensure that he declares the correct classification, applicable rate of duty, value, benefits of exemption notifications claimed, if any, in respect of the imported / export goods while presenting Bill of Entry or Shipping Bill.

17.2. From the discussion hereinabove, it has been established that M/s. Electrotherm (India) Ltd. was being managed by Shri Shailesh Bhandari the Managing director of the company in association with Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd. who used to place order to the overseas suppliers. Accordingly, M/s.Electrotherm (India) Ltd. was being managed and controlled by Shri Shailesh Bhandari the Managing director of the company. And all the communication regarding the purchase and supply of the Parts in CKD condition were being managed by Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd.

17.2.1 In terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the Bills of Entry submitted for assessment of Customs duty. **The willfull mis-statement by** M/s. Electrotherm (India) Ltd. is evident from their Bills of Entry itself. From various documentary and oral evidences as discussed above, it is clear that M/s. Electrotherm (India) Ltd. was all the time aware of the correct classification as well as correct rate of Duty to be paid by them. However, with willfull intention and suppression of facts they evaded the

customs duty and paid reduced duty by declaring the e-bike in CKD condition as individual parts of E- Bike.

Thus, the duty appeared to have been short levied and short paid by wilfully mis-declaring the description of goods as "E-Scooter Spare parts and accessories" and misstating the Customs Tariff heading as 8714 and other CTH as against the applicable Customs Tariff Heading of 8711 for the discharge of duty payable.

It is pertinent to mention that Sr. No. 531A of Notification No. 50/2017-Cus dated 30.06.2017, mentions about electrically operated vehicles. In the instant case, it appeared from goods imported by M/s. Electrotherm (India) Ltd. that they have not imported parts in form as specified in condition 1(a) or 1(b), hence condition 1(a) or 1(b) will not be applicable to the imports done under CTH 8711 by M/s. Electrotherm (India) Ltd. In view of the same, it appeared that imports of e-bike/e-scooter in CKD condition by M/s. Electrotherm (India) Ltd. in the instant case falls under the category *"in a form other than (1) above"* where standard rate of Customs Duty is 50%.

Hence it appeared that the duty short levied and short paid is liable to be recovered in terms of Section 28 (4) of the Customs Act 1962 w.r.t M/s. Electrotherm (India) Ltd.

17.2.2 Further in terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the Bills of Entry submitted for assessment of Customs duty. M/s. Electrotherm (India) Ltd. had wilfully mis-declared the goods as "E-Scooter Spare parts and accessories" whereas the goods were "E-Bikes /E-Scooters in CKD form" and also misstated the Tariff Classification of the said goods imported by them as 8714 and other CTH instead of 8711.

Thus, the duty appeared to have been short levied and short paid by wilfully mis-declaring the description of goods as "Parts of E-Scooter" and misstating the Customs Tariff heading as 8714 and other CTH as against the applicable Customs Tariff Heading of 8711 for the discharge of duty payable by M/s. Electrotherm (India) Ltd. Hence it appeared that the duty short levied and short paid is liable to be recovered in terms of Section 28 (4) of the Customs Act 1962.

17.3. It thus appeared that the classification of the goods under the Customs tariff head (CTH) 8714 and other CTH, declaring the goods as individual parts claimed by M/s. Electrotherm (India) Ltd. is required to be rejected and the said goods covered under Bills of Entry filed by the importer are required to be correctly re-classified under Customs Tariff Heading 87116020 and charged to duties accordingly. Accordingly, the differential Customs Duty amounting to **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Twenty Thee Thousand One Hundred Eighty Five Only)* as summarised in Table 3 above (read with Annexure A) appeared liable to be recovered from M/s. Electrotherm (India) Ltd. by invoking the extended period of five years as per Section 28 (4) of the Customs Act, 1962, in as much as the duty is short paid on account of wilful mis-statement and suppression as narrated above. Further the interest at the prescribed rate is also liable to be recovered from them in terms of Section 28 AA of Customs Act, 1962. Also, the importer M/s. Electrotherm (India) Ltd. has rendered itself liable to penalty under Section 114A of the Customs Act, 1962.

17.4. It further appeared that the goods i.e., 'E-Bikes /E-Scooters in CKD form' as covered under Bills of Entry filed by M/s. Electrotherm (India) Ltd. (as detailed in Annexure- A respectively) were imported by resorting to mis-declaration and mis-classification by way of wilfull mis-statement in the Bills of Entry filed under Section 46 of the Customs Act, 1962, before the designated authority of Customs. The goods having assessable Value of **Rs. 42,48,96,182/-** *(Rupees Forty Two Crores Forty Eight Lakh Ninety Six Thousand One Hundred Eighty Two Only)* as detailed in Bills of Entry filed by M/s. Electrotherm (India) Ltd. (as detailed in Annexure-A respectively), appeared liable to confiscation under the provisions of Section 111(m) of the Customs Act, 1962.

17.5. Further, on account of their above said acts of omission and commission, which have rendered the goods liable to confiscation under Section 111 (m) of the Customs Act, 1962, M/s. Electrotherm (India) Ltd. is also liable for penalty under Section 112 (a) and (b) of the Act ibid.

17.6. M/s. Electrotherm (India) Ltd. appeared to have mis-declared the description of the goods imported by them as parts of e-bike/e-scooter. Further, it appeared that the importers deliberately devised fraudulent modus to mis-declare the CKD condition parts of e-bikes/e-scooters and tried to get these goods cleared from the port to hide the actual import of an e-bike/e-scooter. Thus, it appeared that M/s. Electrotherm (India) Ltd. knowingly or intentionally made, signed or used false declaration, statement or document which appeared to be false or incorrect in material particular, in the transaction of above import business for the purposes of the Customs Act in the Bills of Entry filed by them before the Indian Customs. By their acts of omission and commission it appeared that they have rendered the goods imported by them under the Bills of Entry mentioned in Annexure- A liable for confiscation under Section 111(m) of the Customs Act, 1962. Further, they appear to have rendered themselves liable for penalty under the provisions of Section 112 (a) and (b) or Section 114A and Section 114AA of the Customs Act, 1962.

18. **ROLE OF THE PERSONS**

18.1. **Shri Shivkumar Amar Singh**: It appeared that Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd is the person in the company who was designated to communicate with the overseas Chinese suppliers. Even on various Bills of Lading the name of the concerned person has been mentioned by the supplier as Shri Shiv Kumar which means that he was handling all the affairs related import of E-bikes on behalf of M/s Electrotherm. Shri Shiv Kumar used to place orders if no. of vehicle (E-bike Model) required to be produced to Chinese Suppliers. Shri Shiv Kumar has accepted in his statement that he used to place order to the owner of the supplier firms through Whatsapp group. It appeared that Shri Shiv Kumar was managing the affairs of the company related to overseas purchase of all the essential Parts in CKD form.

18.1.1 Shri Shiv Kumar supervised all purchase related activities of M/s. M/s.Electrotherm (India) Ltd. Ahmedabad. He agreed that the company is engaged in import of all parts of E-bike except Battery, Tyre and charger. They assemble the same in their premises situated at Samakhyali, Kutch, Gujarat. It appeared that Shri Shiv Kumar was placing order according to the E- Vehicle as per requirement of the company and was accordingly was responsible for importing goods under CTH 8714 claiming lower rate of duty as discussed above. The same is corroborated by the Statement of Shri Himanshu Sharma Engineer-Service, Production Co-ordinator of M/s. Electrotherm India Ltd. (Auto Division) wherein he categorically accepted they are importing import most of the components used in the manufacturing of electric vehicles, except Lithium Ion Battery, tyre and Charger.

18.1.2 Shri Shiv Kumar in his statement has accepted categorically that they import most of the items, for assembling of E- bike. They prepare purchase orders of E-bikes correspond to the number of vehicles planned to manufacture. He used to place order through a whatsapp group "ORA CAP Group" to his Chinese Supplier Ms. Echo Rui of China (Mob.+86 13646790215), who is the owner of M/s.Peerless Automotive Co. Ltd. and M/s. Mega Enterprise Co. Ltd. He further agreed that the E-bikes imported by M/s.Electrotherm (India) Ltd. in knock down condition merits classification under 8711.60 of the First Schedule to the Customs Tariff. He agreed that the classification done by M/s.Electrotherm (India) Ltd. for import of parts of E-bikes in sets under CTH 8714 is wrong. He agreed that Customs duty has been short-paid on import of parts

of E-bikes in sets.

18.1.3 It appeared that Shri Shiv Kumar was aware of the provisions of the Customs Act, 1962 as well and fully aware of the goods being imported and could have easily declared the correct classification of the goods imported by M/s. Electrotherm India Ltd under CTH 8711. Therefore, it appeared that prior to import of goods he was aware that they are importing complete/finished e-scooters/e-bikes in CKD form. However, he chose to mis-declare the said imports as spare Parts and accessories of E- vehicle and mis-classify the goods under CTH 8714, so that the company could enjoy the benefits by paying lower rate of Customs duties, thereby resulting in evasion of Customs Duties. It therefore appeared that by his acts of omission and commission, he has rendered the goods imported under Bills of Entry mentioned in Anenexure-A liable for confiscation under Section 111 (m) of the Customs Act, 1962 and consequently, he appeared to have rendered himself liable for penalty under Section 112(a) and 112 (b) of the Customs Act, 1962 and Section 114AA and 117 of the Customs Act, 1962.

18.2. **Shri Shailesh Bhandari:** Shri Shailesh Bhandari is Managing Director in M/s. Electrotherm (India) Ltd. When summon vide DIN Number CBIC-DIN 202207DDZ1000000EE99 dated 17.07.2022 was issued to the Director of M/s Electrotherm (I) Ltd, Ahmedabad, Shri Shailesh Bhandari being Managing director of the company, had authorised Shri Shiv Kumar to present before the Directorate of Revenue, Ahmedabad to tender statement on behalf of the Company vide letter dated 26.07.2022. Therefore the statement of Shri Shivkumar is binding on the company. Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd. in his statement dated 27.07.2022 accepted that the company is being managed by Shri Shailesh Bhandari alone and all other directors are/ were not looking after any business related activities in the company M/s. Electrotherm (India) Ltd. He accepted that they have been classifying this product under CTH 8714 since 2006. However, ultimate decision with regard to all matters of the company lies with their Managing Director Shri Shailesh Bhandari. The final decision with regard to Customs Tariff classification of parts of E-bikes in sets meant for vehicles on import in their case also will be taken by their Managing Director only. Accordingly it is evident that all decisions related to purchase, sales, procurement, international business related to the E bike/ E scooter business of the company are being taken by Shailesh Bhandari.

18.2.2 It appeared that Shri Shailesh Bhandari was aware of the provisions of the Customs Act, 1962 as well and fully aware of the goods being imported and could have easily declared the correct classification of the goods imported by M/s. Electrotherm India Ltd under CTH 8711. Therefore, it appeared that prior to import of goods he was aware that they are importing complete/finished e-scooters/e-bikes in CKD form. However, he chose to mis-declare the said imports as spare Parts and accessories of E- vehicle and mis-classify the goods under CTH 8714, so that the company could enjoy the benefits by paying lower Customs duty, thereby resulting in evasion of Customs Duty. It therefore appeared that by his acts of omission and commission, he has rendered the goods imported under Bills of Entry mentioned in Anenexure-A liable for confiscation under Section 111 (m) of the Customs Act, 1962 and consequently, he appeared to have rendered himself liable for penalty under Section 112(a) and 112 (b) of the Customs Act, 1962 and Section 114AA and 117 of the Customs Act, 1962.

19. This show cause notice pertains to demand of duty involved in the goods imported through multiple ports/Air cargo Complex viz. Ahmedabad Air Cargo Complex (INAMD4), ICD Sabarmati (INSBI6) falling under the jurisdiction of Commissioner/Pr. Commissioner or Commissioner of Customs, Ahmedabad, Nhava Sheva (INNSA1) falling under the jurisdiction of Pr. Commissioner or Commissioner of Customs,

NhavaSheva V Commissionerate, JNCH and Mundra Port falling under the jurisdiction of Pr. Commissioner or Commissioner of Customs, Mundra Commissionerate, Mundra. Therefore in terms of Section 110AA read with Notification no. 28/2022 customs (NT) dated 31.03.2022 issued by Central Board of Indirect Taxes and Customs (CBIC), New Delhi, the proper officer in the instant case is the **Pr. Commissioner / Commissioner of Customs, Mundra,** Commissionerate, Mundra (As per table 3 Above) as the highest duty demand arises for the import done through Mundra Port.

20. **Now, therefore, M/s. Electrothem (India) Ltd,** Survey No 325, Village Samkhiyali, Near Toll Tex Booth, Bhachau, Kutch, Gujarat- 370140 (IEC-0889000093) are hereby called upon to show cause to the Pr. Commissioner/ Commissioner of Customs, Mundra Commissionerate, Mundra having his office at Port User Building, Mundra Port, Mundra, Kutch Gujarat, within thirty days from the receipt of this notice as to why:-

i. The goods imported vide Bills of Entry mentioned in **Annexure A** should not be re-classified under Customs Tariff Heading 87116020 of the First Schedule to the Customs Tariff Act, 1975 and Customs Duty amount payable be re-assessed and differential total Customs duty may be determined at **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Tuenty Three Thousand One Hundred Eighty Five Only)* as per Annexure A accordingly, under Serial No. 531A (2) of Notification No. 50/2017-Customs dated 30.06.2017 as amended;

ii. The goods imported valued at **Rs. 42,48,96,182/-** *(Rupees Forty Two Crores Forty Eight Lakh Ninety Six Thousand One Hundred Eighty Two Only)* as detailed in **Annexue-A** should not be held liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962;

iii. Differential Customs Duty amounting to **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Tuenty Thee Thousand One Hundred Eighty Five Only)*, on the imported goods as detailed in **Annexue-A**, should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962.

iv. Interest should not be recovered from them on the said Customs duty, as at Sl. No. (iii) above, under Section 28 AA of the Customs Act, 1962.

v. Penalty should not be imposed upon them under the provisions of Section 114A /112 (a) and (b) of the Customs Act, 1962 for acts of commission and omission discussed hereinabove.

vi. Penalty should not be imposed upon them under Section 114AA of the Customs Act,1962.

20.1. **Further,** Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd., is hereby called upon to show cause to the Pr. Commissioner / Commissioner of Customs, Mundra Commissionerate, Mundra having his office at Port User Building, Mundra Port, Mundra, Kutch Gujarat, within thirty days from the receipt of this notice as to why:-

(i) Penalty should not be imposed upon him under the provisions of Section 112(a) and (b) of the Customs Act, 1962 with respect to duty demanded from the importer M/s. Electrotherm (India) Ltd. as discussed herein above;

(ii) Penalty should not be imposed upon him under the provisions of Section 114AA of the Customs Act, 1962 in respect of Value of goods pertaining to M/s. Electrotherm (India) Ltd. as discussed herein above;

(iii) Penalty should not be imposed upon him under the provisions of Section 117 of

the Customs Act, 1962 for his acts of commission and omission as discussed hereinabove.

20.2 **Further,** Shri Shailesh Bhandari, Managing Director in M/s. Electrotherm (India) Ltd., is hereby called upon to show cause to the Pr. Commissioner/ Commissioner of Customs, Mundra Commissionerate, Mundra having his office at Port User Building, Mundra Port, Mundra, Kutch Gujarat, within thirty days from the receipt of this notice as to why:-

(i) Penalty should not be imposed upon him under the provisions of Section 112(a) and (b) of the Customs Act, 1962 with respect to duty demanded from the importer M/s. Electrotherm (India) Ltd. as discussed herein above;

(ii) Penalty should not be imposed upon him under the provisions of Section 114AA of the Customs Act, 1962 in respect of Value of goods pertaining to M/s. Electrotherm (India) Ltd. as discussed herein above;

(iii) Penalty should not be imposed upon him under the provisions of Section 117 of the Customs Act, 1962 for his acts of commission and omission as discussed hereinabove.

DEFENCE SUBMISSION

21. **I observe that** *'Audi alteram partem'*, is an important principal of natural justice that dictates to hear the other side before passing any order. Therefore, personal hearing in the matter was granted to the noticees on 27.02.2025, 16.04.2025 and 29.04.2025. Shri Manish Jain, Consultant, representing M/s Electrotherm (India) Ltd, Shri Shivkumar Amar Singh and Shri Shailesh Bhandari, appeared for personal hearing through virtual mode on 29.04.2025. During the personal hearing He reiterated the submissions as made in the reply dated 16.04.2025 in case of all three noticees.

22. **M/s. Electrotherm (India) Ltd.,** Noticee No 1, vide letter dated nil submitted their written submission in which they interalia state that:

A. UNDISPUTED FACTS ARE SUFFICIENT TO SET ASIDE THE DEMAND PROPOSED IN THE SCN.

A.1. It is submitted that, undisputed facts as admitted in the present SCN are sufficient to drop the demand proposed in the SCN and to hold that Rule 2(a) is not applicable in the present case. The impugned goods consisted of various parts but did not have all the essential components/parts for the purpose of assembling a complete E-Bike. Key components like battery, tyres, charger etc. are locally procured and are not being imported by the Noticee which are essential for giving an E-Bike its essential character in terms of Rule 2(a) of General Rules of Interpretation.

A.2. In view of the fact that the batteries, tyres and charger are locally procured, it cannot be specifically said that the Noticee has imported all parts for assembly of complete E-Bikes, since essential parts like batteries and other components necessary for assembling a complete E-Bike are not part of impugned goods.

A.3. Reliance has been placed on BABA BAIDYANATH TRADING COMPANY Vs COMMISSIONER OF CUSTOMS (PORT), KOLKATA (2024) 23 Centax 320 (Tri.-Cal) wherein it has been held that battery is essential component in e-rickshaw/Tricycle operated by battery. The relevant portion is produced below:

> *20. As per the reading of descriptions as provided under Import Tariff, Section Notes to Chapter XVII and Explanatory Notes to HSN/CTH 8703*

and 8708, the goods imported will have the essential characteristic of e-rickshaw only when the same are assembled to create a T-shaped vehicle mounted on a chassis, whose two rear wheels are independently driven by separate battery-powered electric motors.The Appellants stated that to assemble a complete Tricycle/e-rickshaw at least 103 items are required.The Appellants stated that some of the *major components such as Front Axle, Battery Charger 48V, Wiring Harness, Tire, Front Single Horn, Speedmeter, RVM Assy (LH and RH), Tube, Front Brake Drum, Battery are not imported. These are essential parts of the e-rickshaw. Without these components, the parts imported by both Appellants even if put togetherwould not make a tricycle/e-rickshaw in CKD condition.*

21. Thus, we observe that the Appellants have not imported many vital parts of the Tricycle. In the impugned order the adjudicating authority concluded that some parts which were not imported by either of the Appellants were 'minor parts'. From the description of the parts not imported mentioned above, we observe that they are essential parts without which a fully finished Tricycle will not come into existence. The adjudicating authority has not provided any evidence in the impugned order that the goods imported by the appellants together has the essential characteristic of e-rickshaw. For Example, battery is one of the parts not imported. As per the terminology of three wheeled vehicle, the same has to be powered or there should be propulsion through a battery which provides the power to the motor in order to thrust a vehicle.CTH 8703.80 covers the vehicle propelled through motor powered by a battery. The goods imported by the appellants together if assembled will not provide the basic function of propulsion as required for the classification under CTH 870 3.So, without the battery, the Tricycle cannot be operated and hence it is one of the essential parts. Similarly, the other parts not imported are also essential to make a fully finished Tricycle. Hence, we do not agree with the findings of the adjudicating authority that the goods imported by the appellants together has the essential characteristic of e-rickshaw/Tricycle.

A.4. Reliance has been placed on the COMMISSIONER OF CUSTOMS (PORT) KOLKATA VERSUS M/S. TWINKLE TRADECOM PRIVATE LIMITED, 2024 (5) TMI 472 - CESTAT KOLKATA wherein it was held that

"6.3. We observe that the lower authority has placed its reliance on Rule 2 (a) of General Interpretative Rules which stipulates as follows:

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

6.4. We agree with the findings of the Ld. Commissioner (Appeals) that the interpretation of statutes should be in line with the Act i.e., the Customs Tariff Act, 1975, and should be purposive in nature and not strictly as a literal interpretation which will not serve the purpose of the Act and the other literal description as provided. In this regard, the Ld. Commissioner (Appeals) has referred the judgment of Hon'ble High Court in the case of Macneill Engineering Ltd. Vs. Commissioner of Customs (Port), reported in 2014 (310) ELT 33 (Cal.), wherein it has been held as under:

"More often than not, in the interpretation of statutes, the Court should make a purposive interpretation of their provisions. A strictly literal interpretation may not serve the purpose of justice. The same principle should be applied to the interpretation of the Customs Act, 1962 and the related statutes and rules, for example the Customs Tariff Act, 1975 and the schedules appended thereto."

6.5. In order to have the essential characteristics of any machine or vehicle, the parts involved in the manufacturing should fulfil the basic principle of that vehicle or machine. The lower authority has classified the goods under CTH 8703.80 which covers the vehicle propelled through motor powered by a battery. The goods imported as such, by the respondent, if assembled together, will not provide the basic function of propulsion as required for the classification under CTH 8703. Accordingly, we uphold the findings of the ld. appellate authority in the impugned order and hold that the goods imported would not constitute a fully finished e-rickshaw as it did not have all essential components for a fully finished e-rickshaw.

From above judgement, it can be deduced that in absence of battery in e-bike/e-scooter, basic function of propulsion by battery operated motor could not be attained and goods imported in CKD condition would not constitute a fully finished e-bike/e-scooter. In view of this, I find that without battery, all the remaining parts imported in CKD condition could not constitute essential characteristic of e-bike/e-scooter.

A.5. The above decision was also relied upon by the Hon'ble CESTAT, Kolkata in case of COMMISSIONER OF CUSTOMS (PORT), KOLKATA VERSUS M/S. VANI ELECTRIC VEHICLE PRIVATE LIMITED, 2024 (11) TMI 17 - CESTAT KOLKATA wherein it was held that

"5. We observe that in the case of ***Twinkle Tradecom Pvt. Ltd. (Supra),*** *the Tribunal has already examined the said issue and held as under: -*

.....

.....

.....

6. As the issue has already been decided by the Tribunal in the above case, therefore, following the said ratio, we do not find any infirmity in the impugned order and accordingly the same is upheld."

A.6. In such a case, it is not appropriate on the part of the Department to apply Rule 2(a) of GI Rules and assume that parts imported have the essential character of an E-Bike when the SCN itself admits batteries, tyres, charger etc. are not being imported by the Noticee.

A.7. On this ground alone, the demand proposed in the SCN is liable to be set aside.

B. <u>IN "AS IMPORTED" CONDITION, THE PARTS MERIT CLASSIFICATION ON THEIR OWN MERITS UNDER THE RESPECTIVE SUB-HEADINGS .</u>

B.1. Rule 1 of the GI Rule states as under:

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

otherwise require, according to the following provisions:

B.2. As per Rule 1 of GI Rules, the classification shall be determined with reference to Heading, Section Notes and Chapter Notes. Therefore, if the classification is possible and determinable with reference to Headings and Section Notes and Chapter Notes, then recourse to Rule 2(a) cannot be resorted to.

B.3. It is submitted that as per Rule 1, when the goods cannot be classified based on the particular tariff entry along with relevant section and chapter notes, only then, recourse can be made to GI Rules (GI Rules 2 to 6) in a sequential manner. Reliance is placed on the decision of Hon'ble Supreme Court in the case *Salora International Limited v. Commissioner of Central Excise, New Delhi, (2012) 9 SCC 662*. In this case, the Hon'ble Supreme Court held that for the purpose of classification, firstly, the particular tariff entries along with relevant Section and Chapter Notes shall be consulted, and only if classification is not determined by the tariff headings, rest of the GI Rules can be used for the purpose of determination. Relevant portion of the judgement is reproduced hereunder, for ease of reference:

> *"19. On the question of the applicability of the Rules for Interpretation vis-à-vis the section notes and chapter notes in the Tariff Schedule, the rule laid down by this Court in CCE v. Simplex Mills Co. Ltd. may be seen to be applicable in this case. In that decision, a three-Judge Bench had the following to say on the subject:*
> *"11. The Rule for the Interpretation of the Schedule to the Central Excise Tariff Act, 1985 have been framed pursuant to the powers under Section 2 of that Act. According to Rule 1 titles of sections and chapters in the Schedule are provided for ease of reference only. But for legal purposes, classification 'shall be determined according to the terms of the headings and any relevant section or chapter notes'. If neither the heading nor the notes suffice to clarify the scope of a heading, then it must be construed according to the other following provisions contained in the Rules. Rule 1 gives primacy to the section and chapter notes along with terms of the headings. They should be first applied. If no clear picture emerged then only can one resort to the subsequent rules."*
> *Therefore, as clearly specified by the above rule, resort must first be had only to the particular tariff entries, along with the relevant section and chapter notes, to see whether a clear picture emerges. It is only in the absence of such a picture emerging, that recourse can be made to the Rules for Interpretation"*
>
> *(Emphasis supplied)*

B.4. Reliance is also placed on the judgement of the Hon'ble Supreme Court in CCE v. Simplex Mills Co. Ltd, (2005) 3 SCC 51 wherein, the above principles of law have been similarly upheld.

B.5. In the present case, the Noticee has never imported Lithium-Ion batteries as they are locally procured. Further in majority of cases, lead acid batteries are also being procured from local market. Further, even in case of import of lead acid batteries, the Noticee has not imported Lead acid batteries vide the Impugned Bills of Entries and nor has the Noticee imported the said batteries from the same supplier. The Department vide SCN has also accepted the fact that batteries were not imported along with the other consignments of impugned goods. Hence, classifying by resorting to Rule 2(a) and ignoring Rule 1 of GI Rules is against the principles of classification that too when essential parts like batteries and other parts used in assembly of a complete E-Bike were not imported as part of impugned goods. Therefore, the demand proposed in the SCN is liable to be dropped on this ground alone.

B.6. It is also submitted that in the instant case, the impugned goods imported by the Noticee are plastic and mechanical parts used in the manufacturing of E-Bike and by the application of Rule 1 of the GI Rules, the impugned goods are correctly classifiable under their respective sub-headings of the Custom Tariff Act, 1975 (hereinafter referred to as 'Tariff Act'). Consequently, reliance placed upon Rule 2(a) of GI Rules by the Department for classification of the imported goods is bad in law and liable to be rejected.

C. IMPUGNED GOODS IMPORTED/PROCURED FROM MULTIPLE SOURCES CANNOT BE CONSTRUED TO BE 'AS PRESENTED' UNDER RULE 2(A) OF THE GI RULES.

C.1. It is humbly submitted that the Rule 2(a) of the GI Rules is applicable to the impugned goods in their 'as presented' condition to the assessing officer at the time of import. The Department does not have the liberty or authority to club goods imported vide different BOEs at different port of import over a period of time as goods 'as presented' under Rule 2(a) of the GI Rules or any other provision under the Customs law. For ease of reference Rule 2(a) of the GI Rules is extracted below for ease of reference.

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

C.2. Rule 2(a) of GI Rules consists of two parts. According to the Harmonised system of Nomenclature *(hereinafter referred to as 'HSN')*, Explanatory Notes to Rule 2(a), the first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article.

C.3. The HSN Explanatory Notes states that second part of Rule 2(a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

Meaning of the term 'as presented'

C.4. The meaning of the term "as presented" has been discussed by the Hon'ble Supreme Court in *Commissioner of Customs, New Delhi vs. Sony India Ltd, 2008 (231) ELT 385 (S.C.)*. Just to appreciate that the nature of the imports undertaken by the Respondent in the said case are comparable to the nature of the imports in the instant case, a few facts are being provided herein. The Respondent was engaged *inter alia* in manufacturing of CTVs and audio products. The Respondent in the case imported all components during first year of operation and gradually increased over the next few years (similar to the present case as mentioned in the SCN). The Respondent in the said case placed indents on their counterpart in Singapore, because of the proximity of their Singapore counterpart with suppliers situated in various countries including Japan, Taiwan, Thailand, Indonesia, Malaysia, China, etc. All these vendors supplied components on basis of Minimum order Quantity for the optimum utilisation of containers, as also for the reduction in transport costs, standardizing the manufacture and dispatch procedures. The SCN issued in the background of these facts intended to read Rule 2(a) of the GI Rules over 94 consignments that took place over a period of 22 months in 94 lots in containers containing different parts sourced from different countries. The Hon'ble Supreme Court held based on the facts in the aforesaid case

that in order to apply second part of the Rule 2(a) of the GI Rules to import consignments, the components as imported which are presented unassembled or disassembled, should exhibit the "essential character" of the complete or finished articles. The term "as presented" used in Rule 2(a) of the GI Rules would imply that goods would have to be assessed in the form in which they are imported and presented to the customs and not based on the finished goods manufactured after subjecting them to some process of import.

C.5. In the present case also, the judgment of *Sony India (supra)* squarely applies. Hence, the demand proposed in the SCN is liable to be dropped on this ground.

C.6. The Noticee also draws attention to the consultation with respect to "WT/DS342: China — Measures Affecting Imports of Automobile Parts" before the World Trade Organization (WTO) Dispute Settlement Board (DSB). The European Communities, the United States, and Canada, requested consultations with China regarding China's imposition of measures that adversely affect exports of automobile parts from EC, the US and Canada to China. The measures included *inter alia*, Rules for determining whether imported automotive parts and components constitute complete vehicles. The European Communities argued that, under the measures, the imported automobile parts that are used in the manufacture of vehicles for sale in China are subject to charges equal to the tariffs for complete vehicles, if they are imported in excess of certain thresholds.

C.7. While hearing the case, the DSB established a panel which tabled its reports on 18th July, 2008. The Panel Report made observations on whether the term "motor vehicles" must be interpreted to include auto parts imported in multiple shipments meant for domestic assembly. The issue before the panel was, specifically, whether "the term "as presented" in Rule 2(a) includes, as argued by China, the situation where parts are imported in multiple shipments and presented to customs authorities separately or not."

C.8. China contended *inter alia* that the interpretative rules of GIR 2(a) result in a continuum of circumstances under which parts and components of an article will be classified as the complete article and the importation, in multiple shipments, of the parts necessary to assemble a complete motor vehicle is also the importation of a motor vehicle and not parts of the motor vehicle, provided that the imported parts, when assembled, have the essential character of a motor vehicle.

C.9. The Panel has gone into the plain meaning of the term "as presented" to denote a temporal meaning, that is when a good is presented to the customs authority. The word "as" can be defined as an adverb or conjunction of time or place, at or during the time that, when, while, whenever. The word "present" as "verb" to make present, bring into the presence of. As a verb transient – put before the eyes of someone; offer to sight or view; show, exhibit, display". When these definitions are combined, the panel states that they understood the term "as presented" to mean "when something is offered for the eyes of someone, offered to sight or view". In the absence of any other modifying words, "as presented" in the context of Rule 2(a) thus appears to point to the moment when goods are offered to customs authorities for examination, without necessarily encompassing situations where parts and components of a good are offered at different times for observation or examination and later assembled together into a complete good.

C.10. The United States explained in reference to the term "as presented" that it was a replacement for the term "imported" in Rule 2(a) to the CCCN (i.e. a nomenclature preceding the HS) to align it with the French word "présenté" and was intended to cover not only "import" but also "export" trade statistics.

C.11. Reference is also made to a letter provided by the Nomenclature Directorate in response to a question from one of the signatories to the HS concerning the scope of the term "presented" in the text of GI Rules 2(a), wherein the Director of the Customs

Co-operation Council *(hereinafter referred to as 'CCC')* (the immediate precursor to the World Customs Organization) stated that the editorial amendment of replacing the word "imported" with "presented" was adopted t ando make it clear that GI Rules 2(a) applies to a given article in the state in which it is presented for customs clearance.

C.12. The panel considered that if the term "as presented", in the sense of "as imported", was intended to broadly cover parts and components imported and presented at different times so long as they would eventually be assembled together into a complete good in the importing Member's territory, the drafters of the rule would not have included the term "as presented" in the text of Rule 2(a). In other words, given that the ordinary meaning of the term "as presented" denotes a temporal meaning: the moment when a good is presented, if the drafters had intended the scope of the term to be broader than this ordinary meaning, they would have either excluded the term connoting such an obvious temporal meaning from the text of Rule 2(a) or been more specific about the scope of the term.

C.13. Therefore, the ordinary meaning of the term "as presented" was considered together with the context in which the term was introduced into Rule 2(a) by the CCC. This supports the view that the scope of Rule 2(a) is limited to the specific moment when goods are presented to the customs authority for classification.

C.14. The Panel also considered that the aforesaid interpretation was in line with the basic principle of classification as observed by *the Appellate Body in EC – Chicken Cuts*, wherein it was held that goods must be classified based exclusively on their objective characteristics, which refer to their condition as they are presented to customs authorities at the time of importation.

C.15. The Panel has also referred to a document relating to the discussions on the draft Rule 2(a) of the GI Rules at the Nomenclature Committee of the CCC. The following observation was made by the Secretariat of the CCC which is relevant to the question of imports from multiple countries.

> *"It is quite obvious that the principle of assimilating unassembled or disassembled articles to assembled articles of the corresponding kind was laid down in certain Chapters of the Nomenclature solely in order to ensure that if a complete article is specified or included in one particular heading it should not be classified in several different headings where, in particular cases, it cannot be imported assembled.*
> *The only purpose of this principle is to preserve the systematic method of classification on which the Nomenclature rests; it hence reflects technological considerations only. There is therefore every justification for its application to articles disassembled or unassembled solely by reason of their bulk or weight, or of packing and handling difficulties.*
> *However, if the imported goods are parts which are not assembled by the manufacturer, although he could easily do so before shipment, the aim is mainly to supply the assembly industry in the importing country; such practices involve economic considerations, which in the Secretariat's view, cannot be accommodated at the technological level of the Nomenclature. It is for each importing country to take such steps as may be felt necessary in the economic field (e.g. in relation to Customs duties) to assist its assembly industry."*
>
> *(Emphasis Supplied)*

C.16. The Panel stated that the discussion provides information about the reason why classification of "unassembled or disassembled" goods as the complete good of the corresponding kind is a part of Rule 2(a) of the GI Rules. They interpret the above statement to mean that Rule 2(a) of the GI Rules was not intended to apply to goods (parts and components) imported for industrial assembly, which is the multiple shipment situation that was the complaint against China. Rather, with regard to goods imported unassembled or disassembled, Rule 2(a) of the GIR, the second part is

intended to mainly cover the situations in relation to goods that are difficult to be imported in assembled form.

C.17. The Panel further goes on to state that the Explanatory Note (V) to Rule 2(a) of the GI Rules reflects the understanding provided above. Explanatory Note (V) to Rule 2(a) of the GI Rules provides that when the goods are presented unassembled or disassembled, it is usually for reasons such as "requirements or convenience of packing, handling or transport". Explanatory Note (V) is provided in reference to the second part of Rule 2(a) of the GI Rules and is extracted *infra* for ease of reference:

RULE 2 (a)

(Articles presented unassembled or disassembled)

(V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

C.18. The Panel also dwelt on the inclusion of word 'usually' in the Explanatory Note (V) to Rule 2(a) of the GI Rules. According to the panel the word "usually" indicates that the provided reasons are not the only reasons when the second part of Rule 2(a) of the GI Rules applies. Nevertheless, the evidence as a whole indicates that the drafters of Rule 2(a) did not intend to have the Rule applied to the multiple shipment situation, especially when some of the essential parts are not even imported into India as same are procured locally.

C.19. The Panel also makes an observation regarding a document concerning discussions at the CCC in 1962, in which the Austrian administration raised the question of whether the unassembled or disassembled articles must be consigned by one supplier or at least by several suppliers in the same country. That is, the question was with regard to whether Rule 2(a) of the GI Rules must be confined to goods imported unassembled or disassembled from one country, as opposed to different countries. The Nomenclature Directorate considered the question of goods imported unassembled or disassembled from different countries to relate to rules of origin and thus to be outside the field of nomenclature. The Nomenclature Directorate noted as follows with reference to the query:

> *The main classification criteria used in the Nomenclature are: nature, kind, structure or composition and use of the goods. The origin never affects classification.*
>
> *It would hence be against the spirit and the letter of the Nomenclature for the Interpretative Rule on the corresponding Explanatory Note to introduce a discrimination based on the origin of goods imported unassembled or disassembled.*
>
> *Moreover, it is common practice for "sub-assemblies" of large plants to be despatched directly by their manufacturers to the country of destination.*
>
> *Although this matter lies outside the field of Nomenclature, the Nomenclature Directorate considers that such consignments, whether simultaneous or split (insofar as the latter are provided for by national regulation), should be eligible for the facilities afforded by the draft Interpretative Rule, provided that all the other conditions are met.*

C.20. The findings in the Panel Report were appealed by China and the Appellate body report was circulated on 15th December 2008 and adopted on 12th January 2019. In the Appellate body report, they upheld the findings on Rule 2(a) and observed that the Panel did not accept the broad interpretation of Rule 2(a) suggested by China and that the meaning of "as presented" in Rule 2(a) did not appear to contract the meaning of "on their importation" in Article II of the GATT.

C.21. The Noticee submits that as per the abovementioned rulings for Rule 2(a) to apply, the goods that are imported have to be classified "as presented" to imply that the imported goods are the complete or finished article. That is, if all the components are presented at the same time for customs clearance.

C.22. It is submitted that in the present case, it is an admitted fact that the impugned goods some parts are imported from Mundra port and very few lead acid batteries were in any case imported from different suppliers at two different points of time. Further, lithium-ion batteries are not even imported as same are domestically procured. Even in major cases, lead acid batteries are also procured from domestic market.

C.23. However, the SCN has erroneously proposed to club the consignment of impugned goods imported at all the ports and to re-classify them 'as presented' together to imply that the impugned goods imported are not parts but are CKDs kits of E-Bikes. The methodology adopted by the Department in applying Rule 2(a) is bad in law and is contrary to the legal position established by the Hon'ble Supreme Court in case of *Sony (supra)*. Hence, the demand proposed in the SCN is liable to be dropped and the SCN must be discharged forthwith.

C.24. It is submitted that there is no basis whatsoever for the SCN to club the consignments with a pre-determined objective of classifying the imported goods as CKD kits of E-Bike. However, no legal provisions, notification, circular, case laws have been referred to or cited by the SCN in this regard. The proposal is completely devoid of any merits under law and is liable to be discarded forthwith.

Goods are to be construed as CKD kits, only if presented together.

C.25. It is submitted that the Department has conveniently misinterpreted the aspect of what constitutes a CKD kit. In the Panel report on 'China — Measures Affecting Imports of Automobile Parts' referred above, the Panel held that, based on the parties' understanding of the terms, the scope of "CKD and SKD kits" can be defined in terms of the following three elements:

(1) extent of auto parts included in a kit;

(2) package and shipment as a kit; and

(3) assembly operations in the importing country

C.26. With regard to the extent of auto parts and components that need to be contained in a kit so as to constitute a CKD or SKD kit, it was held that a CKD or SKD kit may be understood as consisting of "all or nearly all" the auto parts necessary to assemble a complete vehicle".

C.27. With regard to the package and shipment of the kit, the Panel held that 'all or nearly all' of the auto parts necessary to assemble a complete vehicle must be packaged and shipped altogether in a single shipment to constitute a CKD or SKD kit. They have relied on the definition of a "kit" as "a set of parts or constituents from which a thing may be assembled or made" and held that a CKD or SKD kit is a set of auto parts and components, either entirely unassembled or partially assembled, from which a motor vehicle may be assembled or made.

C.28. Finally, the Panel appreciated that a CKD or SKD kits must go through the assembly process to become a complete vehicle since auto parts and components constituting a CKD or SKD kit are "entirely unassembled" or "only partially assembled". The Panel appreciated that the nature and degree of the assembly process required for CKD and SKD kits to become a complete vehicle will vary depending on the extent to which the parts and components in a CKD or SKD kit would have been already assembled prior to their shipment to the importing country. However, they held that the assembly operations for CKD and SKD kits may be less complicated than the full manufacturing of vehicles from individual auto parts.

C.29. In the case of *Sony India (supra)*, the Hon'ble Supreme Court held that only when components are presented at the same time for customs clearance the goods can be held to be in CKD condition.

C.30. The Noticee submits that it is amply clear from the abovementioned judgements that in order to classify imported goods as CKDs or SKDs of E-Bikes, the impugned goods must be consisting of 'all or nearly all' parts of E-Bike required to make a vehicle. However, in the present case, the batteries were imported at a different time on multiple occasions. It cannot be doubted that batteries are a major component of E-Bike and without the batteries, E-Bikes cannot be said to be complete or even 'near to complete'.

C.31. The Noticee submits that there is no Notification or Circular with reference to scope of Rule 2(a) for goods arriving under different Bills of Entry and how the GI Rules will be interpreted for imports of such split consignments or multiple consignments. In view of lack of any clarity on the scope of CKD or Rule 2(a) of the GIR, the Noticee submits that Rule 2(a) of the GI Rules was not intended to be read in the manner proposed by the Department. Rule 2(a) contemplates, as amply demonstrated in the WTO DBS Panel Order, that Rule 2(a) of the GI Rules is to be interpreted only for goods that are imported from a single supplier and goods "as presented" on importation have the essential nature of the complete product. Similarly, in *Sony India (supra)*, the Hon'ble Supreme Court has held that goods can be assessed under Rule 2(a) of the GI Rules when they are presented to the customs for clearance if they have the essential character of the complete products. On this ground alone, the SCN is liable to be set aside and the demand arising therein is liable to be dropped.

D. <u>RULE 2(A) OF THE GI RULES IS NOT APPLICABLE IN THE INSTANT CASE.</u>

D.1. It is humbly submitted that in attempt to establish that the impugned goods are Completely Knocked Down *(hereinafter referred to as "CKD")* Kits of E-Bikes as per Rule 2(a) of the GI Rules, the Department has taken a combined view of all essential parts and components imported by the Noticee during a period of time by completely ignoring the meaning of the term "as presented".

D.2. In the instant case, the impugned goods under one Bill of Entry are not all parts in any foreseeable sense and certainly do not have the essential character as that of a complete E-Bike. The Impugned goods imported in one consignment do not give the essential functionality of E-Bike because batteries, tyres and charger are important components of E-Bike without which the E-Bike itself is incomplete. Therefore, Rule 2(a) of the GI Rules is not applicable in the instant case.

<u>*First Part of Rule 2(a) is only applicable to unfinished items having essential character of finished goods.*</u>

D.3. It is submitted that Rule 2(a) of the GI Rules is applicable to the goods that are presented unfinished or incomplete, provided that, as presented, they exhibit the "essential character" of the finished goods.

D.4. Explanatory Note (VII) to Rule 2(a) of the GI Rules states that cases covered by this Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section XVII, and Chapters 44, 86, 87 and 89).

D.5. HSN Explanatory Notes to Chapter 87 states that the classification of a motor vehicle is not affected by operations which are carried out after assembling all parts into a complete motor vehicle such as: Vehicle Identification Number fixation, brake system charging and bleeding air from the brakes, charging of the steering booster system (power steering) and cooling and conditioning systems, headlights regulation, wheel geometry regulation (alignment) and regulation of brakes. This includes classification by the application of Rule 2(a).

D.6. The HSN Explanatory Notes to Chapter 87 also states that an incomplete or unfinished vehicle, whether or not assembled, is classified as the corresponding complete or finished vehicle provided it has the essential character of the latter. For example:

i) A motor vehicle, not yet fitted with the wheels or tyres and battery.
ii) A motor vehicle not equipped with its engine or with its interior fittings.
iii) A bicycle without saddle and tyres.

D.7. In the present case, the example given in the HSN explanatory note (i.e. a motor vehicle, not yet fitted with the wheels or tyres and battery) does not apply because the same was not given in the context of E-Bikes. A battery to an E-Bike cannot be equated with a battery to a normal bike. In fact, such examples demonstrate that the SCN has been issued without application of mind and without understanding the goods in question, their commercial usage, relevance and value of various parts of E-Bikes including batteries. The battery is undoubtedly an essential component of the E-Bike. Therefore, without the import of batteries in a single consignment, it cannot be said that Rule 2(a) of GI Rules applies in the present case. Hence, allegations made in the SCN are bad in law and are liable to be discarded forthwith.

D.8. In the case of *Sony India (supra)*, the Hon'ble Supreme Court categorically held that the sine qua non for the application of Rule 2(a) is that any imported article, which is "as presented", must have the essential character of the complete or finished article. This condition of "essential character" is also applicable to the second part of Rule 2(a). The Hon'ble Supreme Court has held that a mere PCB or a CRT, under any circumstances, cannot be held to have the essential character of the completed article, which was a CTV in the aforementioned case. The Hon'ble Supreme Court held that when the clause "as presented, the incomplete or unfinished article has the essential character of the complete or finished article", then the remaining clause can be activated and applied. That is, even when such an article is in a disassembled or unassembled condition, it would still be taken to be a complete article.

D.9. In case before the Dispute Settlement Body in *WTO China measures affecting imports of automobile parts*, the Panel has also discussed extensively on the "essential character" of the goods at the time of importation. The Panel reviewed the import of "essential character" in three parts.

D.10. In the first part, the Panel referred to China importing a body (including cabin) assembly or an engine assembly, plus at least three other assemblies (systems) for the purpose of assembling vehicles. The discussion was specifically with regard to engine assemblies plus three other assemblies, among the chassis assembly, the transmission assembly, the drive-axle assembly, the non-drive axle assembly, the steering system and brake system. Thus if "a chassis fitted with engines" was imported into China with at least two other assemblies fitted or not, the goods would be classified as a motor vehicle. They also refer to observation by the WCO Secretariat that Chapter 87 provides a unique challenge in that it has tariff headings 87.06 and

87.07 for intermediate goods which fall in between complete motor vehicles and parts and components thereof.

D.11. The Panel states that Rule 2(a) must be applied in conjunction with Rule 1, which would imply in the case of CTHs 87.06 and 87.07 that if auto parts imported in a single shipment "as presented" fit the description of one of these two headings, they would have to be classified under either heading in accordance with Rule 1. The text of the tariff heading 87.06 and the Explanatory Note to the heading provide:

> *"87.06 Chassis fitted with engines, for the motor vehicles of headings 87.01 to 87.05. This heading covers the chassis frames or the combined chassis-body framework (unibody or monocoque construction), for the motor vehicles of headings 87.01 to 87.05, fitted with their engines and with their transmission and steering gear and axles (with or without wheels). That is to say, goods of this heading are motor vehicles without bodies."*

D.12. In this respect, the Panel concluded that the text of CTH 8706, read in the context of the Explanatory Note to the heading, illustrates that a "chassis fitted with engines", fitted with the transmission assembly, the steering system and the axle assemblies falls within the scope of tariff heading 87.06. However, according to import classification in China, the same "chassis fitted with engines" with the transmission assembly, the steering system and the axle assemblies would be considered as having the essential character of a motor vehicle and thus classified under the tariff headings for motor vehicles under CTH 8702 to CTH 8705, instead of CTH 8706 as required under Rule 1. That implies that when chassis fitted with engines with the transmission assembly, steering system and axle assemblies will be classified as a motor vehicle on import into China, which is inconsistent with the terms of the CTH 8706.

D.13. In this connection, the Panel determined the essential character based on "the value of the incomplete good in relation to the value of the complete good" as embodied. This means that an importer should know at the time of importation the exact value of complete goods into which the subject incomplete article presented for classification will eventually be incorporated. Auto parts are more standardised and thus can interchangeably be used among different vehicle models, which makes identifying a specific vehicle model into which certain auto parts will be incorporated unnecessarily trade restrictive.

D.14. In the third part, the Panel makes reference to criteria for essential character determination. In this regard, the panel holds that for parts to be "plainly recognizable" as the corresponding complete goods of parts, they must have the physical appearance of the complete good. Based on this criterion, the Panel found that the value criterion is not an appropriate measure of essential character determination. The same illustrates a lack of coherency and objectivity between different criteria which is contained in the same measures.

D.15. A similar view has been taken in *Telco vs. Collector of Customs, 1990 (50) E.L.T. 571 (Tribunal)*, as maintained by the Hon'ble Supreme Court, wherein it was held that the function of an article is one of the most important criteria for determining the essential character of an article. That is, the product as imported should be capable of delivering the function of the complete product for the product to be classified as the complete product under Rule 2(a) of the GI Rules. The Hon'ble Supreme Court while upholding the judgement as reported in [1996(85) ELT A61 (SC)], stated that the products imported have not acquired essential character of the final product in view of the fact that extensive operation is still to be carried out.

D.16. The *TELCO judgement (supra)* referred to the judgement in *Atul Glass Industries Ltd vs. Collector of Central Excise, 1986 (25) E.L.T. 473 (S.C.)* for appreciating identification of an article. In *Atul Glass Industries (supra)*, it was held that the identity

of an article is determined by the primary function which serves the need of the customer. The relevant portion of the judgement is extracted herein.

> *"the identity of an article is associated with its primary function. It is only logical that it should be so. When a consumer buys an article, he buys it because it performs a specific function for him. There is a mental association in the mind of the consumer between the article and the need it supplies in his life. It is the functional character of the article which it identifies in his mind."*

D.17. Further, in *Shivaji Works Ltd. vs. Collector of Central Excise, Aurangabad, 1994 (69) ELT 674 (Tribunal)*, it was held that Rule 2(a) of the GI Rules does not permit to classify an incomplete article which clearly falls under a certain chapter, to be make it fall under another heading by invoking the principal of essential character under the said Rule. The relevant portion of the judgement is extracted herein:

> *"A machine part or a motor-vehicle part would, subject to any section or chapter note, normally be one which is ready for use in a particular machine or motor vehicle. Rule 2(a) does not permit us to conclude that when an article squarely falls under a particular tariff heading, it can be made to fall under another heading by invoking the concept of essential character. This is against the plain reading of Rule 2(a)."*

D.18. It is humbly submitted that by no stretch of imagination various incomplete parts be recognized as a complete e-bike or can perform the function of a complete E-Bike.

D.19. In the view of the above, the Noticee submits that the Department has not established that the parts imported have the essential characteristics of E-Bike. The proceedings initiated in the SCN to invoke the provisions of Rule 2(a) without properly understanding the impact of the same and situations in which the same can be applied, is therefore liable to be dropped for this reason also.

Second Part of Rule 2(A) is applicable only to specific types of imports and not all the imports

D.20. The second part of Rule 2(a) of GI Rules states that *"it shall also be taken to include a reference to that article complete or finished, presented unassembled or disassembled"*. The second part of Rule 2(a) of the GI Rules essential means that when goods are presented for assessment in unassembled or disassembled form.

D.21. The analogy of the rule states that the article is complete or finished before its export at the supplier's end, however, when it is presented for assessment, it is in unassembled or disassembled form.

D.22. The expression "unassembled" refers to an article prior to the stage of final assembly. While the expression "disassembled" refers to an article that has been assembled at the factory but disassembled for the ease of transportation, as has been further substantiated in Explanatory Notes (V) to Rule 2(a) of the GI Rules at page GIR-2 of the HSN Explanatory Notes.

D.23. Therefore, the assessment of an article in an unassembled or disassembled form presented as per second part of Rule 2(a) of the GIR, is possible is only if the article is complete at the supplier's end and disassembled and shipped to India, or prior to final assembly, all the parts and components required for assemble the finished or complete article is shipped to India.

D.24. In view of the above submissions, the SCN issued by the department is ill-conceived and does not appreciate Rule 2(a) of the GI Rules to the proper scenarios. Hence, on this ground the demand is liable to be set aside and SCN is liable to be discharged forthwith.

E. LOCALIZATION OF PARTS AND FURTHER MANUFACTURING UNDERTAKEN BY THE NOTICEE, SUPPORTS THE CONTENTION THAT COMPLETE E-BIKE HAVE NOT BEEN IMPORTED.

E.1. The Noticee submits that the extent of localization of parts has been submitted. The Noticee submits that several critical parts such as tyres, batteries, battery chargers, fasteners etc are localized and establishes further that "as presented", a complete motor vehicle is not imported.

E.2. Moreover, it is submitted that it is not correct to conclude that the imported impugned goods without battery gives the complete characteristics of E-Bike because Battery is an essential part of the E-Bikes without which the E-Bike cannot function. As already submitted, the Lithium-Ion Batteries are procured locally by the Noticee and even cases of Lead Acid Batteries, most of them are procured locally and the remaining are being imported by a different supplier at different However, this crucial fact has been conveniently ignored by the SCN with the sole view to propose and confirm demand on all models.

E.3. Further, it is alleged that impugned goods are CKDs of E-Bikes/E-Scooters as they do not require any treatment or processing. In this regard, it is humbly submitted that the impugned goods are subjected to various stages of processing post importation, which have been ignored by the SCN deliberately.

E.4. Once the impugned goods were imported, they along with other localised parts are subjected to various stages of processing. A detailed flow chart of processing/assembly is already enclosed as Annexure-4.

E.5. From the flow chart, it is evident that the impugned goods along with the localised parts are divided according to their utility and are sent to their respective allocated divisions for processing. Once, each major component of E-Bike is processed, they are further sent to main assembly from where the final product i.e. E-bike comes into existence.

E.6. Further, it is submitted that the Noticee has spent huge amount as the capital investment on plant and machinery required for manufacture of E-Bike. The Noticee submits that the said amount of capital investment is not required in case the E-Bike/E-Scooter could be merely assembled with a simple "screwdriver technology" or with mere nuts and bolts. The capital investment is indicative of the fact that mere assembly cannot lead to manufacture the E-Bikes.

E.7. The Noticee also refers to case of *Jolly Electrical Industries v. Commissioner of Customs, Ahmedabad [2004 (174) ELT 460 (Tri-Mumbai)]* wherein it was observed that "welding" of parts for populating a PCB being considered a simple operation is contradictory to the position that heavy capital investment was made. It was thereby held that since components were imported and domestically procured, manufacturing was undertaken in the factory with requisite machinery for populating the PCB and the goods were cleared on payment of Excise Duty, the imported components were not in the form of a SKD but were parts and components which were used in manufacturing and cleared.

E.8. In view of the above, the impugned goods without batteries cannot give essential character of complete E-Bike. Hence, Rule 2(a) is not applicable. Consequently, classification under CTH 8711 is bad in law and the demand proposed in the SCN is liable to be dropped.

F. EXTENDED PERIOD OF LIMITATION IS NOT INVOKABLE IN THE PRESENT CASE.

F.1. The Noticee submits that the Department issued the SCN on 22.05.2024 with proposals to re-classify the goods imported during the period from F.Y. 2020-21 and 2021-22. Though the duty demanded falls within the normal period of limitation i.e. 2 years, however, the SCN has been issued by invoking extended period of limitation in terms of Section 28(4) of the Customs Act on the ground that the Noticee had done fraud with intention to evade payment of duty. The Noticee submits that such invocation of extended period is bad in law in view of the submission made hereinbelow.

F.2. In the SCN the Department has alleged that the Noticee had suppressed facts to evade the payment of Customs Duty. In this regard, it is submitted that the Noticee has not suppressed any facts. All the BOEs filed during the impugned period contained correct and complete descriptions of each part that was imported by the Noticee. Further, the imported goods were finally assessed and were within the knowledge of the Department. Furthermore, the Noticee adopted corrected classification for each part that was imported by it.

F.3. Moreover, the Noticee also finds it pertinent to highlight the fact that the Noticee has been importing the subject goods since 2006 under the same classification. However, the Department never raised any objection until now. Therefore, it cannot be alleged that the Noticee suppressed any material fact from the Department; the Noticee was always under the bona fide belief that the classification adopted by them is correct. If at all it is assumed that the classification adopted by the Noticee is incorrect, then the Department should have pointed it out much earlier.

F.4. Reliance in this regard can be placed upon the case of *Continental Jt. Venture Foundation v. Commissioner of Central Excise, 2007 (216) E.L.T. 177 (S.C.)* wherein it was held that the expression 'suppression' has to be construed strictly and viewed in the factual matrix in which dispute has arisen and mere omission to supply correct information cannot lead to invocation of the extended period. In the present case, the Department has miserably failed to prove that all the components were imported in CKD kit in "as presented" form. The Department has also failed to appreciate the fact that the batteries that constitute 40-50% of the impugned goods were in any case either imported from different port/time and at different point of time. Further in majority of cases batteries are procured from local market only. Therefore, the impugned goods are mere components and cannot be called as CKD kits of E-Bikes.

F.5. The above decision was also relied upon by the Hon'ble Supreme Court in the case of *Escorts Ltd. vs. Commissioner of Customs, Faridabad, 2015 (319) E.L.T. 406 (S.C.).*

F.6. Further, it has been held in the case of *Vedanta Aluminium Ltd. v. Custom & Central Excise Settlement Commission, 2016 (331) E.L.T. 408 (Cal.)* that when a fraud or misrepresentation is alleged, particulars thereof required to be given in show cause notice and there cannot be a suppression, which is in knowledge of or can be easily ascertained by Department.

F.7. Reliance is also placed on *Gupta Steel v. Commissioner of Customs, Jamnagar, 2015 (324) E.L.T. 29 (S.C.)* wherein the Hon'ble Apex Court held that when the Department had full knowledge of the facts of the case, it cannot invoke extended period alleging misstatement and suppression.

F.8. The Noticee submits that the burden is on the Department to prove that there was suppression on the part of the Noticee to invoke longer period. However, in the present case, the Department has failed to establish that there was suppression on the part of the Noticee.

F.9. Without prejudice to the submission made above it is submitted that the present case involves interpretations of the tariff entries of the Tariff Act and application of the GI Rules, interpretation of Section/Chapter Notes. Therefore, the dispute in the present case relates to the interpretation of law.

F.10. It is submitted that the Noticee were of the *bona fide* belief that classification adopted by them is correct and that there is a difference between 'misclassification' and 'mis-declaration' under the Customs law. However, the SCN obliterated such distinction conveniently without any legal or factual basis.

F.11. In this regard, the Noticee places reliance on the case of *Densons Pultretaknik vs. CCE, 2003 (155) ELT 211 (SC)*, wherein it was held by the Hon'ble Supreme Court that merely claiming classification does not amount to suppression of facts and therefore, extended period of limitation is not invokable.

F.12. In the case of *CC, Bangalore v. A. Mahesh Raj, 2006 (195) ELT 261* the Hon'ble Karnataka High Court has held that there is a distinction between 'misclassification' of goods and 'mis-declaration' of goods.

F.13. It is settled law that in a dispute prevailing around classification, the assessee, cannot be charged with any suppression of facts. Reliance in this regard is placed on the following:

- *CCE v. Ishaan Research Lab (P) Ltd. - 2006 (230) ELT 7 (SC)*
- *Chamundi Die Cast (P) Ltd. v. CCE - 2007 (215) ELT 169 (SC)*

F.14. In view of above, it is submitted that the allegation of misdeclaration/ suppression/ fraud against the Noticee is without any basis whatsoever. The Noticee respectfully submits that in the present case, in the absence of any collusion, willful mis-statement, suppression of facts on part of the Noticee, extended period of limitation as provided under Section 28(4) of the Customs Act cannot be invoked on the ground of incorrect classification.

G. <u>DEMAND NOT SUSTAINABLE AS ASSESSMENT MADE IN BOEs HAS NOT BEEN CHALLENGED BY THE DEPARTMENT.</u>

G.1. It is submitted that for the finally assessed BOEs, issuance of SCN under section 28 is bad in law unless the BOEs are challenged by the Department by way of preferring an appeal. Therefore, the issuance of SCN itself is incorrect because the BOE was finally assessed by the proper officer under the Customs Act. These orders were passed on the satisfaction of the proper officer that the said goods have been properly assessed before clearance of such goods for home consumption.

G.2. It is further submitted that the Out of Charge orders being *quasi-judicial* orders, can only be set aside by a competent appellate authority by way of an appeal. It is submitted that the *quasi-judicial* orders cannot be set aside by a mere show cause notice. A show cause notice cannot be issued unless the *'Out of charge'* order is challenged by way of appeal.

G.3. This position is clear by the decision of *Collector Vs. Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC)* and *Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), 2004 (172) ELT 145 (SC).*

G.4. The Hon'ble Supreme Court in *ITC Limited vs. Commissioner of Customs, Kolkata, 2019 (368) E.L.T. 216 (S.C.)* has held that even after amendment on 08.04.2011 (introduction of self-assessment regime), the parties (importer as well as the department) need to challenge the assessment if they want to alter the assessment so made.

G.5. The above principle has also been applied by the Hon'ble Punjab and Haryana High Court in the case of *Jairath International vs. Union of India, 2019 (10) TMI 642*

wherein the Hon'ble High Court addressed the issue of recovery of erroneous sanction of drawback claim with respect to goods already exported out of India on account of alleged overvaluation. The shipping bills in question were self-assessed and pertained to period post amendment vide Finance Act, 2011. The Hon'ble Court held that the Department does not have power to reassess the value of goods already exported in absence of challenge to the original assessment and as a result of this, no recovery is possible with respect to duty drawback already sanctioned.

G.6. Further, in the case of *Vittesse Export Import vs. Commissioner of Customs (EP), Mumbai, 2008 (224) ELT 241 (Tri.-Mumbai)*, it was held that once the shipping bills have been assessed, they attain finality and cannot be re-assessed on the grounds of mis-declaration.

G.7. Further, the Hon'ble Tribunal in the case of *Ashok Khetrapal vs. CC, Jamnagar, 2014 (304) ELT 408 (Tri.-Ahmd.)* has held that once the BOEs have been assessed, the same attained finality and assessment cannot subsequently be reopened by the Department by way of demand under Section 28 of the Customs Act by invoking extended period.

G.8. The Noticee, therefore, submits that since in this case the assessments done in the BOEs have attained finality due to the fact that no appeal has been filed by the Department against the finally assessed BOEs, the same cannot be altered by issue of a demand under Section 28 of the Customs Act. Hence, it is submitted that the SCN is invalid, and the proposed demand is liable to be dropped on this ground also.

Once the duty is levied and paid as per assessment order, no SCN can be issued under Section 28 of the Customs Act.

G.9. Without prejudice to the above submission, the Noticee submits that if in respect of an assessee, a method of assessment is approved and consequently the assessee pays the duties or taxes based on such assessment, then it is not a case of duty 'short levied' or 'not levied' or 'short paid' or 'not paid', unless such method of assessment is challenged and held to be incorrect.

G.10. For the above, reliance is placed on the decision of *Commissioner of Central Excise vs. Cotspun Ltd. 1999 (113) ELT 353 (SC)* wherein the Constitution Bench of the Supreme Court held that a show cause notice under section 11A of Central Excise Act, 1944 cannot be issued contrary to approved classification list. This was on the principle that duty levied and paid in accordance with approved classification list is duty correctly levied and paid and not a case of duty short levied or not levied or short paid or not paid which alone are covered by Section 11A.

G.11. In the aforesaid judgment, the Constitution Bench approved the judgment of division bench of Supreme Court in the case of *Rainbow Industries [1994 (74) ELT 3 (SC)]*, wherein the division bench had held that when clearances (individual assessments) were made as per approved price list, there cannot be any short-levy or non-levy. Thus, the constitution bench of the Supreme Court held that where the clearances were made in terms of approved classification list, a reclassification could take effect only from the date of the show cause notice seeking to reclassify the product and that no show cause notice under section 11A for the past period.

G.12. In *Mahindra & Mahindra Vs. Addl. CCE – 1998 (29) RLT 117 (T)*, the Tribunal in the context of Central Excise law, decided the issue on merits in favour of Mahindra & Mahindra. It was held that if there was suppression of facts, demand can be raised under proviso to Section 11A. However, in view of the decision on merits, the appeal of Mahindra & Mahindra was allowed by the Tribunal. The department filed an appeal to Supreme Court. By a judgment reported at *Addl. CCE Vs. Mahindra & Mahindra Ltd. – 2000 (120) ELT 290 (SC)*, the appeal of the Revenue was dismissed by the Supreme Court. The Supreme Court did not go into the merits of the matter. Following

its own decision in *Cotspun (Supra)*, the Supreme Court dismissed the appeal of the department before it.

G.13. It is significant to note that taking note of the aforementioned judicial decisions, Section 11A of Central Excise Act was amended and retrospectively validated vide Finance Act, 2000. However, in Section 28 of Customs Act which is *pari materia* to Section 11A of Central Excise Act, no amendment was carried out under the Customs Act. Thus, in the absence of a legislative sanction, the ratio laid down in the *Cotspun (Supra)* and *Mahindra & Mahindra (Supra)* will squarely apply to Section 28 of the Customs Act.

G.14. In the present case also, the duty levied and paid by the Noticee was based on the approved assessment of the BOEs undertaken by the Customs Department. Thus, it is submitted that when the duty has been discharged basis the out of charge given by the Customs Department, such situation cannot be considered to be falling within the ambit of duties 'not levied' or 'not paid' or 'short levied' or 'short-paid'.

G.15. In view of the above same, the SCN has been incorrectly issued under Section 28 and the same is liable to be set aside.

H. <u>THE PROCEDURE OF SECTON 138B OF CUSTOMS ACT, 1962, SHOULD BE FOLLOWED IN THE PRESENT CASE BEFORE RELYING ON THE STATEMENTS RECORDED UNDER SECTION 108 OF THE ACT.</u>

H.1. It is humbly submitted that the present SCN has heavily relied upon the statements given by various employees of the Noticee, for making various allegations against the Noticee and for raising demand of customs duty along with interest and penalties.

H.2. It is submitted that the above statements tendered by the aforesaid individuals and recorded by the DRI officers are not admissible as evidence without examination of the same before a court of law.

H.3. Section 138B of the Customs Act provides for the admissibility of the statements recorded before any custom officer in the course of inquiry. From a bare reading of the said Section, it is evident that a statement recorded before a Customs Officer of Gazetted Rank, can be relevant for the purpose of proving the truth of the facts contained therein only when the person who made the statement is examined as a witness before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted as evidence in the interests of justice, except where the person who has tendered the statement is dead or cannot be found etc. Further, sub-section (2) of Section 138B provides that the provisions of sub-section (1) shall apply in relation to any proceedings under the Customs Act, as they apply in relation to a proceeding before a Court. Therefore, it is requested to ensure compliance with the provisions of Section 138B of the Act before admitting any statement as evidence against the Noticee.

H.4. It is submitted that Section 138B(1)(b) provides the process which an Adjudicating Authority is required to follow. The same is as under:

i) The person who made the statement during the course of inquiry has to first be examined as a witness in the case before the adjudicating authority; and
ii) Thereafter, the adjudicating authority forms an opinion, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

H.5. The Noticee humbly submits that in the present case, as much as the SCN relies on the statement of various personnel of the Noticee, the same can be admitted as evidence against the Noticee only when the aforementioned requirements of Section 138B of the Act are satisfied.

H.6. It is further submitted that in case the procedure laid down in Section 138B is not followed by the Department, it will be deemed that the Department does not wish to rely on such statements and the same cannot be used as evidence against the Noticee. In such situation, there is no requirement of cross-examination.

H.7. In this regard, the Noticee relies upon the following judicial precedents:

- *Him logistics Pvt. Ltd. v. Principal Commissioner of Customs, 2016 (336) E.L.T. 15 (Del.)*
- *Basudev Garg v. Commissioner, 2013 (294) E.L.T. 353 (Del.)*
- *J & K Cigarettes Ltd. v. Commissioner, 2009 (242) E.L.T. 189 (Del.)*
- *M/s J.V. Industries Pvt. Limited, Shri Sushil Kumar Jain, Shri Vishal Sharma, Shri Manoj Kumar Jain, M/s Ganpati Rolling Mills Pvt. Ltd., M/s JMW India Pvt. Limited, Shri Vinod Kumar Jain, Shri Shiji Gupta, M/S JMW India Pvt. Limited v. Commissioner of Central Excise, Delhi/J&K, 2018 (6) TMI 873 - CESTAT NEW DELHI (LB)*
- *CCE, Delhi – I v. Kuber Tobacco India Ltd., 2016 (338) E.L.T. 113 (Tri. - Del.);*
- *Alliance Alloys Pvt. Ltd. v. CCE, Delhi, 2016 (338) E.L.T. 749 (Tri. - Chan.)*

H.8. Therefore, mere reliance on the statements recorded under Section 108 of the Act is not sufficient as it itself appears to have been extracted to suit the needs of building a case by the DRI officials.

H.9. It is also submitted that the denial of right of cross-examination to the Noticee would violate the principles of natural justice. For this purpose, reliance is placed on the case of *Kiran Overseas vs. Collector of Customs, 1988 (38) E.L.T. 362*, wherein it was held that denial of opportunity of cross-examination by quasi-judicial authorities, of third parties by the party in adjudication would violate principles of natural justice.

H.10. This decision was subsequently affirmed by the Hon'ble Supreme Court in the case of *Collector vs. Kiran Overseas, 1996 (88) E.L.T. A187 (S.C.)*.

H.11. The Noticee also places reliance on the case of *Commissioner of Central Excise, Meerut vs. Parmarth Iron Pvt. Ltd., 2010 (260) ELT 514(All.)*, wherein it was held that it is the right of an assessee in the event the revenue seeks to rely on the statements of witnesses recorded by it and whose statements are sought to be relied upon at the stage of adjudication to make available the said witnesses for cross-examination so that it could be established whether the statements recorded from the said witnesses have been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like.

H.12. The Noticee also relies on following judicial pronouncements wherein it has been held that if a statement of a person is relied upon, opportunity of cross examination of the person must be given if demanded:

- *Nirmal Seeds Pvt. Ltd. vs. Union of India, 2017 (350) ELT 486 (Bom)*
- *Kalra Glue Factory vs. Sales Tax Tribunal, 1987 (66) STC 292*
- *Hind Industries vs. Commissioner of Customs, 2018 (364) ELT 218 (Tri. - Del.)*
- *Indo Plast vs. Commissioner of Customs, 1994 (69) ELT 39 (CEGAT)*

H.13. Hence, in light of the decisions above, the Noticee submits that the statements recorded under Section 108 are inadmissible unless procedure under Section 138 (B) is complied with.

I. NO INTEREST IS LEVIABLE UNDER SECTION 28AA ON THE NOTICEE IN THE PRESENT CASE.

I.1. The present SCN proposes to levy interest under section 28AA of the Customs Act, 1962. For ease of reference, Section 28AA is reproduced below:

> *28AA. Interest on delayed payment of duty.*
>
> *(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.*
>
> *(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.*
>
> *(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,-*
>
> *(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and*
>
> *(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.]*

I.2. The Noticee submits that it is well settled law that interest is payable only when there is contravention of the provisions of the statute with respect to discharge of duty. Since, the demand of duty does not arise, interest liability under section 28AA/28AB ibid does not arise.

I.3. The Noticee also submits that interest is compensatory in character and the same is payable only when the payment of any tax has been withheld or is due and payable. Therefore, interest is merely an accessory to the principal and inseparably linked with the demand proposed in the SCN. Thus, if principal amount is not payable, interest is also not payable.

I.4. The Hon'ble Supreme Court of India in *Prathibha Processors vs. Union of India* reported at *1996 (88) E.L.T. 12 (S.C.)*, has held that when the principal amount (duty) is not payable, there is no occasion or basis to levy any interest, either.

I.5. This decision has subsequently been followed by the Tribunal, Kolkata in *Magnetic India Ltd. vs. Commissioner of Customs, Bhubneshwar* reported at *2001 (131) E.L.T. 444 (Tri. - Kolkata)*, wherein it has been held that when duty is not payable on assessment at nil rate, interest is not payable.

I.6. The Noticee also wishes to place reliance on the following judgments which *inter-alia* held that liability to pay interest would arise only when the duty is not paid and if duty is not payable, liability to pay interest would not arise:

- *CCE vs. Pearl Insulation Ltd* reported at *2012 (281) ELT 192 (Kar)*
- *Blue Star Limited vs. UOI* reported at *2010 (250) ELT 179 (Bom)*

- *CCE vs. Bill Forge Pvt Ltd* reported at *2012 (279) ELT 209 (Kar)*

I.7. Thus, in view of the above decisions, the proposal to recover interest under Section 28AA of the Customs Act, 1962 is liable to be set aside.

J. DEMAND, INTEREST AND PENALTY PROVISIONS CANNOT BE INVOKED IN CASES OF DEMAND ON IGST.

J.1. The Noticee humbly submits that demand for IGST, interest on the duties paid, other than BCD, is not sustainable in the present case for the reason that the provisions relating to demand of IGST, interest and penalty on demand of IGST, have not been borrowed into Section 3(8) (*pari materia* to the present Section 3(12)) of the Tariff Act.

IGST is not chargeable under the Customs Act

J.2. Section 12 of the Customs Act is the charging section for levy of basic customs duty on goods imported into India. Relevant portion of Section 12 of the Customs Act is extracted below for ready reference:

> *"SECTION 12 Dutiable goods - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India."*
>
> *(Emphasis Supplied)*

J.3. Relevant portion of Section 2 of Tariff Act is extracted below for ready reference:

> *"Duties specified in the Schedules to be levied. – The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules."*

J.4. The expression "at such rates as may be specified in the Customs Tariff Act, 1975..., or any other law for the time being in force.." employed in Section 12 of the Customs Act refers to Section 2 of Tariff Act.

J.5. CVD is levied under Section 3 of the Tariff Act and not under Section 12 of the Customs Act. This position has been accepted by the Constitution Bench of the Hon'ble Supreme Court in the case of *Hyderabad Industries Ltd. vs. Union of India, 1999 (108) E.L.T. 321 (S.C.)*.

J.6. It is further submitted that CVD is levied under Section 3(1) of the Tariff Act whereas the provisions for levy of interest are prescribed under the Customs Act. Therefore, interest cannot be levied for non-payment of CVD unless such provisions are categorically borrowed into Section 3 of the Tariff Act. In this regard, Section 3(8) (*pari materia* to the present Section 3(12)) of the Tariff Act, reads as under:

> *"(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."*

J.7. From a plain reading of the above provision, it is evident that all the provisions of Customs Act have not been made applicable to the levy of CVD. By virtue of Section 3(8) (*pari materia* to the present Section 3(12)) of the Tariff Act only the provisions relating to levy of duty under the Customs Act including the provisions relating to drawback, refunds and exemption from duties, have been borrowed for the purpose of CVD chargeable under Section 3(1) of the Tariff Act.

J.8. Further, IGST is chargeable under Section 5 of the Integrated Goods and Service Tax Act, 2017 (*hereinafter referred to as 'IGST Act'*). Section 5 is the charging section and the manner of collection of IGST is prescribed under Section 3(7) of the Tariff Act.

To that extent, IGST is also not covered under the ambit of duties of customs to be subject to levy of interest and penalty provisions. In this regard, major reliance is placed on the judgement of Hon'ble CESTAT Delhi in the matter of *Spice Jet Limited v. Commissioner of Customs (General), New Delhi, 2021 (1) TMI 663- CESTAT NEW DELHI* wherein the Hon'ble Tribunal addressed the issue of whether the IGST exemption was available in accordance with Sl. No. 2 in the General Exemption Notification No. 45/2017 dated 30.06.2017 on re-import of aircrafts and parts thereof into India after repairs. The court while addressing the issue held as under –

> *"29. It is, therefore, clear that though integrated tax is levied under section 5 of the Integrated Tax Act, but it is collected in accordance with the provisions of section 3 of the Tariff Act on the value as determined under the Tariff Act and at the point when duties of customs are levied under section 12 of the Customs Act. Thus, integrated tax is levied under section 5(1) of the Integrated Tax Act and only the procedure for collection has been provided under section 3 of the Tariff Act.*
>
> *30. It also needs to be noted that the term "integrated tax" has not been defined either under the Customs Act or the Customs Tariff Act or under the Exemption Notification. As integrated tax is not levied under section 12 of the Customs Act, it cannot be called "duty of customs". The charging section for integrated tax, in terms of which it is levied, is section 5 of the Integrated Tax Act and not section 3(7) of the Tariff Act. Section 3 (7) of the Tariff Act only provides for the manner of collection of the said integrated tax to be done by the Customs Authorities in case of import of goods. This is what was observed by the Madras High Court in Vedanta limited vs. Union of India."*
>
> *(Emphasis supplied)*

J.9. In view of the above, it is evident that IGST is not covered under Section 12 of the Customs Act as duties of customs. Where it is neither levied under the Customs Act, nor under the tariff act, but under the IGST Act, to that extent, IGST, penalty and interest provisions under the Customs Act cannot be borrowed for levy under the IGST Act.

J.10. It is submitted that IGST is levied under Section 5 of the IGST Act 2017 read with Section 3(7) of the Tariff Act. The Tariff Act has limited provisions, and it borrows various provisions from the Customs Act for the implementation of its provisions.

J.11. Section 3(12) of the Tariff Act, which is the borrowing provision with regard to IGST, does not borrow provisions of demand, penalty and interest from the Customs Act. Therefore, it is submitted that penalty cannot be imposed, and IGST / interest cannot be recovered for non-payment of IGST.

J.12. Section 3(12) of the Tariff Act is extracted below for ease of reference:

> *"(12) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."*

J.13. The Hon'ble Supreme Court *in India Carbon Ltd. vs. State of Assam, (1997) 6 SCC 479*, relied upon the earlier five-judge bench decision in the case of *J.K. Synthetics*

Ltd. Ltd. vs. CTO, (1994) 4 SCC 276 and held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. This position of law was approved and reiterated by the constitution bench in the case of *V.V.S. Sugars vs. Govt. of A.P. & Ors., (1999) 4 SCC 192.*

J.14. A similar question relating to the liability of the plant, machinery etc. to confiscation and liability of the assessee to penalty under Rule 9(2) and Rule 173Q of the Central Excise Rules, 1944, for non-payment of the additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, by taking recourse to the provisions of the Central Excise Rules, 1944, came up for consideration before the Hon'ble High Court of Delhi in the case of *Pioneer Silk Mills Pvt. Ltd. vs. UOI, 1995 (80) ELT 507 (Del.).* The Revenue sought to invoke the provisions of the Central Excise Rules, 1944, relying on the provisions of Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, which read as under:

> *"(3) The provisions of the Central Excises and Salt Act, 1944, and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."*

J.15. The provisions of Section 3(3) above, are somewhat similarly worded as the provisions of Section 3(12) of the Tariff Act. The claim of the petitioners in that case was that under Section 3 of the Additional Duties Act, only those provisions of the Central Excises Act and Rules made thereunder, which pertain to the levy and collection of the duties of excise under the Central Excise Act have been borrowed and therefore, no penalty can be imposed.

J.16. Relying *inter alia*, on the order in *In re: Khemka & Co. (Agencies) Pvt. Ltd., 1995 (76) ELT 235 (GOI)*, the Hon'ble High Court of Delhi upheld the contention that there was no provision in the Additional Duties Act which created a charge in the nature of a penalty and that the term "levy and collection" in Section 3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty", otherwise these words were rather unnecessary.

J.17. The Hon'ble High Court also rejected the contention of the Revenue that since Chapter II of the Central Excises Act deals with levy and collection of duty, and this Chapter also contains provisions for offences and penalties, all sections under that Chapter would be applicable. This judgment of the Hon'ble High Court of Delhi was approved by the Hon'ble Supreme Court in *2002 (145) ELT A74 (SC).*

J.18. Reliance is also placed on the case of *Bajaj Health & Nutrition Pvt. Ltd. vs. CC, Chennai, 2004 (166) ELT 189,* wherein the Hon'ble Tribunal, set aside the interest and penalty on evasion of anti-dumping duties on the reasoning that the provisions of Customs Act relating to non-levy, short-levy, and refunds were borrowed only for the purpose of chargeability to anti-dumping duty under Sec. 9A(8) of the Tariff Act and the provisions of the Customs Act relating to confiscation, interest and penalty were not borrowed.

J.19. Even in the case of *Tonira Pharma Ltd. vs. Commissioner, 2009 (237) E.L.T. 65 (Tribunal)* the Hon'ble Tribunal held as under:

> *"16. In the light of the above, we set aside the imposition of penalty for evasion of anti-dumping duty, CVD and SAD. The same reasoning applies to levy of interest - although the applicants did not contest Commissioner's direction for recovery of interest - the error in upholding the levy of interest is required to be rectified, as it is contrary to the provisions of the statute and finding rendered contrary to statutory provisions amounts to an error*

apparent from the record, in the light of the decision of the Tribunal in Super Pack v. CCE, Raipur [2004 (175) E.L.T. 712], relying upon the Apex Court judgement in M.K. Venkatachalam, Income Tax Officer & another v. Bombay Dyeing & Mfg. Co. Ltd. [1958 (34) ITR 143 (S.C)] and Karamchand Premchand P. Ltd. v. Commissioner of Income Tax [(1993 (200) ITR 268 (SC)] and the Larger Bench of the Tribunal in Hindustan Lever Ltd v. CCE, Mumbai [2006 (202) E.L.T. 177 (T)] and in MRF Ltd. v. CCE, Goa [2007 - TIOL-1254 and we accordingly set aside the levy of interest. We also set aside the interest levied and penalty imposed for non-payment of surcharge of customs leviable under Sec. 90 of the Finance Act, 2000 since Section 90(4) did not borrow the provisions of the Customs Act, 1962 relating to the charging of interest or imposition of penalty."

J.20. On a similar issue, the Hon'ble Tribunal in *Siddeshwar Textile Mills Pvt. Ltd. vs. Commissioner, 2009 (248) E.L.T. 290 (Tri.)* has followed the case of *Tonira Pharma (supra).*

J.21. It is therefore submitted that when there is no charge/mechanism for recovery of differential IGST, interest and imposition of penalty, the same cannot be imposed/recovered from the Noticee in the absence of machinery provisions for assessment and collection of interest. Thus, the demand for differential IGST is without any provision and the interest under Section 28AA and penalties on IGST demand are not imposable upon the Noticee and are bad in law.

J.22. Further, recently in the case of *Mahindra & Mahindra Ltd. (Automotive Sector) v. Union of India and Ors., 2022 SCC OnLine Bom 3155*, the above position has been reiterated. The Hon'ble Bombay High Court has relied upon the above cases to hold that interest can be levied and charged on delayed payment of tax only if statute that *levies* and charges tax makes a substantive provision in this behalf. In the absence of specific provisions for levying of interest or penalty due to delayed payment of tax unless the statute makes a substantive provision in this behalf, the same cannot be levied/charged.

K. <u>THE SUBJECT GOODS ARE LIABLE FOR CONFISCATION UNDER SECTION 111(M) OF THE CUSTOMS ACT, 1962.</u>

K.1. Section 111 of the Customs Act, 1962 provides for confiscation of improperly imported goods in cases of misdeclaration. The Department has proposed confiscation of the subject goods under Section 111(m) of the Customs Act, 1962.

K.2. It is most humbly submitted that Section 111 (m) is not invokable in the present case. The extract of Section 111 (m) of the Act is provided below for quick reference:

Section 111: Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation:

...

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

K.3. Section 111(m) of the Act provides for confiscation of any goods, which do not correspond in respect of value or in any other particular with the entry made under the Act. There is no deliberate mis-declaration of value and particulars as alleged.

K.4. The Noticee submits it has not mis-declared any material particulars in the Bills of Entry and therefore, the above provision is not invokable in the present case.

K.5. The term misdeclaration under the Section 111(m) of the Customs Act would primarily include the following situations:

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

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

K.6. On the basis of the aforementioned, it can be said that Section 111(m) of the Customs Act provides for confiscation of any goods, which do not correspond in respect of value or in any other particular with the entry made under the Customs Act. In terms of the provisions of Section 2(16) of the Customs Act, "entry" in relation to goods means an 'entry' made in a bill of entry. It is submitted that there was no mis-declaration either in respect of value or in any other particular with the entry made under the Customs Act. The Noticee had declared the correct value of the impugned goods. The same has not been disputed in the SCN. The Noticee has also declared appropriate description of the impugned goods. Therefore, there was no mis-declaration either in respect of value or in any other particular with the entry made under the Customs Act.

K.7. With respect to the second leg i.e., 'any other particulars', it is submitted that the Noticee had disclosed correct particulars in the BOE filed by it and other import documents for clearance of impugned goods.

K.8. The description of the impugned goods in the BOE matches the actual description of the impugned goods. Moreover, the model number and other facts such as parts of E-bike etc. are mentioned in all the import documents that were available and submitted at the time of import.

K.9. Infact in the case of *Northern Plastic Ltd. vs. Collector, 1998 (101) ELT 549 (SC)*, the Hon'ble Supreme Court, while discussing proposal of confiscation under section 111(m) of the Customs Act, observed that '*the declaration was in the nature of a claim made on the basis of the belief entertained by the Noticee and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the Noticee had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.*' Moreover, the reasoning given by the Collector of Customs and CEGAT in para 17 of the judgement to hold that the classification of the goods was mis-declared was that they were Photographic Film in Rolls and not Cinematographic Films in Rolls. Whereas in the present case, there is no allegation that the impugned goods are not parts of e-bike. The contention of the department is that even though they were parts of e-bike, they were imported in equal quantities, therefore, Rule 2(a) is applicable. Therefore, in the present case, the Noticee had given full and correct particulars/ description as mentioned above in detail. Thus, it does not amount to mis-declaration. The demand in the SCN, therefore, is liable to be dropped.

K.10. In the case of *Kirti Sales Corpn. vs. Commissioner* reported at *2008 (232) ELT 151 (Tri.-Del.*, it was held by the Hon'ble Tribunal that to attract the provisions of Section 111(m) the mis-declaration should be 'intentional'. The Hon'ble Tribunal in this case held as under:

> *"6. We are inclined to accept the case of the Revenue that the goods imported were texturized fabric. However, whether the declaration in the Bill of Entry amounts to 'misdeclaration' so as to attract the*

provisions of Section 111(m) of the Customs Act in a given case depend upon the facts of the case. To constitute 'misdeclaration', the declaration must be intentional. Misdeclaration cannot be understood as same as wrong declaration, of course, made bona fide, the possibility of which cannot be ruled out altogether. The question, therefore, is whether the Noticee had intentionally and deliberately mis-declared the goods as non-texturized fabric rather than texturized fabric. On this point, we are inclined to accept the case of the Noticee that the declaration had been made on the basis of documents supplied by the foreign supplier and there was no intentional or deliberate wrong declaration or misdeclaration on its part so as to attract the mischief of Section 111(m) of the Customs Act. The facts of the case in the instant case..."

(Emphasis supplied)

K.11. The Noticee places its reliance on *P Ripakumar and Company vs. Union of India* reported at *1991 (54) ELT 67*, wherein demand of confiscation and redemption fine in lieu thereof was set aside on the ground that the importer had acted *bona fide*.

Interpretation of provision of statute/ adopting a particular classification does not amount to mis-declaration.

K.12. Without prejudice, the Noticee submits that even if it is finally decided in future that the Noticee's understanding and interpretation of the classification was wrong and that the impugned goods imported by the Noticee were not classifiable under respective classification, still the impugned goods cannot be held liable for confiscation on account of mis-classification, as it is a pure question of interpretation of Rule 2(a) of GI Rules.

K.13. Even if there is any error in classification or exemption claimed on Bill of Entry then the same cannot be equated with misdeclaration, that too with the intention to evade payment of duty. The Hon'ble Tribunal *at Para 4.4* in the case of *Sirthai Superware India vs. Commissioner of Customs, 2020 (371) ELT 324 (Tri.-Mum.)* has set aside confiscation and penalty. The Hon'ble Tribunal followed the principle laid down by the Hon'ble Supreme Court in *Northern Plastic Ltd. vs. Collector, 1998 (101) ELT 549* (SC) even for self-assessed BOEs.

K.14. Further, the Hon'ble CESTAT in *Leuwk Altair Shipping vs. Commissioner of Customs, 2019 (1) TMI 1290 – CESTAT Hyderabad* has held that the CTH indicated by the importer in the Bill of Entry is only a self-assessment by the importer as per his understanding which is subject to re-assessment by the officers if necessary and that the claim to an alleged wrong tariff or ineligible exemption does not amount to misdeclaration, *when the goods have been correctly described in the Bill of Entry*. The said decision has been *upheld in the Hon'ble Supreme Court as reported in 2019 (7) TMI 516*. In the present case, the Assessing officer had all the rights and powers to appreciate at the time of import that the impugned goods can be used on road and rail both (even though it is an incorrect understanding) from the description itself i.e. Rail cum Road vehicle. Therefore, applying the ratio of *Leuwk Altair (supra)*, the confirmation on the proposal of confiscation is liable to be set aside.

K.15. It is a well settled position in law, that interpretation of a provision, *per se*, or claim to any particular classification does not amount to mis-declaration. Reliance is placed on the decision of the Hon'ble Supreme Court in *Northern Plastic Ltd. vs. CCE* reported at *1998 (101) ELT 549 (SC)*, *Baboo Ram Harichand vs. Union of India*, reported at *2011 (270) E.L.T. 356 (Gu.)*.

K.16. Therefore, it is submitted that Section 111(m) of the Customs Act cannot be invoked in the present case and proposal to confiscate the impugned goods should be set aside.

L. PENALTY IS NOT IMPOSABLE ON THE NOTICEE UNDER SECTION 112 AND/OR 114A OF THE CUSTOMS ACT, 1962.

L.1. In the foregoing paragraphs, it has been submitted in detail that no duty is payable. For the same reasons, no penalty proposal is legally sustainable. In the case of *Collector of Central Excise v. H.M.M. Limited [1995 (76) ELT 497 (SC)]*, Hon'ble Supreme Court held that the question of penalty would arise only if the department is able to sustain the demand. Similarly, in the case of *Commissioner of Central Excise, Aurangabad v. Balakrishna Industries [2006 (201) ELT 325 (SC)]*, Hon'ble Supreme Court held that penalty is not imposable when differential duty is not payable.

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

L.2. The Noticee humbly submits that the proposal of penalty under Section 112(a) of the Customs Act, 1962 is incorrect and bad in law on account of the following reasons. For ready reference, the relevant portion of Section 112 is reproduced below:

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

- *The Noticee has not acted / omitted to act in a way which would render the impugned goods liable to confiscation.*

L.3. It is submitted that penalty under Section 112 of the Customs Act is linked to confiscation under Section 111 of the Customs Act, i.e., where the goods are liable to confiscation under Section 111, only then penalty can be imposed under Section 112 of the Customs Act. As has been appropriately demonstrated in the submissions above, there arises no case for confiscation of the goods under Section 111(m) of the Customs Act. Hence, there arises no case for invoking Section 112 to impose penalty on the Noticee.

- *Penalty cannot be imposed on the ground that the Noticee abetted in the wrongful act.*

L.4. The second limb of Section 112(a) of the Customs Act covers abetment of commission/omission of any act which would render the goods liable to confiscation under Section 111 of the Customs Act. In the instant case, the Noticee did not abet the commission or omission of any act which rendered the impugned goods liable to confiscation. The SCN without providing a proper justification for imposition of penalties has proposed penalties

L.5. As the words 'abet' or 'abetment' are not defined in the Customs Act, 1962, it is pertinent to refer to the General Clauses Act, 1897. Section 3(1) of the General Clauses Act, 1897 defines "Abet" as under:

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

L.6. Relevant portion of Section 107 of the Indian Penal Code defines 'abetment' as under:

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

L.7. Furthermore, in the case of *Tata Oil Mills Company Ltd. and Another vs. Union of India and Another, 1986 (26) E.L.T. 931 (Bom.)*, the Hon'ble High Court the applied the definition of 'abetment' as appearing in the Indian Penal Code, 1860 while deciding whether the petitioners could be said to have abetted the unauthorized import of tallow wherein the petitioners merely acted as *bona fide* purchasers. The relevant extract of the judgment is as under:

> *"4. ... The petitioners have established beyond doubt that the charge of abetment referred to in the show cause notice by respondent no. 2 is wholly unsustainable and, therefore, respondent no. 2 had no jurisdiction to issue show cause notices. The expression "abetment" has been defined under the General Clauses Act as one known in the Indian Penal Code and under the Indian Penal Code, the person is said to abet when such person instigates or participates in commission of the offence. In my judgment, it is a far cry to suggest that the petitioners have abetted contravention of the licence by purchasing the tallow after it was cleared by the customs department. In my judgment, show cause notices were issued without any authority and deserve to be quashed."*
>
> *(Emphasis Supplied)*

L.8. Thus, the definition of 'abetment' as defined under Section 107 of the IPC is relevant even for the purpose of the Customs Act.

L.9. Moreover, the Courts have in various cases enlisted the basic ingredients which must be present for an act to constitute 'abetment'. The main ingredients are as under:

i) There must be a *mala fide* intention on the part of the accused to provoke, incite or encourage the doing of an offence.
ii) There must be a positive act on part of the accused.
iii) A person should facilitate the commission of that act.
iv) Mere Negligence is not sufficient to constitute abetment.
v) Mere lack of care and diligence is not sufficient to constitute abetment.
vi) The accused must be proved to have derived a pecuniary benefit from the act.

L.10. The judicial precedents have also held the presence of *mens rea* as an essential prerequisite for establishing abetment and for imposition of penalty under Section 112(a). In this regard Hon'ble Tribunal in the case of *Harbhajan Kaur vs. Collector of Customs, 1991 (56) ELT 273 Tri Del*, held that:

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

L.11. Reliance is also placed on the case of *V. Lakshmipathy vs. Commissioner of Customs, 2003 (153) ELT 640 Tri Bang*, wherein it was held:

"2. (c)The imposition of a penalty under Section 112(a) of the Customs Act presupposes an existence of an element of mens rea. There is no evidence to indicate any such guilty mind on the part of the Noticee herein. There is no evidence that the Noticee herein had dealt with any manner with the goods found to be liable to confiscation. The provisions of Section 112 would apply only to persons who engage themselves in the physical act of importation of the goods..."

(Emphasis supplied)

L.12. Reliance is also placed on the judgment of *Owens Corning Enterprises (I) P. Ltd. vs. C.C. (Export), Nhava Sheva reported in 2011 (270) E.L.T. 547 (Tri. - Mumbai)* for the aforesaid proposition.

L.13. As per the aforesaid judgments, an act/omission which aids in the commission of an offence cannot be straightaway categorized as abetment, but the same has to be supported by knowledge of offence as well as *mens rea* for proving abetment. It has already been explained in detail in the preceding paragraphs that there is no mens-rea in the present case.

L.14. Hence, penalty under Section 112(a) is not imposable.

No penalty can be imposed under Section 112 (b) of the Customs Act.

L.15. The SCN seeks to impose penalty under Section 112 (b) of the Customs Act. For ready reference, the relevant portion of Section 112 (b) of the Customs Act is reproduced below:

"SECTION 112 - Penalty for improper importation of goods, etc. –

(a) .....

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable,

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

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five

thousand rupees, whichever is the highest."

L.16. The Noticee submits that no penalty is imposable under the provision of Section 112(b). As per the provisions of Section 112(b) of the Customs Act, penalty can be imposed on a person who knowingly acquires possession or deals with goods which are liable for confiscation. Thus, for imposition of penalty under this provision, it is necessary that the Assessee must have reason to believe that the goods in his possession or dealership are liable to confiscation.

L.17. In the present case, the Noticee had *bona fide* belief that the impugned goods were appropriately classifiable under respective headings or as parts of E-Bikes in as presented condition. Thus, it cannot be said that the Noticee had reason to believe that the impugned goods were liable for confiscation. For this reason, it is submitted that no penalty can be imposed under Section 112(b) of the Customs Act.

No penalty can be imposed under Section 112 of the Customs Act in the absence of mala fide.

L.18. In addition to the above, the Noticee submits that no penalty, even under Section 112 of the Customs Act, can be imposed when there has been no element of mala fide involved.

L.19. In this regard, reliance is placed on the case of *Nazir-ul-Rehman vs. Commissioner of Customs, Mumbai, 2004(174) E.L.T.493(Tri.-Mum)* wherein the Hon'ble Tribunal held as follows:

> *"13 In regard to penalty imposed on the Appellant, we observe that no evidence has been brought out by the dept. to establish that the two Appellant-committed any one of the acts enumerated u/s 112(b) of the customs act knowingly. Mensrea is a necessary ingredient for imposing a penalty. While the goods are liable to confiscation no penalties can be imposed on the Appellant u/s 112(b) as no evidence was adduced by the dept. to show that the Appellant were knowingly transporting smuggled goods.*
>
> *14. Having regard to the circumstances as discussed above the following order is passed.*
>
> *(a) Confiscation of the goods is upheld.*
>
> *(b) Penalties on the Appellant are set aside.*
>
> *15. The appeals are thus partly allowed."*

L.20. Considering that the present case is purely interpretational, any proposal to impose a penalty under Section 112 of the Customs Act would not be sustainable.

Section 112 and 114A are mutually exclusive. Hence, simultaneous penalty under Section 112 and 114A is legally not sustainable

L.21. The SCN proposed to invoke penalty under Sections 112 or 114A of the Customs Act without mentioning any specific section between section 112 and 114A. On this count also, the SCN is vague because the Noticee was unclear in its mind as to which provision can be invokable between section 112 and 114A of the Customs Act.

L.22. Without prejudice, it is submitted that in light of the fifth *proviso* to Section 114A, no penalty can be levied under Section 112 where a penalty has already been imposed under Section 114A. Both the provisions are mutually exclusive to each other. Hence, the penalty under Section 112 is not legally sustainable. The Noticee must identify one provision to impose a penalty as both of the provisions are mutually exclusive. Hence, the proposal of penalty is liable to be set aside on this ground.

Penalty not imposable under Section 114A of the Customs Act, 1962.

L.23. The impugned order seeks to impose a penalty on the Noticee under section 114A of the Customs Act, 1962. Section 114A of the Customs Act has been reproduced below for the convenience of ready reference:

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

L.24. From perusal of the aforesaid provision, it is clear that penalty under section 114A of the Customs Act can be imposed in cases when the duty has not been paid or short-paid/part-paid by the reason of *collusion or any wilful mis-statement or suppression of facts.*

L.25. In the case of *CC v. Videomax Electronics*, reported at *2011 (264) ELT 0466 (Tri.-Bom.)* it was held that the legal requirements to invoke Section 114A penalty is the same as extended period of limitation under Section 28 of the Customs Act, 1962. In essence, if the extended period of limitation under Section 28 is not invokable, penalty under Section 114A of the Customs Act cannot be imposed.

L.26. As has been demonstrated by the Noticee in their submissions made above, the extended period of limitation cannot be invoked in the present case in the absence of any wilful misstatement or suppression of facts and especially the present case being a case of classification dispute, as has been stated by the Hon'ble Supreme Court time and again. The Noticee places reliance on the same. Hence, by virtue of the same token, penalty under Section 114A is also not imposable.

L.27. In view of the above, wherein the classification of Noticee has merely been rejected by interpreting various rules of classification, it cannot be said that misclassification, if any by the Noticee amounts to mis-declaration and therefore, the penalty can be imposed on the Noticee. In view of the above, penalty imposed on the Noticee needs to be set aside.

M. PENALTY CANNOT BE IMPOSED IN CASES OF DISPUTES RELATING TO CLASSIFICATION .

M.1. The Noticee further submits that there are a number of judgments wherein Hon'ble Tribunal has held that if there is difference of opinion about classification between the importer and Department, penalty should not be imposable. The Noticee places reliance upon the case of *Bahar Agrochem & Feeds Pvt. Ltd vs. Commissioner of C.Ex., Pune, 2012 (277) E.L.T. 382 (Tri-Mum)*, wherein it was held that:

> *"9. As regards the imposition of penalty equal to the duty demanded, once there is no suppression, there cannot be any imposition of penalty under Section 11AC of the Central Excise Act. Further, the issue relates to classification of the product where different views are possible and it is an accepted legal position that imposition of penalty is not warranted in disputes relating to classification."*

(Emphasis Supplied)

M.2. Further in the case of *Digital Systems vs. Commissioner of Customs, 2003 (154) ELT 71*, the Hon'ble Tribunal has held that:

> *"8. As regards imposition of penalty is concerned, no mens rea has been established in this case and the Noticees were under the bona fide belief that the goods fall under CTH 901090 and are importable without a*

licence. They have also relied upon the decision of the Tribunal in the case of CC, New Delhi v. Time Tech Enterprises Pvt. Ltd. where it was held that confiscation of goods as a result of difference about classification between importer and the department - penalty was not imposable. We are of the considered opinion that this decision is applicable to the facts of the present case and in that view of the matter, we set aside the penalty on the Noticees. In the result, except for the reduction in the quantum of redemption fine and setting aside the penalty, the appeal is otherwise rejected."

(Emphasis Supplied)

M.3. Further in the case of *Goodyear (India) vs. CCE, 2003 (157) ELT 560*, it was held by the Hon'ble Tribunal that:

"As the issue involved is one of interpreting the Tariff Heading under which the impugned product will be classifiable, this is not a fit case for warranting imposition of any penalty on the Noticees. We, therefore, set aside the penalty imposed on them. The Appeal is disposed of in the above terms."

(Emphasis Supplied)

M.4. Further in the case of *Anand Metal Industries vs. CCE, 2005 (187) ELT 119*, it was held by the Hon'ble Tribunal that:

"5. In respect of the penalties imposed on the firm as well as on the partner, as the dispute in question in respect of classification which is purely a legal issue, therefore, the penalties imposed on the firm as well as on the partner are set aside. The appeal filed by M/s. Anand Metal Industries is disposed of as indicated above."

M.5. Thus, it is respectfully submitted by the Noticee that the present case also involves interpreting the tariff entries and GI Rules, therefore, no penalty is imposable upon the Noticee.

N. <u>PENALTY IS NOT IMPOSABLE UNDER SECTION 114AA OF THE CUSTOMS ACT, 1962.</u>

N.1. The SCN seeks to impose penalty on the Noticee under Section 114AA of the Customs Act, 1962. It is submitted that penalty under section 114AA is imposable only in those situations where exports benefits are claimed without exporting the goods and by presenting forged documents. In support of this argument reliance is placed on the Twenty Seventh Report of the Standing Committee of Finance wherein insertion of section 114AA was discussed at paragraph 62. For the ease of perusal, the entire discussion is reproduced below:-

Clause 24 (Insertion of new section 114AA)

62. Clause 24 of the Bill reads as follows:

After section 114A of the Customs Act, the following section shall be inserted, namely:—

"114AA. Penalty for use of false and incorrect material.—if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

63. The information furnished by the Ministry states as follows on the proposed provision:

"Section 114 provides for penalty for improper exportation of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to 5 times the value of goods. A new section 114 AA is proposed to be inserted after section 114A."

64. It was inter-alia expressed before the Committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a 'false statement' etc. Questioned on these concerns, the Ministry in their reply stated as under:

"The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because person summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under:

"The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."

66. The Committee observe that owing to the increased instances of wilful fraudulent usage of export promotion schemes, the provision for levying of penalty upto five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The Committee, however, advise the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment."

(Emphasis supplied)

N.2. The aforesaid extract from the report of the standing committee explains the purpose for which Section 114AA has been inserted in the Customs Act, 1962. The purpose is to punish those people who avail export benefits without exporting anything. Such cases involve serious criminal intent, and it cannot be equated with the cases of duty evasion.

N.3. The perusal of the aforesaid extract makes it clear that Section 114AA was inserted to penalise in circumstances where export benefits are availed without exporting any goods. According to the legislatures, Section 114 of the Customs Act provided penalty for improper exportation of goods, and it was not covering situations where goods were not exported at all. Such serious manipulators could have escaped penal action even when no goods were actually exported. Therefore, it is submitted that penalty under section 114AA is imposable only in those circumstances where export benefits are availed without exporting any goods.

N.4. In the light of aforesaid discussion, it is submitted that the present case relates to import of various parts of e-bikes and thus there cannot be any question of goods having not been exported by the Noticee. Therefore, the penalty under section 114AA is not applicable in the present case.

N.5. Further, wording of section 114AA suggests that the penalty under this section is imposed only on individuals and not on the company. Such an inference comes out from the use of the expression *'if a person knowingly or intentionally makes, signs or uses'*. Only an individual can make or sign any declaration or statement. A company cannot do such an act on its own. In support of this argument, reliance is placed on the judgement of ITC Ltd. v Commissioner of Central Excise, Bangalore, 1998 (104) E.L.T. 151 (Tribunal). In this case, the Hon'ble Tribunal was dealing with Rule 52A(5)(c) of the Central Excise rules which read as follows: -

> *"If any person -*
>
> *(a) carries or transports excisable goods from a factory without a valid gate pass, or*
>
> *(b) while carrying or removing such goods from the factory does not on request by an officer, forthwith produce a valid gate pass, or*
>
> *(c) enters particulars in the gate pass which are, or which he has reason to believe to be false,*
>
> *he shall be liable to a penalty not exceeding one thousand rupees, and the excisable goods in respect of which the offence is committed shall be liable to confiscation."*

N.6. In the light of aforesaid provision, the question before the Hon'ble Tribunal was whether the term "person" included ITC or not. The Hon'ble Tribunal holding that the penalty was not imposable on ITC observed as follows:-

> *"Thus we find the Board circular and trade notices do not help Revenue to establish that ITC was required to show the correct PP in G.P.I, delivery invoice etc. and had shown false PP in the said document. Hence Rule 52A(5)(c) of the Rules could not have been invoked against ITC. Further, penalty under Rule 52A(5)(c) is on any person who enters false particulars in the gate pass. It appears that the sub-rule (5)(c) seeks to rope in individuals who are responsible for gate passes with false particulars and not the manufacturer as such, unless the manufacturer is an individual and has personally entered such false particulars in the gate pass. For these reasons, we hold that the penalties imposed on ITC under Rule 52A(5)(c) of the Rules are unsustainable."*

N.7. In the light of aforesaid decision, it is submitted that penalty under section 114AA is imposed only on individuals who make or sign such forged documents and not on the company. Therefore, it is submitted that under section 114AA penalty cannot be imposed on the Noticee.

N.8. It is further submitted that the penalty under the Section 114AA can be imposed when the goods have been exported by forging the documents knowingly or intentionally. The present case does not relate to export at all and even for imports, all the documents presented for imports were genuine and not forged and thus penalty is not imposable under section 114AA of the Customs Act.

N.9. The Noticee relies on the following judgments in this regard:

- *Interglobe Aviation Ltd. vs. Pr. Commissioner Of Cus., Bangalore., 2022 (379) E.L.T. 235 (Tri. - Bang.)*

  "20...The appellants also contended that the penalty under the Section 114AA can be imposed when the goods have been exported by forging the documents knowingly or intentionally. The present case does not relate to export at all and even for imports, all the documents presented for imports were genuine and not forged and thus penalty is not imposable under Section 114AA of the Customs Act, 1962. We find that there is merit in the argument of the appellants. As the case is not of export, we find that no penalty under Section 114AA of the Customs Act, 1962 is imposable."

- *Commissioner vs. Lewek Altair Shipping Pvt. Ltd. - 2019 (367) E.L.T. A328 (S.C.)]*

  "It was further held that mentioning of wrong tariff item or claiming benefit of ineligible exemption notification did not amount to mis-description of goods neither did it amount to making false or incorrect statement. Therefore, merely on the basis of such claims, confiscation under Section 111(m) of Customs Act, 1962, penalty under Section 112(a) ibid and penalty under Section 114AA ibid were not liable."

N.10. In view of the foregoing, it is submitted that no penalty under Section 114AA can be imposed on the Noticee.

N.11. If your good self holds classification under CTH 8711, then the Noticee shall be given an opportunity to claim benefit under applicable Notifications during the relevant period.

N.12. The Noticee prayed to drop the proceedings initiated vide the above said SCN.

23. **Shri Shivkumar Amar Singh**, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd, vide letter dated 16.04.2025 submitted their written reply in which they interalia stated that:

A. <u>NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 112 OF THE CUSTOMS ACT, 1962.</u>

A.1. The Impugned SCN proposes to impose penalty on the Noticee under Section 112(a) of the Customs Act, 1962. The relevant portion of the provision is extracted below for ease of reference-

SECTION 112. Penalty for improper importation of goods, etc. - Any person, -

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

A.2. It is respectfully submitted that as per the provisions of Section 112(a) of Customs Act, 1962 penalty is imposable on any person, who in relation to any goods, does or omits to do any act which act or omission would render such goods liable for confiscation under Section 111 of the Act, or abets the doing or omission of an act. Therefore, the penalty under this sub-section is linked to the liability of the goods to confiscation.

The Noticee has not acted / omitted to act in a way which would render the impugned goods liable to confiscation.

A.3. It is submitted that the subject goods are not liable for confiscation under Section 111(m) of the Customs Act, 1962. The relevant portion of Section 111(m) is extracted below for ease of reference-

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

A.4. Section 111(m) of the Act provides for confiscation of any goods, which do not correspond in respect of value or in any other particular with the entry made under the Act. There is no deliberate mis-declaration of value and particulars as alleged. In terms of the provisions of Section 2(16) of the Customs Act, "*entry*" in relation to goods means an entry made in a bill of entry.

A.5. It is submitted there was no mis-declaration either in respect of value, description, classification or in any other particular with the entry made under the Customs Act. It is therefore, respectfully submitted that the proposal for confiscation of the impugned goods under Section 111(m) of the Customs Act is not sustainable in law.

A.6. Without prejudice, it is submitted that it is settled law that misclassification does not tantamount misdeclaration. Thus, even if it is assumed that the subject goods were wrongly classified, the same cannot be considered as misdeclaration to attract the provisions of Section 111(m) of the Customs Act, 1962.

A.7. In this regard, reliance is placed on the case of *Northern Plastic Ltd. vs. Collector, 1998 (101) ELT 549 (SC)*, wherein the Hon'ble Supreme Court, while discussing proposal of confiscation under section 111(m) of the Customs Act, observed that '*the declaration was in the nature of a claim made on the basis of the belief entertained by the Noticee and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the Noticee had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.*'

A.8. It is submitted that penalty under Section 112 of the Customs Act is linked to confiscation under Section 111 of the Customs Act. It has been demonstrated above that the subject goods are not liable for confiscation; therefore, no penalty can be imposed on the Noticee under Section 112(a) of the Customs Act, 1962.

A.9. Further, the Noticee places reliance on the case of *P. Ripakumar and Company v. Union of India, 1991 (54) ELT 67*, wherein demand of confiscation and redemption fine was set aside on the ground that the importer had acted in good faith i.e., *bona fide*. Thus, it was submitted that goods are not liable for confiscation.

A.10. It is submitted that the Noticee has always acted in a bona fide manner in his capacity of a Manager of the Auto Division Department of the Principal Noticee. Moreover, no allegation has been made in the SCN to discredit the bona fides of the Noticee. The Ld, Principal Commissioner has merely assumed the involvement of the Noticee because the Noticee is responsible for importation of the goods. However, the Ld. Principal Commissioner has not relied on any cogent evidence to prove the active involvement of the Noticee.

A.11. Further, the reliance in this regard is placed on the case of *Hindalco Industries Ltd. and Ors. vs. C.C., Ahmedabad, 2024 (2) TMI 25, Mudrika Ceramics Ltd. vs. Commissioner of Customs, Ahmedabad, Final Order No.10235-10245/202 4, Santosh Timber and Ors. vs. C.C., Kandla, Final Order No. A/ 10385-10386 /2024 and C.C., Kandla vs. Shree Ganesh Timber Store, Final Order No. A/ 10389-10391/2024*, wherein the penalty on individuals were set aside on the ground of goods not being liable for confiscation.

A.12. In the light of the above provisions, the demand for imposition of penalty on the Noticee under Section 112(a) is legally not correct and liable to be set aside.

A.13. Further, the Impugned SCN seeks to impose penalty under Section 112 (b) of the Customs Act. For ready reference, the relevant portion of Section 112 (b) of the Customs Act is reproduced below:

> *"SECTION 112 - Penalty for improper importation of goods, etc. –*
>
> *(a) .....*
>
> *(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
>
> *shall be liable,*
>
> *(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;*
>
> *(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest."*

A.14. The Noticee submits that no penalty is imposable under the provision of Section 112(b) of the Customs Act, 1962. As per the provisions of Section 112(b) of the Customs Act, penalty can be imposed on a person who knowingly acquires possession or deals with goods which are liable for confiscation. Thus, for imposition of penalty under this provision, it is necessary that the assessee must have reason to believe that the goods in his possession or dealership are liable to confiscation.

A.15. In the present case, the Noticee had *bona fide* belief that the impugned goods were appropriately classifiable under respective headings or as parts of E-Bikes in as presented condition. Thus, it cannot be said that the Noticee had reason to believe that the impugned goods were liable for confiscation. For this reason, it is submitted that no penalty can be imposed under Section 112(b)of the Customs Act.

B. NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 114AA OF THE CUSTOMS ACT, 1962.

B.1. The relevant portion of Section 114AA is extracted below for ease of reference-

SECTION 114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

Penalty under Section 114AA not imposable in case of import of goods.

B.2. The Noticee submits that penalty under section 114AA is imposable only in those situations where export benefits are claimed without exporting the goods and by presenting forged documents. In support of this argument reliance is placed on the Twenty Seventh Report of the Standing Committee of Finance wherein insertion of section 114AA was discussed at paragraph 62. For the ease of perusal, the entire discussion is reproduced below: -

"Clause 24 (Insertion of new section 114AA)

62. Clause 24 of the Bill reads as follows:

After section 114A of the Customs Act, the following section shall be inserted, namely:—

"114AA. Penalty for use of false and incorrect material.—if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

63. The information furnished by the Ministry states as follows on the proposed provision:

"Section 114 provides for penalty for improper exportation of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to 5 times the value of goods. A new section 114 AA is proposed to be inserted after section 114A."

64. It was inter-alia expressed before the Committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a 'false statement' etc. Questioned on these concerns, the Ministry in their reply stated as under:

"The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because person summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that

which is not corraborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under:

"The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."

66. The Committee observe that owing to the increased instances of wilful fraudulent usage of export promotion schemes, the provision for levying of penalty upto five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The Committee, however, advise the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment."

(Emphasis supplied)

B.3. The aforesaid extract from the report of the standing committee explains the purpose for which Section 114AA has been inserted in the Customs Act. The purpose is to punish those people who avail export benefits without exporting anything.

B.4. According to the legislature, Section 114 of the Customs Act provides penalties for improper exportation of goods and did not cover situations where goods were not exported at all. Such serious manipulators could escape penal action even when no goods were actually exported. Therefore, there was a need for a specific provision to provide for such situations. In relation to the same, section 114AA was inserted to penalize persons in circumstances where export benefits are availed without exporting any goods.

B.5. Therefore, it is submitted that penalty under section 114AA is imposable only in those circumstances where export benefits are availed without exporting any goods. Since the present case relates to import of goods, there cannot be any question of the Principal Noticee having claimed export benefits without actual export of goods. Thus, penalty under section 114AA is not applicable to the present case.

B.6. Reliance in this regard is placed on the Hon'ble Tribunal's decision in *CC v. Sri Krishna Sounds and Lightings [2019 (370) E.L.T. 594 (Tri. - Chennai)]*. Relevant portion of the decision is extracted below:

> *"7. On appreciating the evidence as well as the facts presented and after hearing the submissions made by both sides, I am of the view that the Commissioner (Appeals) has rightly set aside the penalty under Section 114AA since the present case involves importation of goods and is not a situation of paper transaction. I do not find any merit in the appeal filed by the department and the same is dismissed. The cross-objection filed by respondent also stands dismissed.*

B.7. The Noticee also submits that it has not been established in the SCN as to how the Noticee has intentionally made, signed or used or has caused to be made, signed or used any declaration which is false or incorrect in any particular.

B.8. In the absence of such specific charges in the SCN that directly implicate the Noticee, the imposition of penalty under section 114AA is unsustainable. The Noticee in this regard places reliance on the Tribunal's decision in *Orion Enterprises v. CC [2019 (21) G.S.T.L. 397 (Tri. - Chennai)].*

B.9. The Hon'ble Tribunal in *Interglobe Aviation Ltd. v. Principal Commissioner of Customs, [2022 (379) E.L.T. 235 (Tri.-Bang)]* has also affirmed the above legal position. The relevant portion of the decision is extracted below:

> *"20. ...*
> *The appellants also contended that the penalty under the Section 114AA can be imposed when the goods have been exported by forging the documents knowingly or intentionally. The present case does not relate to export at all and even for imports, all the documents presented for imports were genuine and not forged and thus the penalty is not imposable under Section 114AA of the Customs Act, 1962. We find that there is merit in the argument of the appellants. As the case is not of export, we find that no penalty under Section 114AA of the Customs Act, 1962 is imposable."*
>
> *(Emphasis Supplied)*

B.10. The above legal position is affirmed in the case of *M/s. V.R. Tools v. Commissioner of Customs, Chennai- 2021-VIL-728-CESTAT-CHE-CU,* wherein while allowing the appeal the Hon'ble Tribunal held that penalty under Section 114AA of the Customs Act, 1962 is attracted only when there is deliberate falsification of the documents in order to get undue benefit. The Section was proposed to be introduced consequent to detection of several cases of fraudulent exports where exports are shown only on paper and no goods crossed Indian Border.

B.11. From the above case laws and submissions, it is clear that there cannot be any proposal for imposition of penalty in the absence of any falsification on the part of the Noticee.

B.12. In view of the aforesaid submissions, it is submitted that the imposition of penalty under Section 114AA on the Noticee is liable to be dropped.

Penalty not imposable on the Noticee when he has merely acted in his official capacity as a manager of the Principal Noticee.

B.13. Without prejudice, it is submitted that the Noticee is the Manager (Purchase) of the Auto Division of the Principal Noticee, and he has only acted in his capacity.

B.14. This position has been upheld in *Sterlite Industries (India) Ltd. vs. CCE reported at 2002 (143) ELT 682 (Tri. - Mumbai)* with following observations:

> *"5. We have considered the circumstances. When we look into the facts of the case, it is clear that if the assessee was interested in violating the provisions of Central Excise Rules, he would not have mentioned the relevant entry in the invoice. The facts would reveal that on the fateful day the incharge of the Central Excise fell sick, therefore these things have happened. In this connection, it will be useful to refer to the judgment of the Tribunal in Z.U. Alavi, CCE - 2000 (117) E.L.T. 69. The Tribunal dealing with the question of liability of the employees under Rule 209A of the Central Excise Rules noted as follows :*
>
> *"Commissioner proceeded against the appellant under Rule 209A, which can apply to a person who dealt with the contraband article, not as*

manufacturer. Appellant had no dealings with the contraband article otherwise than in his official capacity as an employee of BHEL, the manufacturer. So, by no stretch of imagination can the appellant fall within the purview of Rule 209A of the Central Excise Rules. Therefore, the Commissioner was clearly in error in thinking that penalty contemplated by Rule 209A could be imposed on the appellant who was only an employee of the manufacturer, namely BHEL."

6. If we look into the observations of the Tribunal, it will be clear that the proceedings initiated against the employees and the directors are not correct inasmuch as they do not have the knowledge or dealing with the goods which are concerned. As far as the truck owners and drivers are concerned, we hold that it is for stronger reasons that they would not have the knowledge or having reason to know that the goods which they were transported have contravened the provisions of Central Excise Rules."

B.15. Further, the Noticee relies on case of *R.K. Ispat Udyog vs. Commissioner of C. Ex., Raipur 2007 (211) E.L.T. 460 (Tri. - Del.)*, wherein it has been clearly held that manager working under the instructions of the manufacturer is not liable to penalty under Rule 26 of the Excise Rules. Relevant portion of the decision is reproduced below:

"7....However, I find that the appellant no. (2), Shri N.N. Swamy, is the Manager of the appellant no. (1) and working under the instructions of the manufacturer and, therefore, penalty imposed upon him is liable to be set aside. Hence the penalty imposed on the appellant no. (2) is set aside..."

B.16. Reliance is also placed on the order of CESTAT Mumbai in the case of *Pankaj Extrusion Limited v. CC (Export) Order No. A/ 86988 – 86989/2021* dated 13.10.2021 where it was observed that no personal liability on director/employees is imposable if he has merely acted in his official capacity and if no specific case has been made against the director/employees.

B.17. In these circumstances, the Noticee cannot be said to have been in any way personally responsible or liable for being proceeded against under the provisions of section 114AA of the Customs Act.

<u>*Penalty not imposable on the Noticee once penalty is imposed on the Principal Noticee*</u>

B.18. It is humbly submitted that the SCN has been issued to the Principal Noticee in which the Noticee is an employee. It is totally unjust and improper to impose a penalty for the same event on the company as well as on its employees.

B.19. Reliance is placed on the case of *Rajendra F. Doshi vs. CC (Gen.), Mumbai reported at 2007 (82) RLT 429 (CESTAT-Mum.)*, wherein it was held by the Hon'ble Tribunal that once the company has suffered penalty, there is no justification for imposing penalty on the Director/employees. To similar effect are the judgments of Hon'ble Tribunal in the following cases:

(i) Globe Rexine Pvt. Ltd. vs. Commissioner of Central Excise, Chennai, 2006 (203) ELT 632 (Tri.-Chennai)

(ii) Rutvi Steel & Alloys vs. Commissioner of Central Excise, Rajkot 2009 (243) ELT 154 (Tri.-Ahmd.)

B.20. Further, in the case of *Jaykrishna Aluminium Ltd. v. Commissioner of Customs, Chennai 2005 (187) ELT 234 (Tri. – Chennai)*, the submissions made by the Appellant therein were accepted by the Tribunal that when the Company has been penalized

there was no justification for two penalties, both on the Company and the Managing Director.

B.21. In view of the above circumstances, the Noticee cannot be held personally liable under Section 114AA of the Customs Act, 1962.

Penalty not imposable in absence of any pecuniary benefit to the Noticee:

B.22. It is further submitted that there is no evidence of any pecuniary benefit flowing to the Noticee and the same has not been disputed in the SCN.

B.23. In this regard, reliance is placed on the decision of the Hon'ble Appellate Tribunal, in the case of *Commissioner of Customs, Mumbai vs. M. Vasi, 2003 (151) ELT (312) (Tri. - Mumbai)*, wherein it was held that for imposing penalty for abetment, knowledge of the proposed offence and also the benefit to be derived from the abetment has to be demonstrated. The relevant extract is as under:

> *"Abetment presupposes the knowledge of the proposed offence and also presupposes the benefit to be derived from the abetment there from...In the absence of conscious knowledge, penalty on charge of aiding and abetting would not sustain."*

B.24. Therefore, it is very clear that to allege misdeclaration on the part of Noticee, an element of mischief is to be attributed to the Noticee, in the sense that the description does not match with the actual goods, or the quantity vary, and such mischief has been deliberate and designed to avoid payment of customs duty. However, as stated above by adopting different wordings for description (corresponding to the actual product), the Noticee has in fact discharged appropriate customs duty. It is submitted that the SCN has not even referred to any evidence that the Noticee mis declared the goods with mala fide intention to evade customs duty and the bald allegations are based on conjunctures and surmises.

B.25. In light of the submissions made above, it is submitted that no penalty is imposable on the Noticee and the same is liable to be dropped.

C. NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 117 OF THE CUSTOMS ACT, 1962.

C.1. The Impugned SCN proposes to impose penalty on the Noticee under Section 117 of the Customs Act, 1962. The Noticee submits that penalty cannot be imposed under Section 117 of the Customs Act as the same is only a residual provision, i.e., this penal provision will be applicable where any provision of the Customs Act is violated, and which violation is not penalized under any other provision. For ready reference, Section 117 is reproduced herein below:

> *"SECTION 117. Penalties for contravention, etc., not expressly mentioned. - Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding four lakh rupees."*

C.2. It is submitted that the Impugned has already proposed to impose penalty under Section 112 and 114AA of the Customs Act, 1962. Thus, in the present case, Section 117 cannot be invoked at all.

C.3. Reliance in this regard is placed on the judgment pronounced in the case of *Nazir-ur-Rahman vs. CC, Mumbai, 2004 (174) ELT 493 (Tri. Mumbai)*, wherein it has been held that where the provisions of Section 112 have been invoked in the SCN,

provisions of Section 117 cannot be invoked. Relevant extract of the stated judgment has been reproduced as follows:

> *"6. Having considered the contentions, we have carefully gone through the findings of Original Authority, which is available at Page 66 of impugned Order-in-Original, wherein the Original Authority has held that there is no evidence on record justifying penalty under Section 112 and that the Officers have neither connived nor indulged in the fraudulent act and that the charges, made out against them, are not explicit and the only ground made out is that they ought to have examined the containers fully and discovered discrepancies. The Original Authority further held that the penal provisions, under Section 117 of Customs Act, 1962, is residuary in nature and can be invoked only in the situation when no express penalty is provided, elsewhere in the Customs Act. He further held that since the show cause notice proposed imposition of penalty under Section 112 of Customs Act, 1962 against the two officers, the provisions of Section 117 of Customs Act, 1962 were not invocable. We find that above findings by Original Authority are sustainable and, therefore, we reject the appeal filed by the Revenue in respect of prayer to impose penalty on Shri Devesh Pandey, Inspector and Shri S.C. Sahu, Superintendent. In respect of penalty imposed on M/s. Ruby Impex, we find that there is no reason to interfere with the same. In view of above, we dismiss the appeal filed by Revenue."*
>
> *(Emphasis Supplied)*

C.4. In *M. Renganathan v. Commissioner of Customs, Chennai, 2009 (235) E.L.T. 860 (Tri. - Chennai)*, the Hon'ble Tribunal has held that Section 117 is a residual penal provision and that the same can be invoked only if a person has failed to comply with / contravened / abetted contravention of any provision of the Customs Act. For ready reference, the relevant portion of the above judgment is extracted hereinunder:

> *"3. After considering the submissions, I have found a valid point with the learned counsel. The text of Section 117 indicates that it is a residual penal provision under the Customs Act, which can be invoked against a person who has failed to comply with any provision of the Act or has contravened any provision of the Act or has abetted such contravention. No such case was made out against the appelant in the show-cause notice, wherein the only allegation was misdeclaration in bill of entry. Misdeclaration of any kind in bill of entry can attract confiscation of the goods under Section 111 of the Act and, consequently, the offender can attract a penalty under Section 112 of the Act. It would follow that the allegation raised against the CHA in the show-cause notice was, at best, relatable to Section 112 of the Act. Consequently, the residual provisions of Section 117 were not invocable. Moreover, this provision could be invoked only where the person sought to be penalised has failed to comply with any provision of the Act or has contravened any provision of the Act or has abetted any such contravention. There was no allegation to this effect in the show-cause notice."*
>
> *(Emphasis Supplied)*

C.5. It is submitted that in the present case, penalty under Sections 112 and 114AA has already been proposed on the Noticee for misclassification of the impugned goods. Therefore, where one penal provision has been invoked for violation of a given Section

of the Customs Act, Section 117, being a residuary penal provision, cannot be invoked for the same violation.

C.6. Section 117 of the Customs Act covers all contraventions which are not expressly mentioned elsewhere under the Customs Act and includes abetment to such contravention.

C.7. Reliance in this regard is placed on the judgment pronounced in the case of *Hazel Mercantile Ltd. vs. Commissioner of Customs, Kandla* reported at *2013 (297) E.L.T. 70 (Tri. - Ahmd.)*, wherein it was held that penalties under Section 117 are for contravention, not expressly mentioned but, there should be sufficient evidence to show *mala fide* intention resulting in contravention of any provisions warranting penalty.

C.8. As already mentioned in the above grounds that Noticee has neither contravened any of the provisions of the Customs Act nor had any *mala fide* intentions. Therefore, penalty is not imposable under section 117 of the Customs Act.

Once penalty has been imposed under a specific section, it cannot be imposed again under the residuary section.

C.9. The SCN proposes to impose penalty on the Noticee under Section 112, Section 114AA and Section 117 of the Customs Act. The Noticee submits that penalty under Section 117 cannot be imposed if penalty has already been proposed under any other Section of the Customs Act. As mentioned above that section 117 of the Customs Act is a residuary section which can be invoked if any the contravention is not expressly mentioned in any other Section of the Customs Act.

C.10. Reliance in this regard is placed on the judgment of *Paharpur Cooling Towers Pvt. Ltd. vs. Collector Of Customs* reported at *1990 (45) E.L.T. 349 (Tribunal)* wherein the scope of section 117 of the Customs Act was discussed. It was held in that case that *'Section 117 of the Act is in the nature of a residuary provision. It provides for imposition of penalty on a person where no express penalty is provided elsewhere in the Act for contravention of any provision of the Act or abetment of such contravention or failure to comply with any provision of the Act which it was his duty to comply with.'*

C.11. Further in the case of *Vetri Impex vs. Commissioner of Customs, Tuticorin* reported at *2004 (172) E.L.T. 347 (Tri. - Chennai)*, the Tribunal noticed that Section 117 is a residuary penal provision which could be invoked against any person contravening, or failing to comply with, any of the provisions of the Customs Act, where no express penalty is otherwise provided for such contravention or failure.

C.12. In view of the aforementioned judgments, it is submitted that in the present case also, once the department has already made a proposal in the present SCN to impose penalty under sections 112 and 114AA, then it is not open for the department to impose penalty under the residuary section (i.e. Section 117 of the Customs Act) also. The department is incorrect to impose penalty simultaneously under Section 112, 114AA and Section 117 of the Customs Act. On this ground also, the penalty is liable to be dropped.

C.13. Further, the noticee prayed to drop the proceedings against him.

24. **Shri Shailesh Bhandari**, Managing Director in M/s. Electrotherm (India) Ltd., vide letter dated 16.04.2025 submitted their written reply in which they interalia stated that:

A. NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 112 OF THE CUSTOMS ACT, 1962.

A.1. The Impugned SCN proposes to impose penalty on the Noticee under Section 112(a) of the Customs Act, 1962. The relevant portion of the provision is extracted below for ease of reference-

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

A.2. It is respectfully submitted that as per the provisions of Section 112(a) of Customs Act, 1962 penalty is imposable on any person, who in relation to any goods, does or omits to do any act which act or omission would render such goods liable for confiscation under Section 111 of the Act, or abets the doing or omission of an act. Therefore, the penalty under this sub-section is linked to the liability of the goods to confiscation.

The Noticee has not acted / omitted to act in a way which would render the impugned goods liable to confiscation.

A.3. It is submitted that the subject goods are not liable for confiscation under Section 111(m) of the Customs Act, 1962. The relevant portion of Section 111(m) is extracted below for ease of reference-

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

A.4. Section 111(m) of the Act provides for confiscation of any goods, which do not correspond in respect of value or in any other particular with the entry made under the Act. There is no deliberate mis-declaration of value and particulars as alleged. In terms of the provisions of Section 2(16) of the Customs Act, "*entry*" in relation to goods means an entry made in a bill of entry.

A.5. It is submitted there was no mis-declaration either in respect of value, description, classification or in any other particular with the entry made under the Customs Act. It is therefore, respectfully submitted that the proposal for confiscation of the impugned goods under Section 111(m) of the Customs Act is not sustainable in law.

A.6. Without prejudice, it is submitted that it is settled law that misclassification does not tantamount misdeclaration. Thus, even if it is assumed that the subject goods were wrongly classified, the same cannot be considered as misdeclaration to attract the provisions of Section 111(m) of the Customs Act, 1962.

A.7. In this regard, reliance is placed on the case of *Northern Plastic Ltd. vs. Collector, 1998 (101) ELT 549 (SC)*, wherein the Hon'ble Supreme Court, while discussing proposal of confiscation under section 111(m) of the Customs Act, observed that '*the declaration was in the nature of a claim made on the basis of the belief entertained by the Noticee and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the Noticee had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred*

to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.'

A.8. It is submitted that penalty under Section 112 of the Customs Act is linked to confiscation under Section 111 of the Customs Act. It has been demonstrated above that the subject goods are not liable for confiscation; therefore, no penalty can be imposed on the Noticee under Section 112(a) of the Customs Act, 1962.

A.9. Further, the Noticee places reliance on the case of *P. Ripakumar and Company v. Union of India,1991 (54) ELT 67*, wherein demand of confiscation and redemption fine was set aside on the ground that the importer had acted in good faith i.e., *bona fide*. Thus, it was submitted that goods are not liable for confiscation.

A.10. It is submitted that the Noticee has always acted in a bona fide manner in his capacity of a Director of the Principal Noticee. Moreover, no allegation has been made in the SCN to discredit the bona fides of the Noticee. The Ld, Principal Commissioner has merely assumed the involvement of the Noticee because the Noticee is responsible for importation of the goods. However, the Ld. Principal Commissioner has not relied on any cogent evidence to prove the active involvement of the Noticee.

A.11. The Noticee places reliance on the case of *Madras Petrochem Ltd. v. Commissioner of Customs, Chennai- 2007 (218) ELT 712 (Tri. - Chennai)*, wherein the Hon'ble Tribunal held that since there was no finding that the Managing Director had personally indulged in any commission or omission rendering the goods liable for confiscation, the penalty is liable to be set aside. Further, simply because the penalty on the Company is sustained does not mean that its Managing Director should also be penalized automatically under Section 112(a) of the Act in absence of *mens rea*.

A.12. Further, the reliance in this regard is placed on the case of *Hindalco Industries Ltd. and Ors. vs. C.C., Ahmedabad, 2024 (2) TMI 25, Mudrika Ceramics Ltd. vs. Commissioner of Customs, Ahmedabad, Final Order No.10235-10245/202 4, Santosh Timber and Ors. vs. C.C., Kandla, Final Order No. A/ 10385-10386 /2024 and C.C., Kandla vs. Shree Ganesh Timber Store, Final Order No. A/ 10389-10391/2024*, wherein the penalty on individuals were set aside on the ground of goods not being liable for confiscation.

A.13. In the light of the above provisions, the demand for imposition of penalty on the Noticee under Section 112(a) is legally not correct and liable to be set aside.

A.14. Further, the Impugned SCN seeks to impose penalty under Section 112 (b) of the Customs Act. For ready reference, the relevant portion of Section 112 (b) of the Customs Act is reproduced below:

> *"SECTION 112 - Penalty for improper importation of goods, etc. –*
>
> *(a) .....*
>
> *(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
>
> *shall be liable,*
>
> *(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;*
>
> *(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees,*

whichever is the highest."

A.15. The Noticee submits that no penalty is imposable under the provision of Section 112(b) of the Customs Act, 1962. As per the provisions of Section 112(b) of the Customs Act, penalty can be imposed on a person who knowingly acquires possession or deals with goods which are liable for confiscation. Thus, for imposition of penalty under this provision, it is necessary that the assessee must have reason to believe that the goods in his possession or dealership are liable to confiscation.

A.16. In the present case, the Noticee had *bona fide* belief that the impugned goods were appropriately classifiable under respective headings or as parts of E-Bikes in as presented condition. Thus, it cannot be said that the Noticee had reason to believe that the impugned goods were liable for confiscation. For this reason, it is submitted that no penalty can be imposed under Section 112(b)of the Customs Act.

B. NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 114AA OF THE CUSTOMS ACT, 1962.

B.1. The relevant portion of Section 114AA is extracted below for ease of reference-

> *SECTION 114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.*

Penalty under Section 114AA not imposable in case of import of goods.

B.2. The Noticee submits that penalty under section 114AA is imposable only in those situations where export benefits are claimed without exporting the goods and by presenting forged documents. In support of this argument reliance is placed on the Twenty Seventh Report of the Standing Committee of Finance wherein insertion of section 114AA was discussed at paragraph 62. For the ease of perusal, the entire discussion is reproduced below: -

> *"Clause 24 (Insertion of new section 114AA)*
>
> *62. Clause 24 of the Bill reads as follows:*
>
> *After section 114A of the Customs Act, the following section shall be inserted, namely:—*
>
> *"114AA. Penalty for use of false and incorrect material.—if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*
>
> *63. The information furnished by the Ministry states as follows on the proposed provision:*
>
> *"Section 114 provides for penalty for improper exportation of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and*

for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to 5 times the value of goods. A new section 114 AA is proposed to be inserted after section 114A."

64. It was inter-alia expressed before the Committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a 'false statement' etc. Questioned on these concerns, the Ministry in their reply stated as under:

"The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because person summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under:

"The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."

66. The Committee observe that owing to the increased instances of wilful fraudulent usage of export promotion schemes, the provision for levying of penalty upto five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The Committee, however, advise the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment."

(Emphasis supplied)

B.3. The aforesaid extract from the report of the standing committee explains the purpose for which Section 114AA has been inserted in the Customs Act. The purpose is to punish those people who avail export benefits without exporting anything.

B.4. According to the legislature, Section 114 of the Customs Act provides penalties for improper exportation of goods and did not cover situations where goods were not exported at all. Such serious manipulators could escape penal action even when no goods were actually exported. Therefore, there was a need for a specific provision to

provide for such situations. In relation to the same, section 114AA was inserted to penalize persons in circumstances where export benefits are availed without exporting any goods.

B.5. Therefore, it is submitted that penalty under section 114AA is imposable only in those circumstances where export benefits are availed without exporting any goods. Since the present case relates to import of goods, there cannot be any question of the Principal Noticee having claimed export benefits without actual export of goods. Thus, penalty under section 114AA is not applicable to the present case.

B.6. Reliance in this regard is placed on the Hon'ble Tribunal's decision in *CC v. Sri Krishna Sounds and Lightings [2019 (370) E.L.T. 594 (Tri. - Chennai)]*. Relevant portion of the decision is extracted below:

> *"7. On appreciating the evidence as well as the facts presented and after hearing the submissions made by both sides, I am of the view that the Commissioner (Appeals) has rightly set aside the penalty under Section 114AA since the present case involves importation of goods and is not a situation of paper transaction. I do not find any merit in the appeal filed by the department and the same is dismissed. The cross-objection filed by respondent also stands dismissed.*

B.7. The Noticee also submits that it has not been established in the SCN as to how the Noticee has intentionally made, signed or used or has caused to be made, signed or used any declaration which is false or incorrect in any particular.

B.8. In the absence of such specific charges in the SCN that directly implicate the Noticee, the imposition of penalty under section 114AA is unsustainable. The Noticee in this regard places reliance on the Tribunal's decision in *Orion Enterprises v. CC [2019 (21) G.S.T.L. 397 (Tri. - Chennai)]*.

B.9. The Hon'ble Tribunal in *Interglobe Aviation Ltd. v. Principal Commissioner of Customs, [2022 (379) E.L.T. 235 (Tri.-Bang)]* has also affirmed the above legal position. The relevant portion of the decision is extracted below:

> *"20. ...*
> *The appellants also contended that the penalty under the Section 114AA can be imposed when the goods have been exported by forging the documents knowingly or intentionally. The present case does not relate to export at all and even for imports, all the documents presented for imports were genuine and not forged and thus the penalty is not imposable under Section 114AA of the Customs Act, 1962. We find that there is merit in the argument of the appellants. As the case is not of export, we find that no penalty under Section 114AA of the Customs Act, 1962 is imposable."*
>
> *(Emphasis Supplied)*

B.10. The above legal position is affirmed in the case of *M/s. V.R. Tools v. Commissioner of Customs, Chennai- 2021-VIL-728-CESTAT-CHE-CU*, wherein while allowing the appeal the Hon'ble Tribunal held that penalty under Section 114AA of the Customs Act, 1962 is attracted only when there is deliberate falsification of the documents in order to get undue benefit. The Section was proposed to be introduced consequent to detection of several cases of fraudulent exports where exports are shown only on paper and no goods crossed Indian Border.

B.11. From the above case laws and submissions, it is clear that there cannot be any proposal for imposition of penalty in the absence of any falsification on the part of the Noticee.

B.12. In view of the aforesaid submissions, it is submitted that the imposition of penalty under Section 114AA on the Noticee is liable to be dropped.

Penalty not imposable on the Noticee when he has merely acted in his official capacity as a Director of the Principal Noticee.

B.13. Without prejudice, it is submitted that the Noticee is the Managing Director of the Principal Noticee, and he has only acted in his capacity.

B.14. This position has been upheld in *Sterlite Industries (India) Ltd. vs. CCE reported at 2002 (143) ELT 682 (Tri. - Mumbai)* with following observations:

> *"5. We have considered the circumstances. When we look into the facts of the case, it is clear that if the assessee was interested in violating the provisions of Central Excise Rules; he would not have mentioned the relevant entry in the invoice. The facts would reveal that on the fateful day the incharge of the Central Excise fell sick, therefore these things have happened. In this connection, it will be useful to refer to the judgment of the Tribunal in Z.U. Alvin. CCE - 2000 (117) E.L.T. 69. The Tribunal dealing with the question of liability of the employees under Rule 209A of the Central Excise Rules noted as follows :*
>
> *"Commissioner proceeded against the appellant under Rule 209A, which can apply to a person who dealt with the contraband article, not as manufacturer. Appellant had no dealings with the contraband article otherwise than in his official capacity as an employee of BHEL, the manufacturer. So, by no stretch of imagination can the appellant fall within the purview of Rule 209A of the Central Excise Rules. Therefore, the Commissioner was clearly in error in thinking that penalty contemplated by Rule 209A could be imposed on the appellant who was only an employee of the manufacturer, namely BHEL."*
>
> *6. If we look into the observations of the Tribunal, it will be clear that the proceedings initiated against the employees and the directors are not correct inasmuch as they do not have the knowledge or dealing with the goods which are concerned. As far as the truck owners and drivers are concerned, we hold that it is for stronger reasons that they would not have the knowledge or having reason to know that the goods which they were transported have contravened the provisions of Central Excise Rules."*

B.15. Further, the Noticee relies on case of *R.K. Ispat Udyog vs. Commissioner of C. Ex., Raipur 2007 (211) E.L.T. 460 (Tri. - Del.)*, wherein it has been clearly held that manager working under the instructions of the manufacturer is not liable to penalty under Rule 26 of the Excise Rules. Relevant portion of the decision is reproduced below:

> *"7....However, I find that the appellant no. (2), Shri N.N. Swamy, is the Manager of the appellant no. (1) and working under the instructions of the manufacturer and, therefore, penalty imposed upon him is liable to be set aside. Hence the penalty imposed on the appellant no. (2) is set aside..."*

B.16. Reliance is also placed on the order of CESTAT Mumbai in the case of *Pankaj Extrusion Limited v. CC (Export) Order No. A/ 86988 – 86989/2021* dated 13.10.2021 where it was observed that no personal liability on director is imposable if he has merely acted in his official capacity and if no specific case has been made against the director.

B.17. In these circumstances, the Noticee cannot be said to have been in any way personally responsible or liable for being proceeded against under the provisions of section 114AA of the Customs Act.

Penalty not imposable on the Noticee once penalty is imposed on the Principal Noticee

B.18. It is humbly submitted that the SCN has been issued to the Principal Noticee in which the Noticee is a director. It is totally unjust and improper to impose a penalty for the same event on the company as well as on its directors.

B.19. To similar effect are the judgments of Hon'ble Tribunal in the following cases:

(i) *Globe Rexine Pvt. Ltd. vs. Commissioner of Central Excise, Chennai, 2006 (203) ELT 632 (Tri.-Chennai)*

(ii) *Rutvi Steel & Alloys vs. Commissioner of Central Excise, Rajkot 2009 (243) ELT 154 (Tri.-Ahmd.)*

B.20. Further, in the case of *Jaykrishna Aluminium Ltd. v. Commissioner of Customs, Chennai 2005 (187) ELT 234 (Tri. – Chennai)*, the submissions made by the Appellant therein were accepted by the Tribunal that when the Company has been penalized there was no justification for two penalties, both on the Company and the Managing Director.

B.21. In view of the above circumstances, the Noticee cannot be held personally liable under Section 114AA of the Customs Act, 1962.

Penalty not imposable in absence of any pecuniary benefit to the Noticee.

B.22. It is further submitted that there is no evidence of any pecuniary benefit flowing to the Noticee and the same has not been disputed in the SCN.

B.23. In this regard, reliance is placed on the decision of the Hon'ble Appellate Tribunal, in the case of *Commissioner of Customs, Mumbai vs. M. Vasi, 2003 (151) ELT (312) (Tri. - Mumbai)*, wherein it was held that for imposing penalty for abetment, knowledge of the proposed offence and also the benefit to be derived from the abetment has to be demonstrated. The relevant extract is as under:

> *"Abetment presupposes the knowledge of the proposed offence and also presupposes the benefit to be derived from the abetment there from...In the absence of conscious knowledge, penalty on charge of aiding and abetting would not sustain."*

B.24. Therefore, it is very clear that to allege misdeclaration on the part of Noticee, an element of mischief is to be attributed to the Noticee, in the sense that the description does not match with the actual goods, or the quantity vary, and such mischief has been deliberate and designed to avoid payment of customs duty. However, as stated above by adopting different wordings for description (corresponding to the actual product), the Noticee has in fact discharged appropriate customs duty. It is submitted that the SCN has not even referred to any evidence that the Noticee mis declared the goods with mala fide intention to evade customs duty and the bald allegations are based on conjunctures and surmises.

B.25. In light of the submissions made above, it is submitted that no penalty is imposable on the Noticee and the same is liable to be dropped.

C. NO PENALTY IS IMPOSABLE ON THE NOTICEE UNDER SECTION 117 OF THE CUSTOMS ACT, 1962.

C.1. The Impugned SCN proposes to impose penalty on the Noticee under Section 117 of the Customs Act, 1962. The Noticee submits that penalty cannot be imposed

under Section 117 of the Customs Act as the same is only a residual provision, i.e., this penal provision will be applicable where any provision of the Customs Act is violated, and which violation is not penalized under any other provision. For ready reference, Section 117 is reproduced herein below:

> *"SECTION 117. Penalties for contravention, etc., not expressly mentioned. - Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding four lakh rupees."*

C.2. It is submitted that the Impugned has already proposed to impose penalty under Section 112 and 114AA of the Customs Act, 1962. Thus, in the present case, Section 117 cannot be invoked at all.

C.3. Reliance in this regard is placed on the judgment pronounced in the case of *Nazir-ur-Rahman vs. CC, Mumbai, 2004 (174) ELT 493 (Tri. Mumbai)*, wherein it has been held that where the provisions of Section 112 have been invoked in the SCN, provisions of Section 117 cannot be invoked. Relevant extract of the stated judgment has been reproduced as follows:

> *"6. Having considered the contentions, we have carefully gone through the findings of Original Authority, which is available at Page 66 of impugned Order-in-Original, wherein the Original Authority has held that there is no evidence on record justifying penalty under Section 112 and that the Officers have neither connived nor indulged in the fraudulent act and that the charges, made out against them, are not explicit and the only ground made out is that they ought to have examined the containers fully and discovered discrepancies. The Original Authority further held that the penal provisions, under Section 117 of Customs Act, 1962, is residuary in nature and can be invoked only in the situation when no express penalty is provided, elsewhere in the Customs Act. He further held that since the show cause notice proposed imposition of penalty under Section 112 of Customs Act, 1962 against the two officers, the provisions of Section 117 of Customs Act, 1962 were not invocable. We find that above findings by Original Authority are sustainable and, therefore, we reject the appeal filed by the Revenue in respect of prayer to impose penalty on Shri Devesh Pandey, Inspector and Shri S.C. Sahu, Superintendent. In respect of penalty imposed on M/s. Ruby Impex, we find that there is no reason to interfere with the same. In view of above, we dismiss the appeal filed by Revenue."*
>
> *(Emphasis Supplied)*

C.4. In *M. Renganathan v. Commissioner of Customs, Chennai, 2009 (235) E.L.T. 860 (Tri. - Chennai)*, the Hon'ble Tribunal has held that Section 117 is a residual penal provision and that the same can be invoked only if a person has failed to comply with / contravened / abetted contravention of any provision of the Customs Act. For ready reference, the relevant portion of the above judgment is extracted hereinunder:

> *"3. After considering the submissions, I have found a valid point with the learned counsel. The text of Section 117 indicates that it is a residual penal provision under the Customs Act, which can be invoked against a person who has failed to comply with any provision of the Act or has contravened any provision of the Act or has abetted such contravention. No such case was made out against the appelant in the show-cause notice, wherein the only allegation was misdeclaration in bill of entry. Misdeclaration of any kind in bill of entry can attract confiscation of the*

goods under Section 111 of the Act and, consequently, the offender can attract a penalty under Section 112 of the Act. It would follow that the allegation raised against the CHA in the show-cause notice was, at best, relatable to Section 112 of the Act. Consequently, the residual provisions of Section 117 were not invocable. Moreover, this provision could be invoked only where the person sought to be penalised has failed to comply with any provision of the Act or has contravened any provision of the Act or has abetted any such contravention. There was no allegation to this effect in the show-cause notice."

(Emphasis Supplied)

C.5. It is submitted that in the present case, penalty under Sections 112 and 114AA has already been proposed on the Noticee for misclassification of the impugned goods. Therefore, where one penal provision has been invoked for violation of a given Section of the Customs Act, Section 117, being a residuary penal provision, cannot be invoked for the same violation.

C.6. Section 117 of the Customs Act covers all contraventions which are not expressly mentioned elsewhere under the Customs Act and includes abetment to such contravention.

C.7. Reliance in this regard is placed on the judgment pronounced in the case of *Hazel Mercantile Ltd. vs. Commissioner of Customs, Kandla* reported at *2013 (297) E.L.T. 70 (Tri. - Ahmd.)*, wherein it was held that penalties under Section 117 are for contravention, not expressly mentioned but, there should be sufficient evidence to show *mala fide* intention resulting in contravention of any provisions warranting penalty.

C.8. As already mentioned in the above grounds that Noticee has neither contravened any of the provisions of the Customs Act nor had any *mala fide* intentions. Therefore, penalty is not imposable under section 117 of the Customs Act.

Once penalty has been imposed under a specific section, it cannot be imposed again under the residuary section.

C.9. The SCN proposes to impose penalty on the Noticee under Section 112, Section 114AA and Section 117 of the Customs Act. The Noticee submits that penalty under Section 117 cannot be imposed if penalty has already been proposed under any other Section of the Customs Act. As mentioned above that section 117 of the Customs Act is a residuary section which can be invoked if any the contravention is not expressly mentioned in any other Section of the Customs Act.

C.10. Reliance in this regard is placed on the judgment of *Paharpur Cooling Towers Pvt. Ltd. vs. Collector Of Customs* reported at *1990 (45) E.L.T. 349 (Tribunal)* wherein the scope of section 117 of the Customs Act was discussed. It was held in that case that *'Section 117 of the Act is in the nature of a residuary provision. It provides for imposition of penalty on a person where no express penalty is provided elsewhere in the Act for contravention of any provision of the Act or abetment of such contravention or failure to comply with any provision of the Act which it was his duty to comply with.'*

C.11. Further in the case of *Vetri Impex vs. Commissioner of Customs, Tuticorin* reported at *2004 (172) E.L.T. 347 (Tri. - Chennai)*, the Tribunal noticed that Section 117 is a residuary penal provision which could be invoked against any person contravening, or failing to comply with, any of the provisions of the Customs Act, where no express penalty is otherwise provided for such contravention or failure.

C.12. In view of the aforementioned judgments, it is submitted that in the present case also, once the department has already made a proposal in the present SCN to impose penalty under sections 112 and 114AA, then it is not open for the department to impose penalty under the residuary section (i.e. Section 117 of the Customs Act)

also. The department is incorrect to impose penalty simultaneously under Section 112, 114AA and Section 117 of the Customs Act. On this ground also, the penalty is liable to be dropped.

D. THE PROCEDURE OF SECTON 138B OF CUSTOMS ACT, 1962, SHOULD BE FOLLOWED IN THE PRESENT CASE BEFORE RELYING ON THE STATEMENTS RECORDED UNDER SECTION 108 OF THE ACT.

D.1. It is humbly submitted that the present SCN has heavily relied upon the statements given by Shri Shivkumar Amar Singh, for imposing penalty and making allegations.

D.2. It is submitted that the statements tendered by Shri Shivkumar Amar Singh before the DRI officials are not admissible as evidence without examination of the same before a court of law.

D.3. Section 138B of the Customs Act provides for the admissibility of the statements recorded before any custom officer in the course of inquiry. From a bare reading of the said Section, it is evident that a statement recorded before a Customs Officer of Gazetted Rank, can be relevant for the purpose of proving the truth of the facts contained therein only when the person who made the statement is examined as a witness before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted as evidence in the interests of justice, except where the person who has tendered the statement is dead or cannot be found etc. Further, sub-section (2) of Section 138B provides that the provisions of sub-section (1) shall apply in relation to any proceedings under the Customs Act, as they apply in relation to a proceeding before a Court. Therefore, it is requested to ensure compliance with the provisions of Section 138B of the Act before admitting any statement as evidence against the Noticee.

D.4. It is submitted that Section 138B(1)(b) provides the process which an Adjudicating Authority is required to follow. The same is as under:

iii) The person who made the statement during the course of inquiry has to first be examined as a witness in the case before the adjudicating authority; and

iv) Thereafter, the adjudicating authority forms an opinion, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

D.5. The Noticee humbly submits that in the present case, as much as the SCN relies on the statement of the Shri Shivkumar Amar Singh, the same can be admitted as evidence against the Noticee only when the aforementioned requirements of Section 138B of the Act are satisfied.

D.6. It is further submitted that in case the procedure laid down in Section 138B is not followed by the Department, it will be deemed that the Department does not wish to rely on such statements and the same cannot be used as evidence against the Noticee. In such situation, there is no requirement of cross-examination.

D.7. In this regard, the Noticee relies upon the following judicial precedents:

- Him logistics Pvt. Ltd. v. Principal Commissioner of Customs, 2016 (336) E.L.T. 15 (Del.)
- Basudev Garg v. Commissioner, 2013 (294) E.L.T. 353 (Del.)
- J & K Cigarettes Ltd. v. Commissioner, 2009 (242) E.L.T. 189 (Del.)
- M/s J.V. Industries Pvt. Limited, Shri Sushil Kumar Jain, Shri Vishal Sharma, Shri Manoj Kumar Jain, M/s Ganpati Rolling Mills Pvt. Ltd., M/s JMW India Pvt. Limited, Shri Vinod Kumar Jain, Shri Shivji Gupta, M/S JMW India Pvt. Limited v. Commissioner of Central Excise, Delhi/J&K, 2018 (6) TMI 873 - CESTAT NEW DELHI (LB)
- CCE, Delhi – I v. Kuber Tobacco India Ltd., 2016 (338) E.L.T. 113 (Tri. - Del.);

- Alliance Alloys Pvt. Ltd. v. CCE, Delhi, 2016 (338) E.L.T. 749 (Tri. - Chan.)

D.8. Therefore, mere reliance on the statements recorded under Section 108 of the Act is not sufficient as it itself appears to have been extracted to suit the needs of building a case by the DRI officials.

D.9. It is also submitted that the denial of right of cross-examination to the Noticee would violate the principles of natural justice. For this purpose, reliance is placed on the case of *Kiran Overseas vs. Collector of Customs, 1988 (38) E.L.T. 362*, wherein it was held that denial of opportunity of cross-examination by quasi-judicial authorities, of third parties by the party in adjudication would violate principles of natural justice.

D.10. This decision was subsequently affirmed by the Hon'ble Supreme Court in the case of *Collector vs. Kiran Overseas, 1996 (88) E.L.T. A187 (S.C.)*.

D.11. The Noticee also places reliance on the case of *Commissioner of Central Excise, Meerut vs. Parmarth Iron Pvt. Ltd., 2010 (260) ELT 514(All.)*, wherein it was held that it is the right of an assessee in the event the revenue seeks to rely on the statements of witnesses recorded by it and whose statements are sought to be relied upon at the stage of adjudication to make available the said witnesses for cross-examination so that it could be established whether the statements recorded from the said witnesses have been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like.

D.12. The Noticee also relies on following judicial pronouncements wherein it has been held that if a statement of a person is relied upon, opportunity of cross examination of the person must be given if demanded:

- *Nirmal Seeds Pvt. Ltd. vs. Union of India, 2017 (350) ELT 486 (Bom)*
- *Kalra Glue Factory vs. Sales Tax Tribunal, 1987 (66) STC 292*
- *Hind Industries vs. Commissioner of Customs, 2018 (364) ELT 218 (Tri.- Del.)*
- *Indo Plast vs. Commissioner of Customs, 1994 (69) ELT 39 (CEGAT)*

D.13. Hence, in light of the decisions above, the Noticee submits that the statements recorded under Section 108 are inadmissible unless procedure under Section 138 (B) is complied with.

DISCUSSION AND FINDINGS

25. I have gone through the facts of the case, records and documents placed before me. Personal hearing was attended by Authorized Representatives of the Noticee on the scheduled date i.e. 29.04.2025 and written submissions dated 16.04.2025 were made for all three notices.

26. After carefully considering the facts of the case, written submissions made by the Noticee and record of Personal Hearing, the issues to be decided before me are:-

i) Whether the goods imported vide Bills of Entry mentioned in Annexure A to SCN be re-classified under Customs Tariff Heading 87116020 of the First Schedule to the Customs Tariff Act, 1975 and Customs Duty amount payable be re-assessed and differential total Customs duty be determined at **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Twenty Three Thousand One Hundred Eighty Five Only)* as per Annexure A accordingly, under Serial No. 531A (2) of Notification No. 50/2017-Customs dated 30.06.2017 as amended;

ii) Whether the goods valued at **Rs. 42,48,96,182/-** *(Rupees Forty Two Crores Forty Eight Lakh Ninety Six Thousand One Hundred Eighty Two Only)* as detailed in Annexure-A be held liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962;

iii) Whether the Differential Customs Duty amounting to **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Twenty Thee Thousand One Hundred Eighty Five Only)*, on the imported goods as detailed in Annexue-A, be demanded and recovered from M/s Electrotherm under Section 28(4) of the Customs Act, 1962 and interest be recovered on the said Customs duty, as at Sl. No. (iii) above, under Section 28 AA of the Customs Act, 1962.

iv) Whether the Penalty be imposed upon M/s Electrotherm under the provisions of Section 114A /112 (a) and (b) of the Customs Act, 1962 for acts of commission and omission discussed hereinabove.

v) Whether the penalty be imposed upon M/s Electrotherm under Section 114AA of the Customs Act,1962.

vi) Whether the Penalty be imposed upon Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under the provisions of Section 112(a) and (b) of the Customs Act, 1962 with respect to duty demanded from the importer M/s. Electrotherm (India) Ltd. as discussed herein above;

vii) Whether the Penalty be imposed upon Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under the provisions of Section 114AA of the Customs Act, 1962 in respect of Value of goods pertaining to M/s. Electrotherm (India) Ltd. as discussed herein above;

viii) Whether the Penalty be imposed upon Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under the provisions of Section 117 of the Customs Act, 1962 for their acts of commission and omission as discussed hereinabove.

27. I have gone through the allegations in the Show Cause Notice and submissions made by the Noticee. The primary question to be decided is whether the imported items constitute an electrically operated vehicle of CTI 87116020 (e-bike) or these are mere parts of aforesaid vehicle of CTI 87116020 (e-bike). The rule which is being pressed by the Department for classifying the imported article as an electrically operated vehicle is Rule 2(a) of the General Rule of Interpretation of Import Tariff and is reproduced below:

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

Rule 2(a) thus states that if any incomplete/unfinished articles has the essential characteristics of a complete/finished article then it shall be taken as if the article itself has been imported. It is therefore necessary to determine, on facts, as to what all articles have been imported by Noticee and whether such articles have essential character of a complete vehicle.

27.1 It is an admitted position that Noticee has imported all articles except tyre and battery with its charger which, in the assembled state, will form an e-bike (make model Yo Drift, Yo Drift DX, Yo Edge DX) though it will be an incomplete e-bike. The imported articles include items such as Front Panel, Front Mould, Foot Board, Fendor, Head Light, Tail Light, Speedometer, Wiring Harness, DC Motor and its Controller, Charging Socket, Handle Bar, Brake, Axle, Seat, down to the last items such as Cable Ties and Fasteners required to assemble the e-bike of a particular model (Yo Drift, Yo Drift DX, Yo Edge DX). The moot point is whether the incomplete vehicle, currently in unassembled state, has the essential character of complete vehicle/e-bike of CTI 87116020.

27.2 Before proceeding further, it is necessary to distinguish between the expression 'essential component' of a vehicle and 'essential character' of the vehicle contemplated in Rule 2(a) of General Rule of Interpretation. For instance, a tyre is an essential component of a vehicle without which it cannot ply on road but a vehicle without tyre still retains its essential character. HSN Explanatory Notes to Chapter 87 goes even further and states that if a motor vehicle, which is not equipped with its engine, without which it cannot function at all, should in the course of international trade, be classified as a motor vehicle. In other words, even the absence of an engine will not rob the vehicle of its essential character in so far as classification under Customs Tariff is concerned. The relevant HSN extract is produced below:

> The classification of a motor vehicle is not affected by operations which are carried out after assembling all parts into a complete motor vehicle, such as : vehicle identification number fixation, brake system charging and bleeding air from brakes, charging of the steering booster system (power steering) and cooling and conditioning systems, headlights regulation, wheel geometry regulation (alignment) and regulation of brakes. This includes classification by the application of General Interpretative Rule 2 (a).
>
> **An incomplete or unfinished vehicle, whether or not assembled,** is classified as the corresponding complete or finished vehicle **provided** it has the essential character of the latter (see General Interpretative Rule 2 (a)), as for example :
>
> (A) A motor vehicle, not yet fitted with the wheels or tyres and battery.
>
> (B) A motor vehicle not equipped with its engine or with its interior fittings.
>
> (C) A bicycle without saddle and tyres.

27.3 In the above context, the CBIC has also issued a Circular in year 1995 regarding how the import of cars in unassembled form with the omission of few parts like battery and tyre is to be assessed and classified. The Circular refers to the judgement of Hon'ble Supreme Court in case of M/s Sharp Business Machines V. Collector of Customs and re-iterated the applicability of Rule 2(a) in such situation. The relevant portion of Circular is reproduced below:

> ***"Subject** : Assessment of goods imported in CKD/ SKD condition.*
>
> *The Board has had the occassion to examine the question of assessment of goods imported in unassembled form, particularly in the context of certain recent imports of cars in SKD kits form with the omission of a few parts like the batteries and tyres.*
>
> *The question is not a new one, having been examined earlier at various levels, including the Supreme Court in the case of Sharp Business Machines v. Collector of Customs. The said Judgement was also taken not of by the Tariff Conference of 1991. A reading of rule 2 (a) of the Interpretative Rules to the First Schedule to the Customs Tariff Act, 1975, along with the Explanatory Not to this rule and the illustrations cited in the HSN Explanatory. Notes makes it amply clear that even incomplete, unassembled articles should be assessed as complete articles, provided that when assembled the incomplete article has the essential character of a complete article. In the context of automobiles, the HSN Notes at page 1423 cites the cases of cars without batteries and tyres, or even the engines, as examples of such articles having the essential character of complete articles.*
>
> *In his background, the Board once again desires the field formations to take due note of the provisions or rule 2(a) of the above said Interpretative Rules, while dealing with such cases."*

27.4 Now, returning to the present case, only two items have not been imported. First is tyre which though an essential component do not impart essential character to the vehicle.

27.5 As to the second item i.e battery and its charger, I see a parallel analogy with the HSN Explanatory Notes example of motor vehicle without engine. Infact, while it is nearly impossible to take out an engine from the motor vehicle and replace it with another, the batteries in an e-bike are easily replaceable and takes minimal time and effort. There are several tutorial available on various online forums including youtube explaining the process of replacement of battery. One such video shows the upgradation and replacement of battery of Yo bikes Drift DX. Screenshot is produced below:

28. The short point of above illustration is that while being essential component of Yo bikes, the batteries are not irreplaceable and its absence alone at the time of import will not mean that the vehicle is reduced to its parts. Besides, if such a view is taken, any importer then can order for unassembled or even fully assembled e-bike sans its battery and would claim that e-bike, having lost its essential characteristics, is now nothing but parts of e-bike. This would also mean that Sr. No. 531A of Notification No. 50/2017 dated 30.06.2017, as currently effective from 01.02.2022, governing effective rates of duty on Electrically Operated Vehicles will be rendered totally otiose because everyone will be free not to import battery and then claim that no vehicle has been imported. Sr. no. 531A of Notification 50/2017 is produced below:

S. No.	Chapter or Heading or sub-heading or tariff item	Description of Goods	Standard rate
"531 A.	8711	Electrically operated motor cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, - (1) As a knocked down kit containing all the necessary components, parts or sub-	

		assemblies, for assembling a complete vehicle, with,-	
		(a) disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake system, Electric Compressor not mounted on chassis;	10%
		(b) pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor not mounted on a chassis or a body assembly	15%
		(2) in a form other than (1) above	50%

29. I will also refer to Advance Ruling in case of M/s Anjali Enterprise, wherein, it has been held vide Order No. 01/ODISHA-AAR/2021-22 dated 15.04.2021 that

"a two or three-wheeled "battery powered electric vehicle" when supplied with or without battery pack is classifiable under HSN 8703 as an 'electrically operated vehicle' and is taxable at the rate of 5% GST"

Relevant portion of Advance ruling is produced below:

8.0 In view of the above, we rule as follows:

A two or three-wheeled "battery powered electric vehicle" when supplied with or without battery pack is classifiable under HSN 8703 as an "electrically operated vehicle" and is taxable @ 5% GST.

7.0 This ruling is valid subject to the provisions under Section 103(2) until and unless declared void under Section 104(1) of the GST Act.

8.0 The applicant or jurisdictional officer, if aggrieved by the ruling given above, may appeal to the Odisha State Appellate Authority for advance ruling under Section 100 of the CGST/OGST Act, 2017 within 30 days from the date of receipt of the advance ruling.

(V.K Pati)
Member, CGST

(Dilip Satpathy)
Member SGST

30. The Noticee placed reliance on total of three decisions of Hon'ble Tribunal, Kolkata to support their stand of having imported parts of e-bike but I find that all the three decisions are distinguished on facts in as much as in all these cases, not one but several essential components including batteries were missing leading to finding of lack of essential character in the imported article. The following comparison may be seen:

	M/s Baba Baidyanath Trading Company Vs Commissioner of Customs (Port), Kolkata (2024) 23 Centax 320 (Tri.-Cal)	Commissioner of Customs (Port), Kolkata V. M/s Twinkle Tradecom Pvt. Ltd. 2024 (5) TMI 472 - CESTAT KOLKATA	Commissioner of Customs (Port) , Kolkata V. M/s Vani Electric Vehicle Pvt. Ltd. 2024 (11) TMI 17 -CESTAT Kolkata	Instant case M/s Electrotherm (India) Ltd.
Goods not present at time of import.	Front Axle, Battery Charger 48V, Wiring Harness, Tire, Front Single Horn, Speedmeter, RVM Assy (LH and RH), Tube, Front Brake Drum, Battery	Battery, Transmission and Rear Axle	Front Axle, Battery Charger, Wiring Harness, Tyre, Horn, Speedometer, RVM Assy.,Tube, Front Brake Drum, Battery	Tyre and Battery with charger

31. In view of the above discussion, I hold that articles as presented by the Noticee constitute an incomplete/unfinished e-bike in unassembled form. Accordingly, they are liable to be classifiable under CTI 87116020. Even the Bill of Lading presented by the Noticee classify the articles under CTI 87116020 as vehicles and not parts. Reference Bill of Lading is produced below:

32. I further observe that the Show Cause Notice has alleged that rate of duty under Sr. No. 531A (2) of the Customs Notification. No.50/2017-Cus, dated 30-06-2017 is applicable to the importer in present case. Sr. No. 531A of Notification NO. 50/2017 is produced below:

Sl. No.	Customs CTH	Description of Goods	Standard rate
"531 A.	8711	Electrically operated motor cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, if imported, - (1) As a knocked down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with,-	
		(a) disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake system, Electric Compressor not mounted on chassis;	15%
		(b) pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor not mounted on a chassis or a body assembly	25%
		(2) in a form other than (1) above	50%

From the wordings of above notification, it is clear that Sr. No. 1(a) is applicable when all necessary components of e-bike are imported along with a dis-assembled battery pack and Sr. No. 1(b) is applicable when all necessary components of e-bike are imported along with a pre-assembled battery pack. However, in instant case, battery is not imported in impugned goods, therefore, Sr. No. 1(a) or Sr. No. 1(b) cannot be applied on impugned goods and only Sr No. 2 is left to be applied on impugned goods with BCD@50%.

33. From the above discussion and findings, I conclude that M/s Electrotherm (India) Ltd. has imported incomplete e-bike in unassembled form with essential character of a complete e-bike and, as such, these are rightly classifiable under CTI 87116020. Further, BCD@50% is applicable as per Sr. No. 531A of the Customs Notification. No.50/2017-Cus, dated 30-06-2017.

34. Noticee further submitted that for the finally assessed BOEs, issuance of SCN under section 28 is bad in law unless the BOEs are challenged by the Department by way of preferring an appeal. In this regard, reliance was placed on the decision of *Collector Vs. Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC)* and *Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), 2004 (172) ELT 145 (SC). Further reliance was placed on the judgement of* the Hon'ble Supreme Court in *ITC Limited vs. Commissioner of Customs, Kolkata, 2019 (368) E.L.T. 216 (S.C.).* In this regard, I find

that the above judgement are not applicable in present case as they deal with grant of refund of duty without first challenging the assessment order but in present case, duty has not been paid and therefore assessment done is automatically challenged by issuance of SCN under Section 28 and the same law has been laid down by Hon'ble Supreme Court in the case of UOI *v. Jain Shudh Vanaspati Ltd* [1996 (86) ELT 460 (SC)], wherein it was held that demand proceedings under Section 28 do survive even without challenge to assessment.

35. Noticee further submitted that that demand for IGST, interest on the duties paid, other than BCD, is not sustainable in the present case for the reason that the provisions relating to demand of IGST, interest and penalty on demand of IGST, have not been borrowed into Section 3(8) (*pari materia* to the present Section 3(12)) of the Tariff Act. It is evident that IGST is not covered under Section 12 of the Customs Act as duties of customs. Where it is neither levied under the Customs Act, nor under the tariff act, but under the IGST Act, to that extent, IGST, penalty and interest provisions under the Customs Act cannot be borrowed for levy under the IGST Act.

36. In this regard, I relied upon the judgement of the CESTAT Bench at Kolkata in the matter of *Texmaco Rail Engineering Limited* v. *CC* [2024 (1) TMI 902]. The Tribunal held that interest was leviable on the differential IGST on the following grounds:

> *"The usage of the words 'shall' and 'in addition to such duty' under Section 28AA(1) emphatically indicates the applicability of interest to a scenario where duty becomes payable. Thus, what has been borrowed for the realisation of interest payable and applicability as an automatic route are the structural elements of Section 28 of the Customs Act.*
>
> *The legislature has consciously incorporated interest provision which is rendered applicable to the CTA.*
>
> *Section 28AA of the Customs Act starts with a non-obstante clause, thereby giving importance to the said provision to hold them as a determinant and a predominant provision in the law."*

Therefore, I find that the Interest and penalty are rightly imposed on differential IGST in the Show Cause Notice.

37. Further, Section 17 of the Customs Act, 1962 provides for self-assessment of duty on import and export goods by the importer or exporter himself by filing a Bill of Entry or Shipping Bill, as the case may be, in the electronic form, as per Section 46 or 50 of the Customs Act, 1962, respectively. Thus, under self-assessment, it is the importer or exporter who will ensure that he declares the correct classification, applicable rate of duty, value, benefits of exemption notifications claimed, if any, in respect of the imported / export goods while presenting Bill of Entry or Shipping Bill. Further, in terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the Bills of Entry submitted for assessment of Customs duty. The willful mis-statement by M/s. Electrotherm (India) Ltd. is evident from their Bills of Entry itself. From various documentary and oral evidences as discussed above, it is clear that M/s. Electrotherm (India) Ltd. was all the time aware of the correct classification as well as correct rate of Duty to be paid by them. Even the Bill of Lading issued by M/s Zhejiang Jet Logistics Corporation Ltd. to exporter M/s Peerless Automobiles Co. Ltd. having consignee M/s Electrotherm clearly clarified the goods under CTH 8711 as complete e-bike. The importer too very

well knew that which particular model of e-bike (Yo Drift, Yo Drift DX, Yo Edge DX) is being imported. However, they evaded the customs duty and paid lower rate of duty by declaring the e-bike in CKD condition as individual parts of E- Bike. Thus, the duty have been short levied and short paid by wilfully mis-declaring the description of goods as "E-Scooter Spare parts and accessories" and misstating the Customs Tariff heading as 8714 and other CTH as against the applicable Customs Tariff Heading of 8711 for the discharge of duty payable.

38. Further, since the goods i.e., 'E-Bikes /E-Scooters in CKD form' as covered under Bills of Entry filed by M/s. Electrotherm (India) Ltd. (as detailed in Annexure-A to SCN) were imported by resorting to mis-declaration and mis-classification by way of wilfull mis-statement in the Bills of Entry filed under Section 46 of the Customs Act, 1962, the same having assessable Value of **Rs. 42,48,96,182/-** *(Rupees Forty Two Crores Forty Eight Lakh Ninety Six Thousand One Hundred Eighty Two Only)* as detailed in Bills of Entry filed by M/s. Electrotherm (India) Ltd. (as detailed in Annexure-A SCN), are liable to confiscation under the provisions of Section 111(m) of the Customs Act, 1962. However, I refrain from imposing a redemption fine as the goods are not available.

39. Since the classification of the goods under CTH 8714 declaring the goods as individual parts is required to be rejected and the goods are required to be re-classified under CTI 87116020 and charged to duties accordingly, the differential Customs Duty amounting to **Rs. 18,15,23,185/-** *(Rupees Eighteen Crore Fifteen Lakh Twenty Thee Thousand One Hundred Eighty Five Only)* (Annexure A to SCN) is confirmed and is to be recovered from M/s. Electrotherm (India) Ltd. by invoking the extended period of five years as per Section 28 (4) of the Customs Act, 1962. Further, the interest at the prescribed rate is also liable to be recovered from them in terms of **Section 28 AA** of Customs Act, 1962. Further, the importer is liable to penalty under Section 114A of the Customs Act, 1962 but since the penalties under section 112 and 114A are mutually exclusive, I do not impose penalty under Section 112 of the Customs Act, 1962.

40. I further find that M/s Electrotherm (India) Ltd. submitted Bills of Entry with wrong description and made a false/incorrect declaration for import of goods, they are liable for penalty under Section 114AA of the Customs Act, 1962.

41. I further find that **Shri Shiv Kumar** was aware of the provisions of the Customs Act, 1962 as well and fully aware of the goods being imported and could have easily declared the correct classification of the goods imported by M/s. Electrotherm India Ltd under CTH 8711. Therefore, prior to import of goods he was aware that they are importing complete/finished e-scooters/e-bikes in CKD form. However, he chose to mis-declare the said imports as spare Parts and accessories of E- vehicle and mis-classify the goods under CTH 8714, so that the company could enjoy the benefits by paying lower rate of Customs duties, thereby resulting in evasion of Customs Duties. Therefore, I find that by his acts of omission and commission, he has rendered the goods imported under Bills of Entry mentioned in Annexure-A to SCN liable for confiscation under Section 111 (m) of the Customs Act, 1962 and consequently, he has rendered himself liable for penalty under Section 112 (b) of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962.

42. I further find that **Shri Shailesh Bhandari** was aware of the provisions of the Customs Act, 1962 as well and fully aware of the goods being imported and could have easily declared the correct classification of the goods imported by M/s. Electrotherm

India Ltd under CTH 8711. Therefore, prior to import of goods he was aware that they are importing complete/finished e-scooters/e-bikes in CKD form. However, he chose to mis-declare the said imports as spare Parts and accessories of E- vehicle and mis-classify the goods under CTH 8714, so that the company could enjoy the benefits by paying lower Customs duty, thereby resulting in evasion of Customs Duty. Therefore, I find that by his acts of omission and commission, he has rendered the goods imported under Bills of Entry mentioned in Annexure-A to SCN liable for confiscation under Section 111 (m) of the Customs Act, 1962 and consequently, he has rendered himself liable for penalty under Section 112 (b) of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962.

43. As regards imposition of penalty under Section 117 of the Customs Act, 1962 on both Shiv Kumar and Shri Shailesh Bhandari , I find that Section 117 proposes penalty where no express penalty elsewhere provided for such contravention or failure, As already penalty has been imposed under Section 112(b) and 114AA of the Customs Act, 1962, I do not find reason to impose penalty on Shri Shiv Kumar and Shri Shailesh Bhandari under Section 117 of the Customs Act, 1962.

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

ORDER

44.1 I hold that the goods imported vide Bills of Entry mentioned in Annexure A to SCN be re-classified under CTI 87116020 of the First Schedule to the Customs Tariff Act, 1975 and Customs Duty amount payable to be re-assessed as per Serial No. 531A (2) of Notification No. 50/2017-Customs dated 30.06.2017 as amended;

44.2 I order for the confiscation of the impugned goods valued at Rs. 42,48,96,182/- *(Rupees Forty Two Crores Forty Eight Lakh Ninety Six Thousand One Hundred Eighty Two Only)* under the provisions of Section 111(m) of the Customs Act, 1962.

44.3 I confirm demand of differential Customs duties totally amounting to Rs. 18,15,23,185/- *(Rupees Eighteen Crore Fifteen Lakh Twenty Three Thousand One Hundred and Eighty Five Only)*, as discussed hereinabove and the same is to be recovered from M/s Electrotherm under Section 28(4) of the Customs Act, 1962 and interest be recovered on the said Customs duty under Section 28 AA of the Customs Act, 1962.

44.4 I impose penalty of Rs. 18,15,23,185/- *(Rupees Eighteen Crore Fifteen Lakh Twenty Three Thousand One Hundred and Eighty Five Only)* on M/s Electrotherm (India) Ltd. under Section 114A of the Customs Act, 1962 for the reasons of wilful mis-statement and suppression of facts. I refrain from imposing penalty under Section 112 as penalty under Section 112 and 114A are mutually exclusive.

44.5 I impose a penalty of Rs. 6,00,00,000/- (Rupees Six Crore Only) on M/s Electrotherm (India) Ltd. under Section 114AA of the Customs Act,1962.

44.6 I impose a penalty of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakh Only) each on both Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under the provisions of Section 112 (b) of the Customs Act,.

44.7 I impose a penalty of Rs 5,00,00,000/- (Rupees Five Crore Only) each on both Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under the provisions of Section 114AA of the Customs Act, 1962

44.8 I refrain from imposing a penalty on Shri Shivkumar Amar Singh and Shri Shailesh Bhandari under Section 117 of the Customs Act, 1962, for the reasons as discussed above.

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

(Nitin Saini)
Commissioner of Customs,
Custom House, Mundra

Date-21.05.2024.

DIN- 20250571MO000000DCF9
F. No.: GEN/ADJ/COMM/208/2024-Adjn-O/o Pr Commr-Cus-Mundra
By Speed Post/E Mail/Notice Board

To,

1. M/s. Electrothem (India) Ltd,
   Survey No 325, Village Samkhiyali, Near Toll Tex Booth, Bhachau, Kutch, Gujarat- 370140 (IEC- 0889000093) (email- bankat.somani@electrotherm.com)

2. Shri Shivkumar Amar Singh, Manager (Purchase), Auto Division, M/s.Electrotherm (India) Ltd, residing at 21-Samarpan Bunglows, Nr. Judges Bunglows, Satellite, Ahmedabad-380015. (email- shivkumar.singh@electrotherm.com)

3. **Shri Shailesh Bhandari**, Managing Director in M/s. Electrotherm (India) Ltd., Residing at 8, Vraj Gopi bunglow, Palodia, Near electrotherm India limited, Ahmedabad -382115 (email-Shailesh.bhandari@electrotherm.com)

COPY TO:-

(A) The Additional Director General, Directorate of Revenue Intelligence, Zonal Unit, 15, Magnet Co-operate Park, Near Sola Bridge, S.G. Highway, Thaltej, Ahmedabad-380054, for information.

(B) 1) The Deputy Commissioner of Customs (EDI), Custom House, Mundra.
2) The Deputy/ Asstt. Commissioner of Customs (Legal/Prosecution), Customs House, Mundra.
3) Office Notice Board.
4) Guard File.