

	<p><b>OFFICE OF THE COMMISSIONER</b> <b>CUSTOM HOUSE, KANDLA</b> <b>NEAR BALAJI TEMPLE, NEW KANDLA</b> <b>Phone : 02836-271468/469 Fax: 02836-271467</b></p>
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DIN-20250171ML000000B052		
A	File No.	GEN/ADJ/COMM/144/2023-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KND-CUSTM-000-COM-17-2024-25
C	Passed by	M. Ram Mohan Rao, Commissioner of Customs, Custom House, Kandla
D	Date of Order	31.01.2025
E	Date of Issue	31.01.2025
F	SCN No. & Date	GEN/ADJ/COMM/144/2023-Adjn-O/o Commr-Cus-Kandla
G	Noticee / Party / Importer / Exporter	M/s. VMware Software India Pvt. Ltd. and others

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

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

2nd Floor, Bahumali Bhavan Asarwa,

Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004
3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs.1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/-in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules, 1982 should be adhered to in all respects.
8. An appeal against this order shall lie before the Appellate Authority on payment of 7.5% of the duty demanded wise duty or duty and penalty are in disupte, or penalty wise penalty alone is in dispute.

## **BRIEF FACTS OF THE CASE-**

Intelligence gathered by Directorate of Revenue Intelligence (DRI), Ahmedabad Zonal Unit, Ahmedabad indicated that **M/s.VMware Software India Pvt.Ltd.**, situated at 165/1, 165/17, Kalyani Vista, Kalyani Vista, 165/2, Doresanipalya, IIM Post Bannerghatta Road, Bangalore 560 076 (IEC no.0707022738) (**hereinafter referred to as M/s. VSIPL**) was engaged in the business of providing Software and IT / IT enabled services mainly in the area of Software development for their parent company i.e. M/s. VMware International, Ireland. M/s.VSIPL also market the software product within Indian Territory on behalf of M/s. VMware International, Ireland.

**2.** Intelligence gathered by Directorate of Revenue Intelligence (DRI), Ahmedabad Zonal Unit, Ahmedabad indicated that M/s. VSIPL had obtained Service Export from India Scheme (hereinafter referred to as SEIS) Srips/licences, though they were not providing any of the services notified under Appendix 3D of FTP 2015-2020. The exporter was actually providing "*Computer and related Services*". The services provided by the exporter appeared to be classifiable under Division 84 of UN Central Product Classification (CPC) Code, which are not included in Appendix 3D, and hence was not eligible for SEIS benefit.

**3.1** Based on the above intelligence the office premise of M/s.VMware Software India Pvt. Ltd. situated at 165/1, 165/17, Kalyani Vista, J.P Nagar, Bangalore (Urban), Karnataka- 560076 was searched under panchnama dated 13.05.2019[**RUD NO: - 01**] in the presence of ShriBosco Noronha, Director, Finance and Shri GuruprasadCashikar, Senior Manager, Finance of M/s. VMware Software India Pvt. Ltd. During the search some documents viz. SEIS application filed before the DGFT {including supporting documents i.e. Commercial Invoices (along with calculation sheet), FIRC, Financial statement, STPI registration certificates/approval and inter-company service agreement}, SEIS Srips, ORG-Structure, Service Tax Registration, GST Registration and Audited Balance Sheet for F.Y. 2016-17 and 2017-18 etc.were withdrawn.

**3.2** From scrutiny of documents, prima facie it appeared that M/s. VSIPLwere not providing any of the services notified under Appendix 3D of FTP 2015-2020, and hence not eligible for SEIS benefits.

**3.3** During the search operation Shri Bosco Noronha Director, Finance informed the officer that M/s.VMWARE Software India Pvt. Ltd. is a subsidiary of VMware International (Ireland) and M/s. VMWARE Bermuda having share 99% and 1% respectively. He, further stated that M/s. VMWARE Software India Pvt. Ltd. has 03 offices in Bangalore for IT enabled services, Software development services and marketing Services, 01 office at Pune for software development services and 06 offices in different cities of India for providing marketing services. He, further stated that M/s. VMWARE Software India Pvt. Ltd. export services of software development, IT enabled services (Call Centre Services) to VMWARE International (Ireland) and they also perform services of Marketing of software products, promotional services of product, liaison between customers and the agents/distributors in the territory of India only on behalf of M/s. VMWARE International (Ireland) Ltd.

**3.4** During the search operation Shri Guruprasad Cashikar, Senior Manager stated that they export services of software development, IT enabled services (Call Centre Services) to VMWARE International (Ireland) and they also perform

services of Marketing of software products, promotional services of product, liaison between customers and the agents/distributors in the territory of India only on behalf of VMWARE International (Ireland) Ltd.

#### **STATEMENTS:**

**4.** During the course of inquiry, the statements of the following persons working with M/s. VMware software India Pvt Ltd. were recorded under Section 108 of the Customs Act, 1962.

- (a) Statement of ShriDev Kumar Prabhu, Director Marketing of M/s. VMware software India Pvt Ltd. recorded on 13/05/2019
- (b) Statement of ShriGuruprasadCashikar S/o Shri C.K. HanumanthaRao, Senior Manager (Finance Controller) of M/s. VMware software India Pvt Ltd. recorded on 13/05/2019
- (c) Statement of ShriBosco Noronha, Director (Finance) of M/s. VMware software India Pvt Ltd. recorded on 14/05/2019
- (d) Statement of ShriBosco Noronha, Director (Finance) of M/s. VMware software India Pvt Ltd. recorded on 18.02.2020.

**4.1** During the statement dated 13.05.2019 of ShriDev Kumar Prabhu, Director Marketing of M/s. VMware software India Pvt Ltd. Kalyani Vista, 165, Doraisanipalya, IIM Post Bannerghatta Road, Bangalore 560076 **[RUD NO: - 02]**, he inter-alia stated that:-

- M/s. VMware software India Pvt Ltd, Kalyani Vista, 165/2, Doresanipalya, IIM Post Bannerghatta Road, Bangalore 560076 had been engaged in software development, marketing these products and solution and providing customer services relating to products and solutions since the year 2007. There were four officials in the Board of Directors. Mr. Bosco Santiago Noronha, an Indian national is the only resident Director, all the others were stationed outside India.
- They were the subsidiary of M/s. VMware International Ltd, Ireland and they in turn are the subsidiary of VMware Inc, California. M/s. VMware software India has executed three agreements with VMware International Ltd, Ireland for the following: R&D (Development service agreement), ITES (Call Centre service agreement), MSS (Market Service agreement). He has submitted copies of said agreements.
- “R&D vertical does research and development services relating to development and improvement of computer products/ software, for our related company in Ireland. This is functioning as an STP unit”.
- “The call centre advises and assists customer with respect to installation and configuration of software products and also advises and assists customers in resolving problems and issues encountered while in development or quality assurance. This is also an STP unit”.
- “The marketing vertical performs general administrative marketing and promotional services, expanding the customer base in the territory (India), act as liaison between customers and agents”.
- He was the head of marketing and Sri Sundar Balasubramaniam was the head of Business Development. There were about 100 personnel in marketing and business development unit; they have marketing offices in Bombay, Delhi, Chennai, Ahmedabad, Hyderabad, Pune etc.
- They market their products i.e. software like vSphere, NSX, vSan, vCenter, App Defense, SRM, HCI, vCloud suite, vRealize suite, vRealize operation, vRealize automation, Workspace ONE, Horizon 7 to our customers (VMware Software India Pvt Ltd.'s Customers) in India; that

the work relating to Marketing & Business Development involves writing up content about our technology (products & solutions) and applying an output in the form of white-papers, presentations, demo's etc. presented to customers to better understand our technology or products that could be like servers, storage, virtualization, networking etc; They ensured their customers understood the full technology possibilities using their software products and solutions. This was done through their partners M/s. Wysetek, M/s. Veeras, M/s. Frontiers, etc. all Indian companies. Sometimes, they also did the marketing through their marketing team.

- They met with the customers on one to one basis and inform them of the technology. In some cases, they engaged with their abovementioned business partners during events to create awareness about their products. Once the customer understands their product further business deals were done by their business partners who engaged with the customer and close the final deal with the customers.
- They did not market for overseas clients, they only do marketing /evangelization for Indian customers.
- On being asked whether their company has provided any marketing services to outside India, he stated that no, they have not provided marketing services outside India. He further stated that they have provided marketing services within India only to Indian Customers only. On being asked, whether he or his marketing team has provided any management consultancy services to Indian Customers, he stated that they did not provide any management consultancy services to Indian Customers.

**4.2** During the statement dated 13.05.2019 of Shri Guruprasad Cashikar S/o Shri C.K. Hanumantha Rao, Senior Manager (Finance Controller) of M/s. VMware software India Pvt Ltd, Kalyani Vista, 165, Doraisanipalya **[RUD NO: - 03]**, he inter-alia stated that:

- M/s. VSIPL was a subsidiary of M/s. VMware International Ltd, Ireland and they in turn were the subsidiary of M/s. VMware Inc, California. M/s. VSIPL has executed three agreements with M/s. VMware International Ltd, Ireland for the following: R&D (development service agreement), ITES (call Centre service agreement), MSS (market Service agreement). He further submitted copies of said agreements, details as under:
  - a. R&D vertical does research and development services relating to development and improvement of computer products / software, for our related company in Ireland. This was functioning as an STP unit.
  - b. The call centre advises and assists customer with respect to installation and configuration of software products and also advises and assists customers in resolving problems and issues encountered while in development or quality assurance. This was also an STP unit.
  - c. The marketing vertical performs general administrative marketing and promotional services, expanding the customer base in the territory, act as liaison between customers and agents. This unit was not in the purview of STP.
- He was the Finance Controller for M/s. VMware Software India Pvt. Ltd. and responsible for overall financial activities of M/s. VMware Software India Pvt. Ltd; He looked after Audits, Taxation and Tax related

compliance to different department of Govt. of India; He had been working with the M/s. VMware Software India Pvt. Ltd. from June 2009 in the finance department of the company and they export services of software development, IT enabled services (Call Centre Services) to VMWARE International (Ireland) and they also performed services of Marketing of software products, promotional services of product, liaison between customers and the agents/distributors in the territory of India only on behalf of VMWARE International (Ireland) Ltd. They have separate agreements with the VMWARE International (Ireland) for providing the above-mentioned services provided by VMWARE Software India Pvt. Ltd.

- M/s. VMWARE Software India Pvt. Ltd have availed SEIS benefits from DGFT for the period of FY 2015-16, 2016-17 and 2017-18. He also stated that M/s. VSIPL had not provided any marketing services outside India or any other country.
- He agreed with the fact that the marketing services provided by M/s. VMWARE Software India Pvt. Ltd. were supplied within India and not outside India, for and on behalf of VMWARE International (Ireland).
- On being asked regarding the decision to avail benefits of SEIS, he stated that It was taken with the approval of Shri Bosco Noronha, Director, Finance of VMWARE Software India Pvt. Ltd.
- On being asked, apart from marketing services whether M/s. VSIPL provided any consulting services in India or abroad, he stated that “he exactly not aware about the same, however, they didn’t raise any such invoice for consulting charges to VMWARE International (Ireland)”.

**4.3** During the statement dated 14.05.2019 of Shri Bosco Noronha, Director (Finance) of M/s. VMware software India Pvt Ltd. **[RUD NO: - 04]**, he inter-alia stated that:-

- M/s. VMware software India Pvt Ltd, Kalyani Vista, 165, Doraisanipalya, IIM Post Bannerghatta Road, Bangalore 560 076 was engaged in software development, marketing these products and solution and providing customer services relating to products and solutions; that
- He was the Director, Finance of M/s. VMware Software India Pvt. Ltd. he had been working in VMware since December 2013. He had approximately 20 years of experience in Finance sector. There were 05 parts of the Finance tasks assigned to him i.e. (1) Procure to Pay (for all VMware group of companies), (2) Accounts receivable (for all VMware group of companies) (3) General Ledger (for all VMware group of companies), (4) Payroll (for all VMware group of companies except VMware Inc. USA) and (5) India controllership (India Accounting and India Compliances), these all 05 section were headed by 05 Senior managers who finally report to me about their work. He was responsible for overall financial activities of M/s. VMware Software India Pvt. Ltd. and he reported about his work to Mr. Brian Delapena, Senior Director, Corporate Controller, VMware Inc., USA and also to Mr. Kieran Barry Murphy, International Controller, finance of the group of companies except VMware Inc., USA for India Audits, Compliance and Taxes (Direct and Indirect).
- He stated that there was no change in the services provided by M/s. VMware Software India Pvt. Ltd after implementations of the GST Act in July 2017, they have provided the same services what they were providing under Service Tax Act.

- He again stated that they were providing the same service as mentioned in their Service Tax Registration as Business Auxiliary Services, Information Technology, Software Services. He further stated that in Business Auxiliary services they have provided marketing services and under Information Technology services, they have provided Call Centre services. In software service, they have provided R & D of software development. All the three services provided by M/s. VMware Software India services were on behalf of VMware International Ltd., Ireland.
- On being asked whether VMware Software India pvt. Ltd. has provided any consultancy service/management consultancy services, he stated that they have not provided any consultancy service/management consultancy services.
- After having been perused printout with title “66. Management or Business Consultant Services” wherein under the definition and scope of services at para B” Taxable service means any service provided or to be provided to any person by a management or business consultant in connection with the management of any organization or business in any manner. [Section 65 (105) (r) Finance Act, 1994 as mentioned]“Management or business Consultant” means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization or business in any manner and includes any person who renders any advice, consultancy or technical or technical assistance in relating to financial management, human resources management, marketing management, procurement and management of information technology resources or either other similar areas of management. [Section 65 (65) Finance Act, 1994 as mentioned], he stated that they had not provided any of the services which were mentioned under title “66. Management or Business Consultant Services”
- He was not well aware about the marketing services provided by their company i.e. VMware Software India Pvt. Ltd., only the marketing Experts of our company as Dev Kumar Prabhu, Director, Marketing would be the relevant person to explain about all the marketing activities of their company i.e. M/s. VMware Software India Pvt. Ltd. he did not have any control on marketing activities of their company.
- He stated that M/s. VMWARE Software India Pvt. Ltd. have availed SEIS benefits from DGFT for the period of FY 2015-16, 2016-17 and 2017-18 and on behalf of M/s. VMware India Software Pvt. Ltd, he had filed all the application to DGFT for availing the SEIS benefits as he was the signing authority for the company. The details of the SEIS applications and the SEIS Authorization are as under:

Application No. and date	SEIS Authorization no.	Duty credit (INR)
072109450013AM19 dated 04.05.2018	0719031528	7000000
	0719031529	7000000
	0719031530	7000000
	0719031531	7000000
	0719031532	7000000
	0719031533	396571
072109450013AM19 dated 04.05.2018	0719031513	4000000
	0719031514	4000000
	0719031515	4000000
	0719031516	4000000

	0719031517	4000000
	0719031518	4000000
	0719031519	4000000
	0719031520	4000000
	0719031521	4000000
	0719031522	4000000
	0719031523	4388508
072109880010AM19 27.11.2018	0719037456	25000000
	0719037457	24213561.62
<b>Total</b>		<b>12,89,98,640.6</b>

- They have sold all the above mentioned SEIS authorization/ Licenses which they have availed from DGFT.
- SEIS benefits were available for the export of eligible services; he was not aware about all the services which were eligible for the SEIS benefits; SEIS benefits availed by them were for providing the Marketing services by their company to customers in India on behalf of their parent company M/s. VMware International, Ireland.
- The consumers to whom marketing services had been delivered are “within India” and not outside India.
- He stated that they had not provided / supplied any management consulting services as declared by him in the SEIS application filed by their company, however, since there was no particular code was given in the Central Processing Code (CPC) for marketing they have mentioned other business Services {management consulting service (865)}’ falls under CPC “1Dc” to avail the SEIS benefits wrongly.
- He stated that at the time of filing the application before DGFT for availing the SEIS benefits, he was very well aware about the Declaration/ Undertaking of the application along with all the other points of the application; The marketing services provided by them were ineligible for SEIS benefits and the said services were not covered under the Annexure to Appendix 3D,however, to avail SEIS benefit, he had mentioned the services provided by them as “other business Services {management consulting service (865)}” falls under CPC “1Dc” to avail the undue SEIS benefits.
- As undertaken by him while applying for the SEIS script from DGFT and in view of his above statement, he was ready to pay the undue SEIS benefits taken by us in the aforesaid SEIS authorizations along with interest chargeable thereon at the earliest after taking final call from the management.

**4.4** During the statement dated 18.02.2020 of Shri Bosco Noronha, **Director (Finance)** of M/s. VMware software India Pvt Ltd. **[RUD NO: - 05]**, he inter-alia stated that:

- All the facts recorded in the statement dated 13.05.2019 of Shri Dev Kumar Prabhu, Director Marketing of M/s. VMware software India Pvt Ltd. are true and correct, specifically, about the supply mechanism of Marketing services supplied by their company, he stated that they have provided the marketing services in the similar manner and to the Indian customers of VMware International, Ireland in Indian territory.
- He was shown Statement dated 13.05.2019 of Shri Guruprasad Cashikar, Senior manager, Finance of M/s. VMware software India Pvt

Ltd. In token of having seen & read the same, he endorsed his dated signature on the last page of said Statement.

- He was agreed with the facts recorded in his statement dated 14.05.2019; that all the facts recorded in his earlier statement dated 14.05.2019 were true and correct and to the best of his knowledge; They have provided the marketing promotional and evangelization services on behalf of VMware International, Ireland to the Indian Customer of VMware International, Ireland in Indian Territory.
- M/s. VMware International, Ireland provided the marketing promotional and evangelization services to its customers in India through their subsidiary i.e. M/s. VMware India Pvt. Ltd.; they represented themselves as “VMware” before the clients (Indian customers of VMware International, Ireland) when they had reached them to provide/supply the Marketing services.
- After having read letter dated 22.05.2019 submitted by their company before Investigation Officer, DRI, AZU, and CPC codes under the Heading 865 (Management Consulting Services), he found that the reproduction of CPC codes under the Heading 865 (Management Consulting Services) was mis-represented by them in their letter dated 22.05.2019 and then he had reason to believe that the marketing Consulting reads as “advisory, consultancy and operational assistance” which is combination of actions of actives and not separately.
- Their company did not provide the combination of Services “advisory, guidance and operational assistance services concerning the marketing strategy and marketing operations to VMware International, Ireland, Instead VMware, Ireland instructed them to market their product to the Indian customer base of VMware International, Ireland in India, their Company only provide marketing promotional and evangelization services to the Indian customers of VMware International, Ireland and they did not provide any kind of Management Consultancy to VMware International, Ireland.
- He agreed that the service rendered to the customers of VMware, Ireland in India falls under mode C of Section 2 (e) (II) (i) of Foreign Trade (Development and Regulation) Act., 1992, i.e. “ by service supplier of another country (VMware International, Ireland), through commercial presence (VMware Software India Pvt. Ltd. ) in India”
- As per the definition of “Commercial Presence” provided by WTO, GATS Training Module: Chapter 1 “Basic Purpose and Concept”, M/s. VMware India Pvt. Ltd. was Commercial presence of VMware International, Ireland in India.
- He agreed that services provided by M/s. VMware Software India P Ltd. were mis-represented in the SEIS application filed before DGFT to avail the SEIS benefits.
- M/s. VMware Software India Pvt. Ltd was not eligible for availing SEIS benefits; the SEIS scrips obtained in wrongful manner by VMware Software India Pvt. Ltd.
- M/s. VMware Software India P Ltd. accepted all the above facts, further they have already paid the entire amount of SEIS scrips obtained by them (as they have sold all the SEIS scrips obtained by their company), they have further decided not to contest and they were waiving off their right to have Show Cause Notice.



## **5. DETERMINATION OF CLASSIFICATION:-**

As per the marketing Service Agreement executed between M/s. VSIPL, and M/s. VMware, Ireland, M/s. VSIPL provides services to the potential Indian customers of M/s. VMware, Ireland which include attending the queries of the clients in relation to the software products of M/s. VMware i.e. consultancy in respect of software products of M/s. VMware, Ireland. Further, M/s. VSIPL provided periodical reports to M/s. VMware, Ireland in respect of the customers need in India, which implies that M/s. VSIPL first analysed the clients need in respect of the software products and reported the same to M/s. VMware, Ireland.

Further, Shri Dev Kumar Prabhu, Director (Marketing) of M/s. VMware software India Pvt Ltd. stated in his statement dated 13.05.2019 that through Marketing Services provided by their company, they impart knowledge about their software products to the customers of M/s. VMware, Ireland, in India, so that the customer better understand the functionality of their software technology & products that could be like servers, storage, virtualization, networking etc.

Hence it appears that the service rendered by M/s. VSIPL, Bangalore covered under CPC code 841 to 849, specifically CPC- 84220, which are defined as under:

### **DIVISION 84 COMPUTER AND RELATED SERVICES[RUD NO: - 06],**

#### ***841 Consultancy services related to the installation of computer hardware***

##### ***8410 84100 Consultancy services related to the installation of computer hardware***

*Assistance services to the clients in the installation of computer hardware (i.e. physical equipment) and computer networks.*

#### ***842 Software implementation services***

*All services involving consultancy services on, development and implementation of software. The term "software" may be defined as the sets of instructions required to make computers work and communicate. A number of different programmes may be developed for specific applications (application software), and the customer may have a choice of using ready-made programmes off the shelf (packaged software), developing specific programmes for particular requirements (customized software) or using a combination of the two.*

##### ***8421 84210 Systems and software consulting services***

*Services of a general nature prior to the development of data processing systems and applications. It might be management services, project planning services, etc.*

##### ***8422 84220 Systems analysis services***

***Analysis services include analysis of the clients' needs, defining functional specification, and setting up the team. Also involved are project management, technical coordination and integration and definition of the systems architecture.***

##### ***8423 84230 Systems design services***

*Design services include technical solutions, with respect to methodology, quality-assurance, choice of equipment software packages or new technologies, etc.*

#### **8424 84240 Programming services**

*Programming services include the implementation phase, i.e. writing and debugging programmes, conducting tests, and editing documentation.*

#### **8425 84250 Systems maintenance services**

*Maintenance services include consulting and technical assistance services of software products in use, rewriting or changing existing programmes or systems, and maintaining up-to-date software documentation and manuals. Also included are specialist work, e.g. conversions.*

### **843 Data processing services**

#### **8431 84310 Input preparation services**

*Data recording services such as key punching, optical scanning or other methods for data entry.*

#### **8432 84320 Data-processing and tabulation services**

*Services such as data processing and tabulation services, computer calculating services, and rental services of computer time.*

#### **8433 84330 Time-sharing services**

*This seems to be the same type of services as 84320. Computer time only is bought; if it is bought from the customer's premises, telecommunications services are also bought. Data processing or tabulation services may also be bought from a service bureau. In both cases the services might be time sharing processed. Thus, there is no clear distinction between 84320 and 84330.*

#### **8439 84390 Other data processing services**

*Services which manage the full operations of a customer's facilities under contract: computer-room environmental quality control services; management services of in-place computer equipment combinations; and management services of computer work flows and distributions.*

### **844 Database services**

#### **8440 84400 Database services**

*All services provided from primarily structured databases through a communication network.*

*Exclusions: Data and message transmission services (e.g. network operation services, value-added network services) are classified in class 7523 (Data and message transmission services). Documentation services consisting in information retrieval from databases are classified in subclass 96311 (Library services).*

### **845 Maintenance and repair services of office machinery and equipment including computers**

*8450 84500 Maintenance and repair services of office machinery and equipment including computers*

*Repair and maintenance services of office machinery, computers and related equipment.*

#### **849 Other computer services**

#### **8491 84910 Data preparation services**

*Data preparation services for clients not involving data processing services.*

**8499 84990 Other computer services n.e.c.**

*Other computer related services, not elsewhere classified, e.g. training services for staff of clients, and other professional computer services.*

(emphasis added)

**6. WHY THE SERVICES PROVIDED BY M/s. VMWARE SOFTWARE INDIA PVT. LTD. (for which they have claimed SEIS benefits) APPEAR**

- (a). NEITHER COVERED UNDER “MANAGEMENT CONSULTING SERVICES
- (b). NOR COVERED UNDER EXPORT OF SERVICES”:-

**6(a) Not covered under “Management Consulting Services:**

The definition of “Management consulting services” as under CPC division-865 is given below. **([RUD NO: - 07],**

*8650 Management consulting services*

**86501 General management consulting services**

*Advisory, guidance and operational assistance services concerning business policy and strategy and the overall planning, structuring and control of an organization. More specifically, general management consulting assignments may deal with one or a combination of the following: policy formulation, determination of the organizational structure (decision-making system) that will most effectively meet the objectives of the organization, legal organization, strategic business plans, defining a management information system, development of management reports and controls, business turnaround plans, management audits, development of profit improvement programmes and other matters which are of particular interest to the higher management of an organization.*

**86502 Financial management consulting services (except business tax)**

*Advisory, guidance and operational assistance services concerning decision areas which are financial in nature, such as working capital and liquidity management, determination of an appropriate capital structure, analysis of capital investment proposals, development of accounting systems and budgetary controls, business valuations prior to mergers and/or acquisitions, etc., but excluding advisory services on short-term portfolio management which are normally offered by financial intermediaries.*

**86503 Marketing management consulting services.**

*Advisory, guidance and operational assistance services concerning the marketing strategy and marketing operation of an organization. Marketing consulting assignments may deal with one or a combination of the following: analysis and formulation of a marketing strategy, formulation of customer service and pricing policies, sales management and staff training,*

*organization of distribution channels (sell to wholesalers or directly to retailers, direct mail, franchise, etc.), organization of the distribution process, package design and other matters related to the marketing strategy and operations of an organization.*

#### **86504 Human resources management consulting services**

*Advisory, guidance and operational assistance services concerning the human resources management of an organization. Human resources consulting assignments may deal with one or a combination of the following: audit of the personnel function, development of a human resource policy, human resource planning, recruitment procedures, motivation and remuneration strategies, human resource development, labour-management relations, absenteeism control, performance appraisal and other matters related to the personnel management function of an organization.*

#### **86505 Production management consulting services**

*Advisory, guidance and operational assistance services concerning methods for improving productivity, reducing production costs and improving the quality of production. Production consulting assignments may deal with one or a combination of the following: effective utilization of materials in the production process, inventory management and control, quality control standards, time and motion studies, job and work methods, performance standards, safety standards, office management, planning and design and other matters related to production management, but excluding advisory services and design for plant layout and industrial processes which are normally offered by consulting engineering establishments.*

#### **86506 Public relations services**

*Advisory, guidance and operational assistance services concerning methods to improve the image and relations of an organization or individual with the general public, government, voters, shareholders and others.*

#### **86509 Other management consulting services**

*Advisory, guidance and operational assistance services concerning other matters. These services include industrial development consulting services, tourism development consulting services, etc.*

(emphasis added)

On perusal of the above mentioned definition of Management Consulting Services, it appears that it is a combination of services i.e. advisory, guidance and operational Assistance services concerning the marketing strategy and marketing operations, whereas as per the Marketing Services Agreement executed between M/s. VSIPL, and M/s. VMware, Ireland, M/s. VSIPL provides only operational assistance to M/s. VMware, Ireland, by way of attending queries to know the customers need and accordingly imparting knowledge to its existing and potential customers and liasioning between client and the distributors, in the territory of India.

Further, Shri Bosco Noronha, Director of M/s. VMware software India Pvt Ltd., who have filed the SEIS application before, DGFT stated in his statement dated 14.05.2019 & 18.02.2020 that their company did not provide Marketing

Management Consultancy to M/s. VMware, Ireland; they have declared their services in SEIS application as CPC- 865- Marketing Management Consultancy, as there was not any specific division in the CPC for the services provided by M/s. VSIPL. He further stated that they did not provide combination of services i.e. advisory, guidance and operational Assistance services concerning the marketing strategy and marketing operations to M/s. VMware, Ireland, Instead VMware, Ireland instructed/directed M/s. VSIPL in relation to the services provided to the Indian customer of VMware, Ireland in the territory of India on behalf of VMware, Ireland.

In view of the above, it appears that the services provided by M/s. VSIPL did not falls under CPC division-865 i.e. Management Consultancy Services.

#### **6(b) Not covered under Export Of Services:**

As per the marketing Service Agreement executed between M/s. VSIPL (subsidiary), and M/s. VMware, Ireland (parent) **[RUD NO: - 08]**, On the directions/instructions of M/s. VMware, Ireland, M/s. VSIPL provided services to the existing and potential customers of M/s. VMware, Ireland in the Indian territory on behalf of M/s. VMware, Ireland, which implies that M/s. VMware, Ireland (parent) has provided services to its customers in Indian territory through its subsidiary i.e. M/s. VMware Software India Pvt. Ltd.

U/S 2 (Definition)- 2(e) (II)(i) of Foreign Trade (Development) and Regulation Act., 1992 (FTD & R), there are 04 ( A, B, C and D) modes of import in relation to supply of services or technology in India. Further, as per mode (C) the supply of service “by a service supplier of another country, through its commercial presence in India” is considered as import in India.


As per the World Trade Organization, GATS training module: Chapter-1 (Basic Purpose And Concepts) downloaded from [www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s3p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm) [WTO | Services - CBT - Basic Purpose and Concepts - Definition of Services Trade and Modes of Supply - Page 1](#) **[RUD NO: - 09]**, there are 04 modes of supply of service. As per mode ‘C’, the supply of service, “by a service supplier of one member, through commercial presence, in the territory of any other member” is said to be supply through “Mode 3- Commercial presence”. Further, as per the examples of the four modes of supply (from the prospective of an “importing” country A), the supply of services through “Mode 3- Commercial Presence” defined as “the service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company.

Considering the various facts and definition mentioned above, the supply of services to the customers of M/s. VMware, Ireland in the territory of India through its subsidiary in India i.e. M/s. VMware Software India Pvt. Ltd., appears to be falls under import of service in India as per FTD & R and under “Mode 3- Commercial presence” of WTO GATS.

Further Shri Bosco Noronha, Director, M/s. VSIPL in his statement dated 18.02.2020 confirmed that their service falls u/s 2(e) (II)(i) of Foreign Trade (Development) and Regulation Act., 1992 (FTD & R), which is supply of service in India (import).

#### **07. WHY THE SERVICES EXPORTED BY M/S. VSIPL, BANGALORE APPEAR NOT ELIGIBLE FOR SEIS BENEFITS ON THE BASIS OF INDEPENDENT DOCUMENTARY EVIDENCES:**

**7.1** On perusal of the Service Tax Returns for the year 2015-16 to 2017-18 – **[RUD NO: - 10]** of M/s. VSIPL, they have shown export only in Business Auxiliary Service and Information Technology Software services. M/s. VSIPL have obtained registration under Business Auxiliary Service (zzb) and Information Technology Software services (zzzze) and have shown exports only under these services in their Service Tax returns. Respective section for Business Auxiliary Service (zzb) and Information Technology Software services under Finance Act, 1994 65(105) are 65(105) (zzb) and 65(105) (zzzze) respectively, whereas, erstwhile section under Finance Act, 1994 for Management or Business Consultancy is 65(105) (r). Further, the said party neither taken service tax registration (ST-2) under Management Consultancy Services nor they have declared any of their supply of service as Management Consultancy Services in their service tax returns (ST-3) for the period for which they have claimed SEIS benefits.

 <b>CENTRAL BOARD OF EXCISE AND CUSTOMS</b> Ministry of Finance - Government of India <b>FORM ST-2</b>			
<p>Shri/Ms. VMWARE SOFTWARE INDIA PRIVATE LIMITED, 1,2,3,4&amp;9TH FLOOR, 165/2, BLOCK I, KALYANI MAGNUM TOWER, DORAISANIPALYA, BANNERGHATA ROAD, IIM POST, BANGALORE URBAN, KARNATAKA, 560076 having undertaken to comply with the conditions prescribed in Chapter V of the Finance Act, 1994 read with the Service Tax Rules, 1994, and any orders issued thereunder is hereby certified to have been registered with the Central Excise Department. The Service Tax Code and other details are mentioned hereunder.</p>			
<b>Name :</b>	VMWARE SOFTWARE INDIA PRIVATE LIMITED		
<b>Address :</b>	1,2,3,4&9TH FLOOR, 165/2, BLOCK I, KALYANI MAGNUM TOWER, DORAISANIPALYA, BANNERGHATA ROAD, IIM POST, BANGALORE URBAN, KARNATAKA, 560076		
<b>PAN No :</b>	AACCV4573E		
<b>Name as in PAN :</b>	VMWARE SOFTWARE INDIA PRIVATE LIMITED		
<b>Nature of registration :</b>	Centralized Registration for more than one premises		
<b>Service Tax Code(Registration Number) :</b>	AACCV4573EST002		
<b>Taxable services :</b>	BUSINESS AUXILIARY SERVICES, INFORMATION TECHNOLOGY SOFTWARE SERVICE		
<b>ADDRESS OF BUSINESS PREMISES</b>			
<b>Name Of Premises/Building :</b>	KALYANI MAGNUM TOWER	<b>Flat / Door / Block No :</b>	1,2,3,4 & 9TH FLOOR, 165/2
<b>Road / Street / Lane :</b>	BLOCK I	<b>Village / Area / Lane :</b>	DORAISANIPALYA
<b>Block / Taluk / Sub-Division / Town :</b>	BANNERGHATA ROAD	<b>Post Office :</b>	IIM POST
<b>City / District :</b>	BANGALORE URBAN	<b>State / Union Territory :</b>	KARNATAKA
<b>PIN :</b>	560076	<b>Phone Number-1 :</b>	08040646000
<b>Phone Number-2 :</b>		<b>Fax Number-1 :</b>	08040646070
<b>Fax Number 2 :</b>		<b>Email Address :</b>	vkanniap-pan@vmware.com
<b>Premises Code :</b>	SA0101A001		
Address of all the premises from where taxable services are provided or intended to be provided			
<b>Name Of Premises/ Building :</b>	VMWARE SOFTWARE INDIA PVT LTD	<b>Flat / Door / Block No:</b>	TATA COMMUNICATIONS
<b>Road / Street / Lane :</b>	NO. 18, 11&20,	<b>Village / Area / Lane :</b>	EPIP LAYOUT
<b>Block / Taluk / Sub-Division / Town :</b>	KAJIB	<b>Post Office :</b>	WHITEFIELD
<b>City / District :</b>	BANGALORE	<b>State / Union Territory :</b>	KARNATAKA
<b>PIN :</b>	560066	<b>Phone Number-1 :</b>	08040646000
<b>Phone Number-2 :</b>		<b>Fax Number-1 :</b>	
<b>Fax Number-2 :</b>		<b>Email Address :</b>	vkanniap-pan@vmware.com
<b>Premises Code :</b>	SA0101A010		
<b>Taxable services :</b>	BUSINESS AUXILIARY SERVICES, INFORMATION TECHNOLOGY SOFTWARE SERVICE		
<b>Name Of Premises/ Building :</b>	VMWARE SOFTWARE INDIA PVT LTD	<b>Flat / Door / Block No:</b>	LEVEL 5, WESTERN CENTRE 3
<b>Road / Street / Lane :</b>		<b>Village / Area / Lane :</b>	DP ROAD



Description of Taxable Services	Business auxiliary service				(2016)			
Taxable Service for which Tax is being Business auxiliary service paid								
A10	Assessee is liable to pay Service Tax on this taxable service as							
	A10.1 A Service Provider under Section 68(1)	Yes	A10.2 A Service Receiver under Section 68(2)	No				
	A10.3 A Service Provider under partial reverse charge under proviso to Section 68(2)	No	A10.4 A Service Receiver under partial reverse charge under proviso to Section 68(2)	No				
	A10.5 If covered by A10.3 above, then the percentage of Service Tax Payable as Provider of Service	0	A10.6 If covered by A10.4 above, then the percentage of Service Tax Payable as Recipient of Service	0				
A11 EXEMPTIONS								
A11.1	Has the assessee availed benefit of any exemption Notification ('Y'/'N')							N
A11.2	If reply to A11.1 is 'Y', Please furnish Notification No. and Sl. No. in the Notification under which such exemption is availed							
Sl. No.	Notification Number							Sl. No.
1								
A12 ABATEMENTS								
A12.1	Has any abatement from the value of services been claimed ('Y'/'N')							N
A12.2	If reply to A12.1 is 'Y', Please furnish Notification No. and Sl. No. in the Notification under which such abatement is availed							
Sl. No.	Notification Number							Sl. No.
1								
A13 PROVISIONAL ASSESSMENT								
A13.1	Whether provisionally assessed ('Y'/'N')							N
A13.2	If reply to A13.1 is 'Y', please furnish Provisional Assessment Order No. and Date							
	Provisional Assessment Order No.							Date
PART - B	VALUE OF TAXABLE SERVICE AND SERVICE TAX PAYABLE							
PART - B1	FOR SERVICE PROVIDER							
Sl. No.	Month	Apr	May	June	Jul	Aug	Sep	Total
B1.1	Gross Amount (excluding amounts received in advance, amounts taxable on receipt basis, for which bills/invoices/challans or any other documents may not have been issued) for which bills/invoices/challans or any other documents are issued relating to service provided or to be provided (including export of service and exempted service)	5909498 27	9117276 73	7142518 31	7691496 87	5464049 15	5746979 97	4707181 900
B1.2	Amount received in advance for services for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0
B1.3	Amount taxable on receipt basis under third proviso to Rule 6(1) of Service Tax Rules, 1994 for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0
B1.4	Amount taxable for services provided for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0

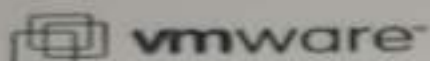
Page 7 of 36

**7.2** As per the Marketing Service Agreement executed between M/s. VSIPL, Bangalore (subsidiary) and M/s. VMware, Ireland (parent), on the directions/ instructions of the parent company and on behalf of the parent company, the subsidiary company in India i.e. M/s. VSIPL has provided various services to the potential/existing customers of the parent company in the territory of India.

- Therefore, the services were rendered by M/s. VMware, Ireland to its customers in the Indian territory, through its subsidiary in India i.e. M/s. VSIPL, which appears to be mode-3 of supply of service of World Trade Organization, GATS training module i.e. **Commercial presence**—“by a service supplier of one member, through the commercial presence in the territory of any other member”. Further, as per the World Trade Organization, GATS training module, Commercial Presence” defined as “a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company.
- Considering the supply of services as prescribed u/s “2 (e) (II) (i) (C)” of Foreign Trade (Development) and Regulation Act., 1992 - “by a service supplier of another country, through its commercial presence in India”, the said supply of services by M/s. VMware, Ireland through M/s. VSIPL, appears to be fall under import of services in India. The screen shot of the Marketing Service Agreement, respective section of Foreign Trade (Development) and Regulation Act., 1992 and World Trade Organization, GATS training module have been pasted below for ready reference.

GATS TRAINING MODULE   CHAPTER 1	
Basic Purpose and Concepts	
Click the + to open an item.	
Introduction	
Basic Purpose and Concepts	[-]
1.1 Historical Background	
1.2 Basic Purpose	
1.3 Definition of Services Trade and Modes of Supply	
1.4 Scope and Application	
1.5 General Transparency and Other "Good Governance" Obligations	
1.6 Most-Favoured-Nation Treatment	
1.7 Conditional Granting of Market Access and National Treatment	
1.8 Test Questions	
Main Building Blocks: Agreement, Annexes, and Schedules	[+]
A Closer Look at Domestic Regulation	[+]
How the GATS is Administered	[+]
Role and Responsibilities of Member Governments	[+]
The Challenges Ahead	[+]
Preparing Requests and Offers	[+]
Misconceptions about the GATS	[+]
Keeping Up to Date	
Test Summary	
Annexes	[+]
1.3 Definition of Services Trade and Modes of Supply	
The definition of services trade under the GATS is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to <a href="#">Article 1.2</a> , the GATS covers services supplied	
a. from the territory of one Member into the territory of any other Member (Mode 1 – Cross border trade);	
b. in the territory of one Member to the service consumer of any other Member (Mode 2 – Consumption abroad);	
c. by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 – Commercial presence); and	
d. by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4 – Presence of natural persons).	
<a href="#">Box A</a> gives examples of the four modes of supply.	
The above definition is significantly broader than the balance of payments (BOP) concept of services trade. While the BOP focuses on residency rather than nationality – i.e. a service is being exported if it is traded between residents and non-residents – certain transactions falling under the GATS, in particular in the case of mode 3, typically involve only residents of the country concerned.	
Commercial linkages may exist among all four modes of supply. For example, a foreign company established under mode 3 in country A may employ nationals from country B (mode 4) to export services cross-border into countries B, C etc. Similarly, business visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3).	
<b>Box A: Examples of the four Modes of Supply (from the perspective of an "importing" country A)</b>	
<b>Mode 1: Cross-border.</b> A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.	
<b>Mode 2: Consumption abroad</b> Nationals of A have moved abroad as tourists, students, or patients to consume the respective services.	
<b>Mode 3: Commercial presence</b> The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and – controlled company (bank, hotel group, construction company, etc.).	
<b>Mode 4: Movement of natural persons</b> A foreign national provides a service within A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g., consultancy firm, hospital, construction company).	





## MARKETING SERVICES AGREEMENT

This Services Agreement ("Agreement") is entered into effective as of November 1, 2007 by and between VMware International Limited, a private company with limited liability, organized under the laws of Ireland, with its principal place of activities at Ballincollig Industrial Estate, Ballincollig, County Cork, Ireland ("International") and VMware Software India Private Limited, Unit 706, "A" Wing, Carlton Tower No. 1, Airport Road, Bangalore 560 008, Karnataka, India ("Provider").

- a) WHEREAS, International is primarily engaged in the business of distributing certain International software and associated products ("Products") to customers in the Territory (as defined in Article 2);
- b) WHEREAS, Provider is engaged in the business of promoting and marketing software products as well as providing support for software products in the Territory;
- c) WHEREAS, Provider is capable of providing various marketing and other support services to International as hereinafter set forth;
- d) WHEREAS, International desires to engage Provider to promote and market the Products and to support the Products pursuant to the terms and conditions herein set forth; and
- e) WHEREAS, Provider agrees to promote, market and support the Products in accordance with the terms and conditions herein set forth;

NOW THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows.

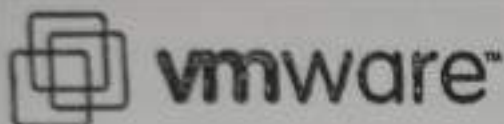
### 1) Provision of Services

During the term of this Agreement, Provider shall, at International's request and in accordance with International's instructions, assist International by performing the following services for or on behalf of International ("Services");

- a) Provide general and administrative, marketing and promotional services;
- b) Assist in developing and expanding the customer base in the Territory for the Products
- c) Act as a liaison between customers and agents/distributors;
- d) Maintain appropriate contact with existing and potential customers, including attending to their enquiries on International's range of products and services.
- e) Provide periodic feedback to International in the form of reports or statistics on local conditions and customer needs.
- f) Any other services that International reasonably requests as may be agreed by Provider.

### 2) Territory

Provider shall provide the Services in the Territory identified in Exhibit A and other areas as agreed to from time to time.



## EXHIBIT A

### TERRITORY

Territory shall mean and include India and other places as agreed between the parties from time to time.

# THE FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992

ACT No. 22 OF 1992

[7th August, 1992.]

An Act to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Forty-third Year of the Republic of India as follows:—

## CHAPTER I

### PRELIMINARY

**1. Short title and commencement.**—(1) This Act may be called the Foreign Trade (Development and Regulation) Act, 1992.

(2) Sections 11 to 14 shall come into force at once and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of June, 1992.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) “Adjudicating Authority” means the authority specified in, or under, section 13;

(b) “Appellate Authority” means the authority specified in, or under, sub-section (1) of section 15;

(c) “conveyance” means any vehicle, vessel, aircraft or any other means of transport including any animal;

(d) “Director General” means the Director General of Foreign Trade appointed under section 6;

<sup>1</sup>[(e) “import” and “export” means,—

(I) in relation to goods, bringing into, or taking out of, India any goods by land, sea or air;

(II) in relation to services or technology,—

(i) supplying, services or technology—

(A) from the territory of another country into the territory of India;

(B) in the territory of another country to an Indian service consumer;

(C) by a service supplier of another country, through commercial presence in India;

(D) by a service supplier of another country, through presence of their natural persons in India;

(ii) supplying, services or technology—

(A) from India into the territory of any other country;

(B) in India to the service consumer of any other country;

(C) by a service supplier of India, through commercial presence in the territory of any other country;

**7.3** During the enquiry it came to notice that the DGGI/ DGCEI, Bangalore also served periodically Show Cause Notice to M/s. VSIPL, Bangalore denying their claim of export of the said services i.e. Business Auxiliary” against which they have availed SEIS benefits. DGGI/ DGCEI has alleged that as per the provision of Service Tax/GST the place of provision in respect of the services rendered by M/s. VMware Software India Pvt. Ltd., is India, accordingly, the services provided by M/s. VSIPL, which they have claimed as ‘Marketing Services’, does not qualify as “Export of Services”. In its response, M/s. VSIPL has settled the said case in 2019-2020 by way of availing benefits of “SabkaVishwas (Legacy Dispute Resolution) Scheme Rules, 2019” launched by Govt. of India, The discharge certificate issued in this regard has been reproduced below:

**Form No. SVLDRS-4** *[See rule (i)]*  
 (Discharge Certificate for Full and Final Settlement of Tax Dues under Section 127 of the Finance (No. 2) Act, 2019 read with Rule 3 of the Sabka Vishwas (Legacy Scheme, 2019)  
**SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME RULES, 2019**

Declaration No :  SVLDRS-4 No :  Commissionerate/DGO, Delhi :  Zone/DGO, Delhi :

Whereas  (Name and address of the declarant) having registration number  had made a declaration under Section 125 of the Finance (No. 2) Act, 2019;

And whereas the designated committee by issue of a  under Section 127 of the Finance (No. 2) Act, 2019 determined the amount of Rs.  (Rupees) payable by the declarant in accordance with the provisions of the Scheme towards full and final settlement of tax dues as per details given below:

S.No.	Category	Issue Involved	Time Period		Tax Dues		Tax Relief	Pre-Deposit/any other deposit of duty	Estimated Amount Payable	
			From Period	To Period	Name	Amount			Name	Amount
1	Arrears		01/07/2012	01/06/2017	Business Auxiliary Service - 00445225	74,81,80,842.00	8,08,76,235.85	64,39,92,748.00	Business Auxiliary Service - 00445225	12,13,12,858.20
<b>GRAND TOTAL</b>						<b>74,81,80,842.00</b>	<b>8,08,76,235.85</b>	<b>64,39,92,748.00</b>		<b>12,13,12,858.20</b>

Amount Payable (in Words) : Twelve Crores Thirteen Lakhs Twelve Thousand Eight Hundred and Fifty Eight rupees and Two paise only

And whereas the declarant has paid Rs.  (Rupees) being the amount payable determined by the designated committee under section 126 of the Finance (No. 2) Act, 2019;

And whereas the declarant had filed an appeal before the  (mention the name of the Commissioner (Appeal) or the CESTAT (Branch name) against any order in respect of the tax dues and whereas the said appeal is deemed to be withdrawn in accordance with the provisions contained in sub-section (5) of section 127 of the Finance (No. 2) Act, 2019;

**OR**

And whereas the declarant had filed a writ petition/appeal/reference before  (mention the name of the High Court/High Court or the Supreme Court against any order in respect of the tax dues and the declarant has withdrawn the said writ petition/appeal/reference and furnished proof of such withdrawal in accordance with the provisions contained in sub-section (7) of section 127 of the Finance (No. 2) Act, 2019;

Now, therefore, in exercise of the powers conferred by sub-section (5) of section 127 of the Finance (No. 2) Act, 2019, the designated committee hereby issues this Discharge Certificate to the said declarant:-

(a) Certifying the receipt of payment from the declarant towards full and final settlement of the tax dues determined in the Statement No.  dated  in accordance with the Declaration no.  dated  made by the aforesaid declarant;

(b) Discharging the declarant from the payment of any further duty, interest or penalty with respect to the aforesaid matter;

(c) Granting immunity, subject to the provisions contained in the Scheme, from instituting any proceeding for prosecution for any offence under the Chapter V of the Finance Act 1994 or from the imposition of penalty under the said enactment, in respect of the aforesaid matter; and

(d) The provisions of sections 129 and 131 of the Finance (No. 2) Act 2019 will be applicable with respect to this Discharge Certificate

**Members of the Designated Committee**

S.No.	SSO ID	Name	Description
1	10033794	PARRYVALLAL T	Joint Commissioner
2	10012890	ARI K NIGAM	Commissioner

Remarks

Place :

Date :

**7.4** As per the Annual Financial statement **[RUD NO: - 11]** of the company for the period they have availed SEIS benefits, they have declared their services against which they have claimed SEIS benefits, as “Marketing Services” and not “Management Consultancy Services”.

**7.5** Sample of Export Invoices **[RUD NO: - 12]**, the description is shown as “Cost plus for Marketing Services” and not “Management Consultancy Services”.

8. Therefore, in view of the foregoing paras, it appears that the services provided by M/s. VSIPL, Bangalore are not eligible for availing SEIS benefits and further appears to be fall under Division-84 of UN Central Product Classification (CPC) Code. The list of evidences is summarised as under:

- 1) As per the marketing Service Agreement executed between M/s. VSIPL (subsidiary), and M/s. VMware, Ireland (parent) the services rendered are

not management Consultancy services, but computer /software consultancy services.

- 2) Services registered in the Service Tax Registration Certificate does not mention “Management Consultancy Service;[**RUD NO: - 13**]
- 3) ST-3 data (Service Tax Returns for the period for which SEIS benefits availed shows export only in Information Technology Software Services and Business Auxiliary Services and no export of Management Consultancy Service were shown, against which SEIS benefits availed by M/s. VSIPL, Bangalore.
- 4) Considering the definition of Commercial presence described in World Trade Organization, GATS training module and definition of import of service in India, described in Foreign Trade (Development) and Regulation Act., 1992, the service against which SEIS benefits were claimed falls and import of services in India and not export of services.
- 5) Sample of Export Invoices, the description is shown as ”Cost plus for Marketing Services” and not “Management Consultancy Services”.
- 6) In his statements dated 14.05.2019 & 18.02.2020, Shri Bosco Noronha, Director of M/s. VMware software India Pvt Ltd., who had filed the SEIS application before DGFT stated that their company did not provide Marketing Management Consultancy to M/s. VMware, Ireland; they have declared their services in SEIS application as CPC- 865- Marketing Management Consultancy, as there was no specific division in the CPC for the services provided by M/s. VSIPL. He, further stated that they did not provide combination of services i.e. advisory, guidance and operational Assistance services concerning the marketing strategy and marketing operations to M/s. VMware, Ireland, Instead VMware, Ireland instructed/directed M/s. VSIPL in relation to the services provided by M/s. VSIPL to the Indian customer of VMware, Ireland, on its behalf, in the territory of India.
- 7) Shri Dev Kumar Prabhu, Director (Marketing) of M/s. VMware software India Pvt Ltd. stated in his statement dated 13.05.2019 that through the Marketing Services provided by their company, they impart knowledge about their software products to the customers of M/s. VMware, Ireland, in India, so that the customer better understand the functionality of their software technology & products that could be like servers, storage, virtualization, networking etc; which seems to be covered under CPC code 841 to 849.

#### **EXPORTS INCENTIVES UNDER DUTY CREDIT SCRIPS – SERVICES EXPORT FROM INDIA SCHEME (SEIS):-**

**09.** In terms of Chapter 3 of the Foreign Trade Policy (FTP) 2015-2020 exporters are issued duty credit Scrips under two schemes for exports of Merchandise and Services namely (i) Merchandise Exports from India Scheme (MEIS)& (ii) Service Exports from India Scheme (**SEIS**) with an objective to provide rewards to exporters to offset infrastructural inefficiencies and



associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India’s export competitiveness.

**10.** Service Exports from India Scheme (SEIS) has been introduced by the Government of India w.e.f. 01.04.2015 under the Foreign Trade Policy 2015-20 (FTP 2015-2020) replacing the erstwhile ‘Served From India Scheme (SFIS) under the FTP 2009-15. As per FTP 2015-2020, Service Providers of Notified Services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. Objective of Service Exports from India Scheme (SEIS) is to encourage and maximize export of notified Services from India. Only Services rendered in the manner as per Para 9.51(i) and Para 9.51(ii) of this policy shall be eligible for SEIS benefit. The notified services and rates of rewards are listed in Appendix 3D. SEIS is a reward computed based on the ‘net’ free foreign exchange realized and the percentage of this reward is specified in Appendix 3D of the FTP 2015-20. Benefit allowed under this scheme is 3% to 7% (as amended from time to time) as per nature of services supplied and the Scrips can be used for the payment of Custom duties on imports, payment of excise on domestic procurement, including capital goods and payment of service tax. The duty Scrips are freely transferable. The SEIS entitlements as per Public Notice No. 03 dated 01/04/2015 (as amended by DGFT) **[RUD No. – 14]** issued by the Directorate General of Foreign Trade (DGFT), Ministry of Commerce on all the list of services are as under:

**Annexure to Appendix 3D**

**Note 1:** *The services and rates of rewards notified against them shall be applicable for services export made between 1-4-2015 to 30-09-2015 only. The list of services/rate is subject to review with effect from 1-10-2015.*

**Note 2:** *The rate of reward for eligible services is subject to conditions as specified in FTP and HBP.*

**Note 3:** *For Educational Services, SEIS reward shall not be available on Capitation Fee.*

**Note 4:** *Under Maritime Transport Services marked with \*[9A (a), (b) and (c)], the reward shall be limited to Operations from India by Indian Flag Carriers only*

**List of Services**

S.No.	SECTORS	Central Product Classification (CPC) Code	Admissible rate in % (on Net Foreign Exchange earnings) [As amended by DGFT]
<b>1</b>	<b>BUSINESS SERVICES</b>		
<b>A.</b>	<b><u>Professional services</u></b>		
a.	Legal services	861	5/ 7
b.	Accounting, auditing and bookkeeping services	862	5/ 7
c.	Taxation services	863	5/ 7

d.	Architectural services	8671	5/7
<b>e.</b>	<b>Engineering services</b>	<b>8672</b>	<b>5/7</b>
f.	Integrated engineering services	8673	5/7
g.	Urban planning and landscape architectural services	8674	5/7
h.	Medical and dental services	9312	5/7
i.	Veterinary services	932	5/7
j.	Services provided by midwives, nurses, physiotherapists and paramedical personnel	93191	5/7
<b>B</b>	<b>Research and development services</b>		
a.	R&D services on natural sciences	851	5/7
b.	R&D services on social sciences and humanities	852	5/7
c.	Interdisciplinary R&D services	853	5/7
<b>C.</b>	<b>Rental/Leasing services without operators</b>		
a.	Relating to ships	83103	5/7
b.	Relating to aircraft	83104	5/7
c.	Relating to other transport equipment	83101 83102 83105	5/7
d.	Relating to other machinery	83106- 83109	5/7
<b>D</b>	<b>Other business services</b>		
a.	Advertising services	871	3/5
b.	Market research and public opinion polling services	864	3/5
c.	Management consulting service	865	3/5
d.	Services related to management consulting	866	3/5
<b>e.</b>	<b>Technical testing and analysis services</b>	<b>8676</b>	<b>3/5</b>
f.	Services incidental to agricultural, hunting and forestry	881	3/5
g.	Services incidental to fishing	882	3/5
h.	Services incidental to mining	883 5115	3/5
i.	Services incidental to manufacturing	884 885	3/5
j.	Services incidental to energy distribution	887	3/5
k.	Placement and supply services of personnel	872	3/5
l.	Investigation and security	873	3/5
m.	Related scientific and technical consulting services	8675	3/5
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633 8861-8866	3/5
o.	Building – cleaning services	874	3/5
p.	Photographic Services	875	3/5
q.	Packaging services	876	3/5
r.	Printing, publishing	88442	3/5
s.	Convention services	87909	3/5
<b>2</b>	<b>COMMUNICATION SERVICES</b>		
	<b>Audiovisual services</b>		
a.	Motion picture and video tape production and	9611	5/7

	<i>distribution service</i>		
<i>b.</i>	<i>Motion picture projection service</i>	<i>9612</i>	<i>5/7</i>
<i>c.</i>	<i>Radio and television services</i>	<i>9613</i>	<i>5/7</i>
<i>d.</i>	<i>Radio and television transmission services</i>	<i>7524</i>	<i>5/7</i>
<i>e.</i>	<i>Sound recording</i>	<i>n.a.</i>	<i>5/7</i>
<b>3</b>	<b>CONSTRUCTION AND RELATED ENGINEERING SERVICES</b>		
<i>A.</i>	<i>General Construction work for building</i>	<i>512</i>	<i>5/7</i>
<i>B.</i>	<i>General Construction work for Civil Engineering</i>	<i>513</i>	<i>5/7</i>
<i>C.</i>	<i>Installation and assembly work</i>	<i>514</i> <i>516</i>	<i>5/7</i>
<i>D.</i>	<i>Building completion and finishing work</i>	<i>516</i>	<i>5/7</i>
<b>4.</b>	<b>EDUCATIONAL SERVICES (Please refer Note-3)</b>		
<i>A.</i>	<i>Primary education service</i>	<i>921</i>	<i>5/7</i>
<i>B.</i>	<i>Secondary education services</i>	<i>922</i>	<i>5/7</i>
<i>C.</i>	<i>Higher education services</i>	<i>923</i>	<i>5/7</i>
<i>D.</i>	<i>Adult education</i>	<i>924</i>	<i>5/7</i>
<b>5</b>	<b>ENVIRONMENTAL SERVICES</b>		
<i>A.</i>	<i>Sewage services</i>	<i>9401</i>	<i>5/7</i>
<i>B.</i>	<i>Refuse disposal services</i>	<i>9402</i>	<i>5/7</i>
<i>C.</i>	<i>Sanitation and similar services</i>	<i>9403</i>	<i>5/7</i>
<b>6</b>	<b>HEALTH-RELATED AND SOCIAL SERVICES</b>		
<i>A.</i>	<i>Hospital services</i>	<i>9311</i>	<i>5/7</i>
<b>7</b>	<b>TOURISM AND TRAVEL-RELATED SERVICES</b>		
<i>A.</i>	<i>Hotels and Restaurants (including catering)</i>		
<i>a.</i>	<i>Hotel</i>	<i>641-643</i>	<i>3/5</i>
<i>b.</i>	<i>Restaurants (including catering)</i>	<i>641-643</i>	<i>3/5</i>
<i>B.</i>	<i>Travel agencies and tour operators services</i>	<i>7471</i>	<i>5/7</i>
<i>C</i>	<i>Tourist guides services</i>	<i>7472</i>	<i>5/7</i>
<b>8.</b>	<b>RECREATIONAL CULTURAL AND SPORTING SERVICES (other than audiovisual services)</b>		
<i>A.</i>	<i>Entertainment services (including theatre, live bands and circus services)</i>	<i>9619</i>	<i>5/7</i>
<i>B.</i>	<i>News agency services</i>	<i>962</i>	<i>5/7</i>
<i>C.</i>	<i>Libraries archives, museums and other cultural services</i>	<i>963</i>	<i>5/7</i>
<i>D.</i>	<i>Sporting and other recreational services</i>	<i>964</i>	<i>5/7</i>
<b>9</b>	<b>TRANSPORT SERVICE (Please refer Note 4)</b>		
<i>A.</i>	<b><u>Maritime Transport Services</u></b>		
<i>a.</i>	<i>Passenger transportation*</i>	<i>7211</i>	<i>5/7</i>
<i>b.</i>	<i>Freight transportation*</i>	<i>7212</i>	<i>5/7</i>
<i>c.</i>	<i>Rental of vessels with crew*</i>	<i>7213</i>	<i>5/7</i>
<i>d.</i>	<i>Maintenance and repair of vessels</i>	<i>8868</i>	<i>5/7</i>
<i>e.</i>	<i>Pushing and towing services</i>	<i>7214</i>	<i>5/7</i>
<i>f.</i>	<i>Supporting services for maritime transport</i>	<i>745</i>	<i>5/7</i>
<b>B.</b>	<b><u>Air Transport services</u></b>		
<i>a.</i>	<i>Rental of aircraft with crew</i>	<i>734</i>	<i>5/7</i>

b.	Maintenance and repair of aircraft	8868	5/7
c.	Airport Operations and ground handling		5/7
<b>C</b>	<b><u>Road Transport Services</u></b>		
a.	Passenger transportation	7121 7122	5/7
b.	Freight transportation	7123	5/7
c.	Rental of Commercial vehicles with operator	7124	5/7
d.	Maintenance and repair of road transport equipment	6112 8867	5/7
e.	Supporting services for road transport services	744	
<b>D</b>	<b><u>Services Auxiliary To All Modes of Transport</u></b>		
a.	Cargo handling services	741	5/7
b.	Storage and warehousing services	742	5/7
c.	Freight transport agency services	748	5/7

(emphasis added)

**11.** Further, DGFT vide Trade Notice No. 04/2018 dated 25.04.2018 [RUD No. – 15] has noted that “**the Appendix 3D does not mention any service as IT/ITeS Service and only has a positive list of the Services, with a CPC Provisional code which has been made eligible for claiming benefit under SEIS**” and also clarified that “**only the service categories which have been notified in Appendix 3D for SEIS are allowed for claim under SEIS..**” From the above trade notice, it is clear that the underlying services provided by a company should be listed in Appendix 3D for them to be eligible for SEIS.

**12.** From the above list of services and their corresponding CPC codes which are eligible for SEIS benefits as defined in Appendix 3D of FTP 2015-2020, it is clear that the services provided/exported by M/s. VSIPL which are classifiable under CPC 841 to 849 are not covered under Appendix 3D and hence not eligible for SEIS benefits.

**13.** As seen from various statutory and other documents (as described in para7 and 8) it appears that, M/s. VSIPL, Bangalore had correctly classified the services exported by them. However, it appears that while applying for SEIS benefits in the Form ANF-3B before the DGFT, M/s. VSIPL, Bangalore had wilfully mis-stated and mis-classified their services under Management Consultancy Service (862), and had managed to fraudulently obtain the SEIS Scrips.

**14. MODUS OPERANDI ADOPTED BY M/S. VSIPL, BANGALORE FOR WRONGLY OBTAINING SEIS SCRIPS:-**

**14.1** M/s. VSIPL, Bangalore was engaged in the business of building software products for its parent company i.e. M/s. VMware Ireland.M/s. VSIPL also provided computer related services i.e. IT/Software Consultancy to the existing and potential customers of M/s. VMware, Ireland in Indian territory, on behalf of M/s. VMware, Ireland; They used to visit the customers mainly one to one basis, understood the customers need and accordingly imparted knowledge about their software products to the customers of M/s. VMware, Ireland, in India, so that the customer better understand the functionality of their software technology & products. Further, it appears that M/s. VSIPL, Bangalore had wrongly classified their exported services as “Management Consultancy Services” and wrongly obtained SEIS scrips, which were otherwise not available to them.



**14.2** As discussed in para 7.2 above, , the way services were provided by M/s. VSIPL (subsidiary) on behalf of M/s. VMware Ireland (parent) to the customers of the parent company in Indian territory, appears to be falls under mode-3 of supply of service of World Trade Organization, GATS training module i.e. **Commercial presence**—“by a service supplier of one member, through the commercial presence in the territory of any other member” which falls under import of services in India as prescribed u/s “2 (e) (II) (i) (C)” of Foreign Trade (Development) and Regulation Act., 1992 - “by a service supplier of another country, through its commercial presence in India”.

#### **VOLUNTARY REFUND OF SEIS INCENTIVES BYM/S VSIPL, BANGALORE:-**

**15.** ShriBosco Noronha, Director of the company M/s. VSIPL, Bangalore in his statement dated 14.05.2019 & 18.02.2020 recorded under Section 108 of Customs Act, 1962 had inter-alia admitted that the Services rendered by them do not fall under the Services eligible for SEIS and had agreed to pay the ineligible amount. M/s. VSIPL, Bangalore, vide letter dated 12.06.2019 had informed this office their company was ready for the voluntary payment of the SEIS benefits availed by them and accordingly voluntarily made payment of SEIS scrips amount i.e. Rs. **128,998,643/-,(RUD No. 16)**. The details of payments made by M/s. VSIPL, Bangalore are enclosed as **Annexure ‘B’**.

#### **16. CANCELLATION OF SEIS SCRIPS BY DGFT:-**

**16.1** During the course of investigation, this office vide letter F. No. DRI/AZU/GI-02/ENQ-56(Int-17)/2019 dated 16.03.2020[**RUD No. -17**] had requested the Add. DGFT, Bangalore to cancel the SEIS Scrips issued to M/s. VSIPL, Bangalore(IEC-707022738), as detailed in **Annexure ‘A’**, to the extent of misuse of such SEIS Scrips by mis-classification of their export services in contravention of the relevant provisions of Foreign Trade Policy.

**16.2** The Add. DGFT, Bangalore vide Order issued from F. No. 07/21/094/98/SEIS/MISC/AM2020/DRI dated 27.05.2021[**RUD No. -18**] has cancelled the SEIS licences issued to M/s. VSIPL, Bangalore.

#### **VIOLATION OF STATUTORY PROVISIONS:-**

#### **17. Violation of Various Statutory Provisions by M/s. VSIPL, Bangalore:-**

**17.1** From the independent documentary evidences as well as confirmatory statements on record it appears that M/s. VSIPL, Bangalore have wilfully and fraudulently mis-stated and mis-classified the services provided, before the DGFT with an intent to avail undue benefit of SEIS. On the basis of such wilful mis-statements and mis-classifications based on suppression of facts, SEIS Scrips were issued to them by DGFT. Such SEIS scrips fraudulently obtained by them are invalid ab-initio and have now been cancelled by DGFT. It appears that M/s. M/s. VSIPL, Bangalore by resorting to such acts, have contravened provisions of Foreign Trade (Development and Regulation) Act, 1992, Foreign Trade (Regulation) Rules 1993, Foreign Trade Policy, 2015-20 etc., and of Customs notification, as detailed below:

- (a) **Section 11 of** the Foreign Trade (Development and Regulation) Act, 1992, read with **Rule-14 of** Foreign Trade (Regulation) Rules, 1993, in as much as they have make, signed and used the declarations, statements or documents for the purposes of obtaining SEIS Scrips knowing or having reason to believe that such declarations, statements or documents were not representing the true, correct, and actual classification of services, and they thereby have employed fraudulent practice for the purposes of obtaining the SEIS Scrips;
- (b) **Provisions of Exim policy related to SEIS scheme** in as much as they have availed benefit of SEIS scheme of Foreign Trade Policy 2015-2020 though they were not eligible for the services rendered by them, if classified correctly.

**17.2 Violation of Notification No. 25/2015-Customs dated 8<sup>th</sup> April, 2015 issued under Customs Act, 1962, by M/s. VSIPL, Bangalore:**

**As per the Notification:**

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

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

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

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

- (1) *that the duty credit in the said scrip is issued to a service provider located in India **against export of notified services listed in Appendix 3D** of Appendices and AayatNiryat Forms of Foreign Trade Policy 2015-2020*

\*

\*

In the instant case it appears that M/s. VSIPL, Bangalore provides 'Software/Information Technology Services related to Computer Programming and Consulting', which are not notified in Appendix 3D of Appendices of Foreign Trade Policy, 2015-20 therefore M/s. VSIPL, Bangalore has violated the condition 2 (1) of the Notification No. 25/2015-Customs dated 08th April, 2015 issued under section 25 of the Customs Act, 1962.

## 18. RECOVERY OF DUTY FROM M/S. VSIPL, BANGALORE:

### **Section 28AAA of the Customs Act, 1962 –**

Section 28AAA was inserted in the Customs Act, 1962 in 2012 to provide for recovery of duties from the person to whom an instrument such as credit Scrips was issued, i.e. exporter, where such Scrips was obtained by means of collusion, or wilful misstatement or suppression of facts. It appears that M/s. VSIPL, Bangalore had provided/exported 'Software/Information Technology Services related to Computer Programming and Consulting' and appears to have fraudulently obtained the SEIS Scrips and subsequently transferred/sold the Scrips to various importers. As per section 28AAA:

#### ***Recovery of duties in certain cases***

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

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

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

As per para 3.02 of the Foreign Trade Policy 2015-2020 SEIS Duty Credit Scrips holder was eligible to transfer/sell the entitlement freely. The Duty Credit Scrips can be used for (i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A; (ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per DoR notification; (iii) Payment of service tax on procurement of services as per DoR notification; and (iv) Payment of Customs Duty and fee as per paragraph 3.18 of this Policy. In the instant case it appears that M/s. VSIPL, Bangalore had wrongly obtained SEIS Scrips by mis-stating their exported Services as Management Consultancy Services". M/s. VSIPL, Bangalore 411016 had transferred/sold all the SEIS Scrips to various importers. The said importers had imported the goods by utilizing the said SEIS duty credit Scrips for payment of duties.

In view of the facts discussed in the foregoing paras and material evidences available on record, it appears that M/s. VSIPL, Bangalore had obtained SEIS Scrips by means of suppression of facts regarding the nature of services exported by them and wilful mis-statement regarding the classification of services exported by them and M/s. VSIPL, Bangalore subsequently sold/transferred the same to various importers. The said various importers had

utilised the said ineligible SEIS amount for payment of Customs duties against the imports made by them. Therefore, the import duties equivalent to the duty credit Scrips utilised by the other importers for their imports, as detailed in **Column 15 of Annexure ‘C’**, is required to be recovered from M/s. VSIPL, Bangalore under Section 28AAA of the Customs Act, 1962 along with interest under Section 28 AA of the Customs Act, 1962.

## **19. Confiscation and Penalty:**

**19.1** The goods imported, against the SEIS Scrips which were fraudulently obtained and which have now been cancelled by DGFT, and which were not eligible to the benefit of exemption under Notification No. 25/2015-Customs dated 08th April, 2015 issued under Section 25 of the Customs Act, 1962 are also liable for confiscation under Section 111(m) and 111(o) of Customs Act, 1962. M/s VSIPL, Bangalore who in relation to the imported goods, did or omitted to do acts/omissions which rendered such goods liable to confiscation under section 111 are liable to penalty under Section 112(a) of the Customs Act, 1962.

The relevant legal provisions under Customs Act, 1962 are as follows:

As per **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 transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;*

.....  
.....

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

**19.2** M/s VSIPL, Bangalore, as a person, had mis-declared/mis-stated their exported Services in ANF-3B Form and fraudulently obtained SEIS Scrips. They had subsequently transferred/sold the Scrips to various importers. These Scrips were used by various importers for purpose of availing benefit of Customs Duty exemption available under Notification No. 25/2015-Customs dated 08<sup>th</sup>

April, 2015 issued under Section 25 of the Customs Act, 1962. Therefore VSIPL, Bangalore had knowingly or intentionally made, signed and used, or caused to be made, signed or used, Customs declarations/statements/documents and other declarations/ statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act, 1962. Therefore, M/s. VSIPL, Bangalore are liable for penalty under Section 114AA of the Customs Act, 1962.

#### **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.*

**19.3** Further, it appears that M/s. VSIPL, Bangalore had obtained SEIS Scrips fraudulently by way of wilful mis-statement and suppression of facts and such SEIS Scrips have been utilised by other persons for discharging their duty liability and therefore M/s. VSIPL, Bangalore have also rendered themselves liable for penalty under Section 114AB of the Customs Act, 1962.

#### **SECTION 114AB**

*Penalty for obtaining instrument by fraud, etc. — Where any person has obtained any instrument by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.*

*Explanation. — For the purposes of this section, the expression “instrument” shall have the same meaning as assigned to it in the Explanation 1 to section 28AAA*

#### **20. Violation of statutory provisions by key person of M/s. VSIPL, Bangalore Shri Bosco Noronha, Director:-**

**20.1** It further appears that mis-declaration of classification of services in the SEIS application viz., Form ANF-3B presented by M/s. VSIPL, Bangalore before DGFT, had been signed by ShriBosco Noronha, Director of M/s. VSIPL, Bangalore, to suppress the facts and wilfully mis-state the true, correct, and actual classification of services to enable M/s VSIPL, Bangalore to fraudulently obtain SEIS Scrips from DGFT. It, therefore, appears that ShriBosco Noronha, Director of M/s. VSIPL, Bangalore was primarily responsible for wrongful availment of export benefits under SEIS by M/s VSIPL, Bangalore; thereby enabling and abetting M/s VSIPL, Bangalore in availing undue benefit of SEIS Scheme and conversely facilitating various importers to utilise the wrongly obtained SEIS duty credit Scrips for their imports.

**20.2** Therefore, it appears that by his deliberate acts of commission and omission he has rendered the goods which were imported (by utilising the ineligible Scrips) liable for confiscation. Thereby ShriBosco Noronha, Director of M/s. VSIPL, Bangalore is liable for penalty under section 112(a) of the Customs Act, 1962.

**20.3.** Further, Shri Bosco Noronha had knowingly or intentionally made, signed and used, or caused to be made, signed or used, Customs declarations/statements/documents and other declarations/statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act. Therefore he is also liable for penalty under Section 114AA of the Customs Act, 1962.

**21. Provisions for the confiscation of goods imported by various importers using ineligible SEIS Scrips fraudulently obtained by M/s. VSIPL, Bangalore:-**

**21.1** From the discussion in foregoing paras, it appears that various importers (i.e. person/s other than the person to whom the instrument SEIS Scrips) have already imported goods as detailed in **Annexure 'C'** to this notice, by claiming exemption against the SEIS Scrips which were fraudulently obtained by M/s. VSIPL, Bangalore and have been cancelled by DGFT. Hence such imports can be termed as imports made without observing the conditions prescribed under Notification No. 25/2015 - Customs dated 08/04/2015, as amended; hence such imported goods valued at Rs. **58,30,46,418/-** (Rupees Fifty Eight Crore, Thirty Lacs Forty Six Thousand Four Hundred Eighteen Only) are liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.

**22. IMPORTATION OF GOODS / QUANTIFICATION OF LIABILITIES:-**

**22.1** As established in the above paras, M/s. VSIPL, Bangalore have obtained 19 SEIS Scrips from DGFT, fraudulently, by wilful mis-statement and suppression of various facts, and the total duty involved in these 19Scrips/Licences is Rs. 12,89,98,640/- (Rupees Twelve Crore, Eighty Nine Lacs, Ninty Eight Thousand Six Hundred Forty Only).

**22.2** It is also evident that M/s. VSIPL, Bangalore have transferred/sold the SEIS Scrips to other importer/s,. The said importer/s (person/s other than the person to whom the instrument (SEIS Scrips) were issued) have imported their goods by utilizing the said transferred SEIS duty credit Scrips which were fraudulently obtained from DGFT and later cancelled. The duty involved in these 19 SEIS Scrips which were transferred to other importer/s by M/s. VSIPL, Bangalore and subsequently utilised by the said importer/s, to the tune of Rs. **12,89,97,747/-** (Rupees Twelve Crore, Eighty Nine LacsNinty Seven Lacs Seven Hundred Forty Seven Only), as enumerated in the **Column 15 of the Annexure 'C'** to this Show Cause Notice, is required to be recovered from M/s. VSIPL, Bangalore under Section 28AAA of the Customs Act, 1962 along with interest under Section 28 AA of the Customs Act,1962 as discussed in Para 22. Whereas, it appears that the importer/s have undertaken import of the goods through various ports, so this Show Cause Notice has been made answerable to the respective Jurisdictional Customs Authorities taking into account the duty

relatable to utilisation of such cancelled instruments. The value of goods and duty relatable to utilisation of such cancelled instruments (including that which may possibly be utilised in future) which is recoverable, alongwith Jurisdictional Customs Authorities is detailed below as **TABLE ‘X’**:

**TABLE - X**

Sr. No	Bill of Entry/ SEIS Scrips Details	Name and IEC of Importer	Ineligible SEIS Amount transferred by M/s. VSIPL & thereafter utilised by other importers for their imports (In Rs.)	Total Assessable Value (Item Wise) of the Imported Goods (In Rs.)	Jurisdictional Custom Authority
(1)	(2)	(3)	(4)	(5)	(6)
1	As per Annexure ‘C’	M/s. Havells India Limited  [IEC- 0588160385]	2,42,13,175	11,00,67,291	The Pr. Comm. of Customs, Custom House- Kolkata (Port)  <b>[Chennai Sea- INMAA1]</b>
2		M/s. AakKamani Private Limited [IEC- 307097897]	2,89,99,517	12,40,23,812	The Pr. Comm. of Customs, NS-II, NhavaSheva, JNCH,  <b>[NHAVA SHEVA SEA - INNSA1] –</b>
3		M/s. Noble Natural Resources India Private Ltd. [IEC- 0311046975]	4,37,85,070	27,59,16,942	The Pr. Comm. of Customs, Custom House: Kandla,  <b>[KANDLA CUSTOMS - INIXY1]</b>
4		M/s. Gemini Edibles & Fats India Private Limited  [IEC- 909014922]	3,19,99,986	7,30,38,373	The Jt./Addl. Comm. of Customs Krishnapatnam Port  <b>[- INKRI-1]</b>
	<b>Total</b>		<b>12,89,97,763</b>	<b>58,30,46,418</b>	

**23.1** Therefore, **M/s.VMware Software India Pvt. Ltd.**, situated at 165/1, 165/17, Kalyani Vista, Kalyani Vista, 165/2, Doresanipalya, IIM Post Bannerghatta Road, Bangalore 560 076 (IEC No.0707022738)are hereby called upon to show cause, in writing, to the Commissioner of Customs, Kandla Port, Custom House, Near Balaji Temple, Kandla as to why:

- (i) The duty payable amount aggregating to Rs. **12,89,97,763/-** (Rupees Twelve Crore, Eighty Nine LacsNinty Seven Lacs Seven Hundred Sixty Three Only), as mentioned in Column – 4 of Table X mentioned in para 22, should not be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962.
- (ii) The goods totally valued at Rs. **58,30,46,436/-**(Rupees Fifty Eight Crore, Thirty Lacs Forty Six Thousand Four Hundred thirty Six Only), as mentioned in Column - 5of Table ‘X’ in para 22 above, should not be held liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962. However, the goods are not available for confiscation.

(iii) Penalty should not be imposed upon them under the provisions of Section 112(a), 114AA, 114AB of the Customs Act, 1962.

(iv) The amount of Rs. **128,998,643** (Rupees Twelve Thousand Eighty Nine Lacs Ninty Eight Thousand Six Hundred Forty Three Only) already paid by them should not be appropriated against the amount due to be recovered from them;

**23.2** Therefore, **Shri Bosco Noronha**, Director, M/s. VSIPL, Bangalore is hereby called upon to show cause, in writing, to the Commissioner of Customs, Kandla Port, Custom House, Near Balaji Temple, Kandla as to why:

(i) Penalty should not be imposed under Section 112(a), Section 114AA and 114AB of the Customs Act, 1962 upon them.

**23.3** Therefore, being the actual importer of the goods, (i) **M/s. Havells India Limited**, [IEC- 0588160385], situated at 904, 9th Floor Surya Kiran Building , K.G. Marg, Connaught Place, New Delhi – 110001, (ii) **M/s. Aak Kamani Private Limited**, [IEC- 307097897], situated at 14th Floor, Quantum, Central Avenue, Hiranandani Estate, Hiranandani Business Park, Ghodbunder Road , Thane West, , Thane - 400607, (iii) **M/s. Noble Natural Resources India Private Ltd.**, [IEC- 0311046975], situated at Survey NO. 302/2, 303, opp. Rama, Cylinder, Vil. Bhimasar, Taluka-Anjar, Kutch, Gujarat, 370240 and (iv) **M/s. Gemini Edibles & Fats India Private Limited** [IEC- 909014922], situated at Freedom House, NO. 8-2-334/70 & 71, Road NO. – 5, Banjara Hills, Hyderabad, Telangana, 500034, as detailed in Column (3) in the above mentioned **TABLE 'X'** are hereby called upon to show cause, in writing, to the **Commissioner of Customs**, Kandla Port, Custom House, Near Balaji Temple, Kandla with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in Annexure 'C' to this show cause notice, as to why:

(i) The goods valued at the respective entry under **Column 5 of TABLE-X** of para 22, covered in Bills of entry mentioned in Annexure-C should not be held liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962, for the reasons discussed at para 22 above.

## **PERSONAL HEARING-**

**24.** Shri Samsuddha Majumder and Shri Kartikeya Kulshrestha appeared for personal hearing on 28.11.2023 on behalf of M/s. VMware, Bangalore and Shri Bosco Noronha, erstwhile financial head of M/s VMware Software India Pvt. Ltd. He briefly stated the facts of the case and also explained the working of their company and category of the services which they exported. He mentioned that they have submitted all points and their stands in the written submission and contesting the whole issue including various penalties imposed on the company. He submitted that the company applied for issuance of scrips before DGFT with proper and correct declaration and followed all the procedures and submitted all correct declarations and documents whenever asked by DGFT and after due verification scrips were issued to them by DGFT. The allegation made in the SCN is that we have wrongly mentioned the category of the service as in the service tax regime we declare our export service under the category of "Business Auxiliary services". We declared our service as "Management and consultancy services" before



DGFT and DRI has made the case by alleging the service as “mis-declared” and hence invoked the section 28AAA of the Customs Act, 1962 and proposed various penalties. He submitted that the classification under the Service Tax regime is irrelevant for the purpose of FTP and particularly, SEIS, since the FTP is a self contained code and prescribes its own classification/categories in Appendix-3D, which is separate and independent of the classification under the service tax regime.

He also submitted that the company, during the application process, had also provided a copy of its master services agreement, where the activities to be carried out by the company (on which SEIS benefit was being sought) were duly mentioned. Thus, all the facts relating to the company’s activities, claimed classification, etc. were already in the knowledge of the DGFT, even before the SEIS benefits were granted to the company. Notably, it is not the allegation of the DRI or the DGFT that the company was doing any activity other than what was mentioned in the master services agreement, or what was not already in the knowledge of the authorities. He, thus, submitted that it is only a matter of interpretation of the categories mentioned in the Appendix-3D and there is no wilful misstatement or wilful suppression of facts in the present case. Accordingly, Section 28AAA cannot be invoked. He also submitted that the case made by DRI was totally based on interpretation of facts. He submitted that penalty cannot be imposed under Sec. 114AB, which was brought into effect on 01.08.2019 with prospective effect, and all scrips were issued before this date and also sold out immediately. He further submitted that penalty under Section 114AA is also not sustainable as they had not given any false declaration to the Custom Authorities and all its dealings were only with the DGFT; that the actual importers who had actually used the scrips were also not known to the company since the Company had sold the scrips in the open market to a third party platform and had no direct dealings or relationship with the actual importers. He also submitted that there are various case laws wherein the penalty under Section 114AA and under S.112 for wrong interpretation is not imposable. Further, regarding penalty under S. 112, he also submitted that the company had no role in the importation of goods by the actual importers; the company was not even aware of the existence or the identity of these importers till the issuance of the present show cause notice. He submitted that DGFT cancelled all scrips and issued notice under FTDRA and not imposed any penalties. He also submitted that Shri Bosco Noronha had taken all steps in interest of company and penalty imposed under S.112 and 114AA is also not imposable and sustainable as stated above.

**24.1** Shri Ramesh C.Kainthola, Advocate appeared for personal hearing on 28.11.2023 on behalf of M/s. Noble Natural Resources India Pvt. Ltd and submitted that they have already submitted their written submission on 31.07.2023 and are Bona fide purchaser of scrips and at the time of purchasing the scrips were valid and not cancelled by DGFT. So they have filed their written submission on mainly 3 points.

1. At the time of sale, scrips were valid and they have all right to sale the same under sale of goods Act 1930 .
2. Goods were cleared for home consumption and once goods cleared for home consumption, the same cannot be confiscated and also not liable for any penalty.
3. They have no mens rea or bad intention.

**24.2** Shri Jas Sanghavi, Shri Alekshendra Sharmaa and Ms. Bharti Punjabi appeared for personal hearing on behalf of M/s. Aak Kamani Pvt. Ltd. The

Authorised representative (AR) of the noticee submitted that they have already submitted defence submission on 08.03.2023 and additional submission on 31.07.2023 incorporating all the relevant judgements. They have further submitted that the main allegation against them was that they were bonafide purchaser of the scrips, which were issued to VMware software India Pvt. Ltd. During the course of hearing, they have relied upon the OIO issued by Commissioner, Customs Delhi in the matter of M/s. Himani Industries Ltd., wherein also the confiscation of goods was proposed for wrong availment of MEIS. They have further submitted that the Hon'ble Commissioner, Customs Delhi have dropped the demand of confiscation against them as they were also a party to the show cause notice. The AR of the notice further argued that they were the bonafide purchaser of the SEIS scrips and the show cause notice is silent on their role in availment of scrips. They have also submitted that DGFT has not taken any action against the parties. They have also questioned the jurisdiction of Customs when DGFT has not taken any action. They have further submitted that when the assessment proceedings have been finalized and no further action has been taken by the Customs department under Section 128D, no action contrary to final assessment can be taken. The goods were cleared after valid assessment by the proper officer.

**24.3** Due to change in adjudicating authority, Shri Alekshendra Sharma, Ms. Bharti Punjabi and Shri Suyog Bhawe appeared for personal hearing on 14.11.2023 and informed that they had already heard in person but due to change in adjudicating authority they have been enlisted for personal hearing again. He explained issue that they have purchased the said scrips from open market. Further, DRI investigation revealed that the Original exporter M/s VMware software India Pvt. Ltd has obtained the scrips fraudulently and sold these scrips to various importers. Accordingly, they have been issued Show cause notice for asking them why their imported goods should not be confiscated under section 111(m) and 111(o) of the Customs Act, 1962 for utilization of such scrips during import of goods.

He submitted that they have purchase the scrips from open market and no action from DGFT has been taken against them so Customs also cannot take action against us. He also submitted that they have purchased the scrips from M/s Global Exim and not from the main noticee i.e. M/s VMware software India Pvt. Ltd. They have all relevant documents viz, invoice bank statement and other transfer documents, which shows that we were nowhere involved or even aware of such mis-classification of scrips. He further submitted that they have taken due diligence while purchasing the scrips and at the time of import the said scrips were also verified by the Customs and goods were cleared by Customs Authority. Therefore, there should be no confiscation under section 111(m) as there is no mis –classification of scrips and also not under section 111(o), which is applicable for improper import of exempted goods after not following the all condition laid therein. Since their goods are dutiable hence confiscation under Section 111(o) also cannot be invoked. He also added in his submission that in similar issue the Hon'ble Commissioner, Kandla in case of M/s Fashion accessories where they were co-noticee, has dropped the charges of confiscation against them as well as other co-noticees. In another OIO issued by Commissioner of Customs, New Delhi in case of Himani Industries, charges of confiscation has also been dropped by adjudicating authority.

**24.4** Shri Srinivas Nagunuri, Authorised representative appeared for personal hearing on behalf of M/s. Gemini Edibles & fats India Ltd. on 14.11.2023 and reiterated the submission dated 23.03.2023 and reiterated that they purchased the scrips from the open market and they were not aware of the fraudulent activity of the exporter. They also added that in the similar issue Commissioner of Customs, Delhi and Joint Commissioner of Customs, Hyderabad held that

goods cannot be confiscated under S.111 and no penalty can be imposed under 114 of the Customs Act, 1962.

**24.5** Shri Ashok Kumar Bhasin, Advocate appeared on virtual mode on 10.09.2024 on behalf of M/s. Havells India Ltd and reiterated the submission made under replies dated 07.05.2024 and November 2023. He opposes the proposal in the SCN and says that goods are not confiscable as they are already cleared even if considered confiscable, as the duty is already paid as per demand and in view of provision of S.125, RF cannot be imposed. We placed reliance on case laws cited in their reply.

#### **SUBMISSION-**

**25.** M/s. VMware software India Pvt. Ltd vide their submissions dated 23.11.2023 and 18.12.2024 interalia submitted that-

- (i)** The Noticee, a private limited company incorporated under the Companies Act, 1956, is a subsidiary of VMware International Unlimited Company, Ireland (formerly known as VMware International Ltd.) (VMware Ireland). VMware Ireland is primarily engaged in the business of selling, marketing and providing support services in relation to software products internationally, including products such as vSphere, vRealize, vSAN, Horizon, Fusion, Workstation Pro, Workstation Player, vCloud Suite, etc. (Software Products). The Noticee inter-alia provides promotion, marketing and support services to VMware Ireland in relation to the Software Products being sold in India. The Noticee holds the Importer-Exporter Code (IEC) Number 0707022738.
- (ii)** The Noticee and VMware Ireland entered into a Marketing Services Agreement dated 01.11.2007 (MSA) for provision of promotion, marketing and other support services in relation to the Software Products in India. Accordingly, the Noticee agreed to perform the following services at the request and instructions of VMware Ireland:
  - a. Provide general and administrative marketing and promotional services;
  - b. Assist in developing and expanding the customer base in the Indian territory for Software Products;
  - c. Act as a liaison between customers and agents/ distributors;
  - d. Provide periodic feedback to VMware Ireland in the form of reports or statistics on the local conditions and customer needs;
  - e. Maintain appropriate contact with the existing and potential customers, including attending to their enquiries on VMware Ireland's range of products and services; and
  - f. Any other services that VMware Ireland reasonably requests or as may be agreed
- (iii)** The Noticee had a bona fide belief that the services rendered to VMware Ireland pursuant to the MSA qualified as 'marketing management consulting services' under Appendix 3D and were, therefore, eligible for the availment of duty scrips under the SEIS. Further, the Noticee was aware that as per paragraph 3.04 of the Handbook of Procedure for FTP 2015-2020 (HBP), the applications for SEIS would be individually scrutinised by the DGFT and the DGFT takes the final decision as to whether an applicant is eligible for SEIS benefits.
- (iv)** Accordingly, the Noticee, on good faith basis, filed an application in Form ANF-3B under the SEIS for the Relevant Period to avail duty scrips in relation to services rendered to VMware Ireland under the MSA. The Noticee provided the description of the services being provided to VMware Ireland in Form ANF-3B as 'management consulting service' bearing code '865' and appearing in sl. no. 1Dc under Appendix 3D. However, pursuant to filing of Form ANF-3B for FY 2015-16 and 2016-17, DGFT rejected the SEIS application vide letters dated 28.05.2018 and 31.05.2018, stating that "as per the invoice and FIRC, purpose mentioned as cost plus not eligible for SEIS".
- (v)** Thereafter, in response to the rejection letters dated 28.05.2018 and 31.05.2018, the Noticee filed letters dated 18.06.2018 and 20.06.2018 for FY 2015-16 and 2016-17, respectively, providing a detailed

description of the services being rendered by the Noticee to VMware Ireland. It is relevant to note that the letters dated 18.06.2018 and 20.06.2018 specifically mentioned “Company has entered into an agreement with VMware International Limited (VMware Ireland) to provide support services in the nature of marketing and promotion of products in India, including liaising with the distributors” (emphasis added). The Noticee further furnished a copy of the MSA for review by the DGFT. In relation to specific objection raised with respect to consideration, the Noticee explained that “the term cost plus indicates that the model being adopted for compensation is cost-plus model, which is nothing but cost-plus mark-up at the agreed percentage rate”. Accordingly, based on these submissions, the Noticee requested the DGFT to issue duty scrips on provision of services under MSA. The Noticee was also assured by its consultant, which is one of the big 4 accounting firms, that the Noticee was eligible for benefits under the SEIS scheme.

- (vi)** The DGFT, after reviewing the documents submitted by the Noticee and duly satisfying itself as to correctness of the Noticee's claims, approved its SEIS application and accordingly, issued the duty scrips for the period FY 2015-16 and 2016-17. Thereafter, based on the approval granted for the earlier years, the Noticee filed an application for claiming SEIS benefits in relation to the services provided under the MSA for the FY 2017-18 as well. It is relevant to note that the Noticee mentioned the same description and classification of the services in ANF 3B filed for FY 2017-18 as mentioned in the ANF 3B filed for the FY 2015-16 and FY 2016-17. The DGFT approved the Noticee's application for FY 2017-18 without raising any objections.
- (vii)** Accordingly, from the above, it is abundantly clear that the Noticee has declared the nature of the services exactly as it appears in the MSA and being performed by the Noticee in reality. In other words, there was no wilful misrepresentation or suppression of facts by the Noticee, regardless of whether the Noticee's claim merited the award of SEIS duty scrips. It is also clear from the initial rejection and the subsequent approval granted for the SEIS duty scrips, that DGFT had satisfied itself in relation to the nature of service being rendered under the MSA and thereafter, issued duty credit scrips to the Noticee under the SEIS for the Relevant Period.
- (viii)** Given that the duty scrips issued by DGFT are transferable, the Noticee proceeded to sell the validly obtained duty scrips to third parties for a monetary consideration. The Noticee, until the issuance of the SCN, was not aware if such duty scrips had been utilized by the transferee for discharging central taxes applicable on import of goods. The fact of utilization of the duty scrips was brought to the knowledge of the Noticee for the first time in the SCN.
- (x)** Subsequent to being apprised of the investigation against the Noticee vide the said letter, the DGFT issued a show cause notice to the Noticee, bearing F. No. 07/21/094/98/SEIS/MISC/AM2020/DRI, dated 17.06.2020 (DGFT SCN), seeking to (i) declare the Noticee as a defaulter and place it in the Denied Entity List (DEL) under Rule 7 of the Foreign Trade (Regulation) Rules, 1993 (FTR Rules), so as to stop any benefits under the FTP from flowing to the Noticee, (ii) impose penalty under Section 11(2) of the FTDR Act, (iii) suspend the IEC of the Noticee, and (iv) cancel the SEIS duty scrips obtained by the Noticee and (v) recover the duty amount contained in the scrips along with interest. Copy of the DGFT SCN dated 17.06.2020 is enclosed.
- (xi)** The Noticee submitted a response to the DGFT SCN, and a personal hearing was held in the matter. Thereafter, the Ld. Additional Director General of Foreign Trade passed an order bearing F. No. 07/21/094/98/SEIS/MISC/AM2020/DRI/48/49, dated 27.05.2021 (DGFT Order), upholding the demand of the amount pertaining to the SEIS duty scrips, and the interest applicable thereon. Furthermore, despite the Noticee having deposited the entire amount contained in the scrips and having cited judicial precedents holding that the scrips should not be cancelled, the Ld. Additional Director General of Foreign Trade proceeded to order the cancellation of the scrips in the DGFT Order, seemingly to protect the interest of the revenue. The Noticee, however, has no records of receipt of the DGFT Order, and hence, it could not

appeal against the DGFT Order. Copy of the DGFT Order dated 27.05.2021 is enclosed.

- (xii)** Services provided by the Noticee to VMware Ireland under the MSA were correctly classifiable under 'management consulting service (CPC code 865)'

A.1 The Noticee submits the operational assistance on marketing provided by the Noticee to VMware Ireland qualified as 'management consulting service (CPC code 865)' under Appendix 3D of the FTP 2015-2020. The Noticee submits that 'management consulting service' has several sub-categories, one of which is 'marketing management consulting services'. 'Marketing management consulting services' are defined under the CPC as:

"Advisory, guidance and operational assistance services concerning the marketing strategy and marketing operation of an organization. Marketing

consulting assignments may deal with one or a combination of the following:

analysis and formulation of a marketing strategy, formulation of customer service and pricing policies, sales management and staff training, organization of distribution channels (sell to wholesalers or directly to retailers, direct mail, franchise, etc.), organization of the distribution process, package design and other matters related to the marketing strategy and operations of an organization." [emphasis supplied]

A.2 The Noticee submits that from a bare perusal of the definition of 'marketing management consulting services', it becomes clear that the definition has two separate parts: (i) The first part which lists the specified distinct services covered under 'marketing management consulting services', namely, advisory, guidance and operational assistance services concerning the marketing strategy and marketing operation of an organization. These services may be rendered on standalone basis or in a combination with others, to qualify as 'marketing management consulting services'. Nothing contained in this part of the definition specifies or even suggests that in order to qualify as 'marketing management consulting services', these distinct services have to be provided in a combination. (ii) The second part, which provides an indicative list of the activities which the 'marketing consulting assignments' may deal with. In terms of the definition, these activities "may deal with one or a combination of the following: analysis and formulation of a marketing strategy, formulation of customer service and pricing policies, sales management and staff training, organization of distribution channels (sell to wholesalers or directly to retailers, direct mail, franchise, etc.), organization of the distribution process, package design and other matters related to the marketing strategy and operations of an organization".

- (xiii)** The statements of Mr. Bosco Noronha dated 14.05.2019 (RUD-3) and 18.02.2020 (RUD- 4) allegedly 'admitting' misclassification, are also based on the explanation of the scope of 'management consulting service (CPC code 865)' provided by the customs authorities to the Noticee where the customs authorities have stated that for activities to qualify as 'management consulting service (CPC code 865)', they are required to be a combination of advisory, guidance and operational assistance services concerning the marketing strategy and marketing operations. It is also submitted that the Mr. Bosco Noronha is not a legal expert and his statements to the extent of the interpretations of these specific legal issues are merely 'opinions' and have no legal relevance with respect to the Noticee.

- (xiv)** The Noticee submits that doubts raised by the customs authorities on the classification of the Noticee's services to VMware Ireland are based on completely incorrect reading of the definition provided under the CPC. The Noticee submits that the CPC nowhere requires a combination of activities, for them to qualify as 'management consulting service (CPC code 865)'. The 'and' used in the first part of the definition has to be read as 'or', given the context of the rest of the definition which specifically states that the "marketing consulting assignments may deal with one or a combination of the following...". Further, it is to be noted if the CPC intended for there to be a combination of the specified services/ activities, it would have mentioned the same. However, such language is

conspicuous by its absence. Therefore, it is clear that the doubts raised by the customs authorities are based on an incorrect reading of the definition and purposive addition of the text which is not present in the definition.

- (xv) The Noticee also submits that the DGFT is the appropriate authority for administering the benefits under the FTP (including the SEIS), and the DGFT, on an independent review of the documents submitted by the Noticee, came to the same conclusion, i.e., the services provided by the Noticee are classifiable under 'management consulting service (CPC code 865)'. As an authority tasked with export promotion of goods and services, the DGFT is entitled to adopt a more lenient or purposive interpretation (when two interpretations are possible), in order to further the objectives of export promotion and thereby, earning foreign exchange for India.
- (xvi) The services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the [FTP 2015-20](#). The Noticee, at the outset, submits that the export status under the erstwhile service tax regime has no bearing on whether the provision of services by the Noticee to VMware Ireland would qualify as 'export' under the FTP 2015-20 read with the FTDR Act. For being eligible for the benefits under the SEIS, the services of the Noticee were required to qualify as exports as per the FTP 2015-20, and not under the erstwhile service tax law, i.e., as per the Finance Act, 1994.
- (xvii) Without prejudice to the above, though the export status under the erstwhile service tax law is not required to be examined for determining the eligibility for SEIS benefits in the present case, the Noticee submits that, based on its reading of the provisions of the service tax law and the below judicial precedents on the issue where the export status was of services upheld in similar situations, the Noticee was under the bona fide belief that the services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the service tax law.
- M/s Godaddy India Web Services Private Limited, 2016-TIOL-08-ARA-ST
  - Universal Services India Pvt Ltd., 2016 (42) STR 585 (AAA)
  - Lubrizol Advanced Materials India Pvt. Ltd. v. Commissioner of Central Excise, Belapur, 2019 (1) TMI 720 - CESTAT MUMBAI
  - M/s Verizon India Private Limited v. Commissioner of Service Tax, Delhi, TS-594-CESTAT-2019-ST
- (xviii) The Noticee also submits that the services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the FTP 2015-2020. 'Export of services' is defined in Section 2 (e)(II)(ii) of the FTDR Act (under which the FTP 2015-2020 has also been issued) to mean supplying services:
- i. from India into the territory of any other country;
  - ii. in India to the service consumer of any other country;
  - iii. by a service supplier of India, through commercial presence in the territory of any other country;
  - iv. by a service supplier of India, through presence of Indian natural persons in the territory of any other country.
- (xix) The Noticee submits that, in the present case, the Noticee was providing marketing services to VMware Ireland located outside India, who was the contractual recipient and the consumer of such services under the MSA. Thus, the services rendered by the Noticee to VMware Ireland were supplied 'from India into the territory of any other country' which is squarely covered under s. no. (i) of the definition of 'export of services' under the FTDR Act. Accordingly, the services provided by the Noticee to VMware Ireland qualified for export status under the FTP 2015-2020.
- (xx) They argued that penalty cannot be imposed upon M/s. VMware and its Director and cited various case laws.

**25.1** M/s. Gemini Edibles& Fats India Private Limited vide their submission dated 30.03.2023, interalia, submitted that the scrips were purchased by the noticee after payment of due consideration from the open market through agents dealing in scrips. Considering the elaborate procedure prescribed for issuance of SEIS scrips, the Noticee deduced that the verification as to the correctness and

validity of the scrips is ensured by DGFT and Customs authorities at the time of issuance of and registration of the scrips.

**25.2** The impugned SCN prejudged the issue to the extent detrimental to the interests of the Noticee on the ground that, VSIPL may have misclassified the services in order to fraudulently obtain SEIS scrips. The impugned SCN in toto has only discussed about alleged misclassification made by VSIPL for claiming SEIS scrips and in the process failed to comprehend the general procedure of sale and procurement of the scrips. The impugned SCN failed to acknowledge that the ultimate importers in bonafide belief upon legally complying with all necessary customs provisions, purchased the scrips on monetary payment of necessary consideration as mutually agreed. It is humbly submitted that the impugned SCN conveniently ignored the facts and proposed to confiscate the imported goods, mechanically. They have relied upon the judgement of Hon'ble Tribunal in the case of Leadage Alloys (I) Ltd. Vs. CCE, ST & Customs, Bangalore [2017 (5) TMI 1326 CESTAT Bangalore], wherein it was held that there cannot be confiscation without seizure when the goods are not available.

**25.3** The SEIS scrips purchased by the Noticee were valid and subsisting at the time of purchase. There was no caveat on the subject scrips by Customs or DGFT Authorities and there was no material evidence whatsoever to doubt the authenticity of scrips. The Noticee exercised all necessary precautions that ought to have been normally exercised by an ultimate user of SEIS scrips, at the time of its purchase and most importantly has purchased for monetary consideration the scrips in good faith in the open market.

**25.4** They have relied upon the judgement of Sumit Wool Processors Vs. Commissioner of Customs (Import/Export) [2015-TIOL-2090-CESTAT-Mumbai], the Hon'ble Tribunal held that in the event where importer had no knowledge of the misrepresentation made by exporters in obtaining the licences/scrips, no confiscation of goods imported by the transferee of licenses/scrips can be made and the demand of custom duty, interest and penalty are set aside.

**25.5** They have also referred to the decision of Hon'ble High Court of Punjab and Haryana in the case of Pee Jay International Vs. Commissioner of Customs [2016 (340) E.L.T 625(P&H)] wherein the Hon'ble Court while referring to the below mentioned cases, ruled that the importers were not a party to the fraud with the seller of DEPB, DEPB was found to be a genuine document, though obtained by seller by producing some forged documents, to which the appellant was not a party. In the below mentioned cases, it was ruled that the importer was not a party to the fraud and there is clear evidence that licences were purchased in open market by payment of monetary consideration in bonafide belief, duty cannot be demanded from the importer.

(a) CCus., Amritasr Vs. Vallabh Design Products [2007(219) E.L.T 73 (P&H)]

(b) CCus., Vs. Leader Valves Ltd., [2007 (218) E.L.T 349 (P&H)]

**25.6** They have also relied upon the judgement of the Hon'ble Tribunal of Delhi in the case of Singh World Vs. CCUs., New Delhi [2017 (353) E.L.T. 243 (Tri.-Del.)] where it was held that at the time of purchase, the scrips were valid and that penalty can be waived in cases where there is bonafide belief and there was no malafide intention for committing fraud. Considering that the license was issued by DGFT, which was purchased by the Appellant, the failure was on part

of DGFT and not importer. Basing on this, the Tribunal held that no demand/penalties can be levied on the importer as the bonafide belief was established.

**25.7** Further, the noticee has relied upon various judgements wherein it is held that in absence of evidence to prove collusion, misstatement or suppression of facts by the importer, duty cannot be recovered from the importer.

**25.8** M/s. Havells India Limited vide submission dated 27.11.2023, interalia, submitted that they purchased the SEIS scrips that were available in the open market for legitimate purchase. They were under bonafide belief that the impugned scrips had been validly issued by the DGFT to VMware only after duly verifying its application for grant of the scrips. They were not a party to the alleged fraud committed by the exporter.

**25.9** They have relied upon the judgement of the Crafts Studio v. CCE Jaipur [2004(163) ELT 109] and Ram Khazana Electronics & Ors. V. CC, Air Cargo, Jaipur (Supra) [2003 (156) E.L.T 122(Tribunal)] to argue that since the goods had already been cleared, they could not have been confiscated and redemption fine imposed on them.

**25.10** M/s. Noble natural resources India Pvt. Ltd vide their submission dated 31.07.2023, interalia, submitted that they were the bonafide purchaser of the scrips and relied upon the decision of Hon'ble High Court of Bombay in the matter of Taparia Overseas (P) Ltd. Vs. UoI 2003(161) ELT 47(Bom).

**25.11** M/s. AAK Kamani pvt. Ltd vide their submission dated 08.03.2023 interalia, submitted that they were the bonafide purchaser of the said scrips without notice of alleged misclassification of services. They purchased the scrip from the open market and the scrip was validly issued by the DGFT and freely transferrable. They have also relied upon various judgements.

## **DISCUSSION AND FINDINGS-**

**26.** I have carefully gone through the Show Cause Notice, written submissions, record of personal hearing and all the evidences placed on record.

**27.** The issues to be decided before me are:-

- a. whether the service rendered by the exporter comes within the definition of export of service;
- b. Whether the services rendered by them were notified/listed under Appendix-3D for availing the benefit of SEIS;
- c. Whether duty of Rs.....under Section 28AAA of the Customs Act, 1962 is required to be paid by M/s. VMware software India Pvt. Ltd along with applicable interest;
- d. Whether M/s. VMware software India Pvt. Ltd is liable for penal actions under various sections as proposed in the Show cause notice;



- e. Whether the imported goods are liable for confiscation under Section 111 of the Customs Act, 1962

## **EXPORT PROMOTION SCHEMES UNDER FTP 2015-2020**

**28.** In terms of Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, [an act which provides for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto] the Central Government notified the Foreign Trade Policy 2015-20 w.e.f. 01.04.2015. [FTP 2015-20](#) introduced two new schemes, namely “Merchandise Exports from India scheme (MEIS)” for export of specified goods to specified Markets and “Service Exports from India Schemes (SEIS)” for increasing exports of notified services, in place of plethora of schemes earlier, with different conditions for eligibility and usage. The matter in hand pertains to SEIS.

**29.** In terms of Chapter 3 of the Foreign Trade Policy (FTP) 2015-2020 exporters are issued duty credit Scrips under two schemes for exports of Merchandise and Services namely (i) Merchandise Exports from India Scheme (MEIS) & (ii) Service Exports from India Scheme (**SEIS**) with an objective to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India’s export competitiveness.

**30.** Service Exports from India Scheme (SEIS) has been introduced by the Government of India w.e.f. 01.04.2015 under the Foreign Trade Policy 2015-20 (FTP 2015-2020) replacing the erstwhile ‘Served From India Scheme (SFIS)’ under the FTP 2009-15. As per FTP 2015-2020, Service Providers of Notified Services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. As per Para 3.07 of FTP 2015-2020, objective of Service Exports from India Scheme (SEIS) is **to encourage export of notified Services from India**. Further as per Para 3.08 of [FTP 2015-2020](#), Services rendered in the manner as per Para 9.51(i) and Para 9.51(ii) of this policy shall be eligible for SEIS benefit. The notified services and rates of rewards are listed in Appendix 3D. SEIS is a reward computed based on the ‘net’ free foreign exchange realized and the percentage of this reward is specified in Appendix 3D of the FTP 2015-20. Benefit allowed under this scheme is 3% to 7% (as amended from time to time) as per nature of services supplied and the Scrips can be used for the payment of Custom duties on imports, payment of excise on domestic procurement, including capital goods and payment of service tax. The duty Scrips are freely transferable. The SEIS entitlements as per Public Notice No. 03 dated 01/04/2015 (as amended by DGFT) [**RUD No. – 14**] issued by the Directorate General of Foreign Trade (DGFT), Ministry of Commerce on all the list of services are as under:

### **Annexure to Appendix 3D**

**Note 1:** The services and rates of rewards notified against them shall be applicable for services export made between 1-4-2015 to 30-09-2015 only. The list of services/rate is subject to review with effect from 1-10-2015.

**Note 2:** The rate of reward for eligible services is subject to conditions as specified in FTP and HBP.

**Note 3:** For Educational Services, SEIS reward shall not be available on Capitation Fee.

**Note 4:** Under Maritime Transport Services marked with \*[9A (a), (b) and (c)], the reward shall be limited to Operations from India by Indian Flag Carriers only

**List of Services**

S.No.	SECTORS	Central Product Classification (CPC) Code	Admissible rate in % (on Net Foreign Exchange earnings) [As amended by DGFT]
<b>1</b>	<b>BUSINESS SERVICES</b>		
<b>A.</b>	<b><u>Professional services</u></b>		
a.	Legal services	861	5/7
b.	Accounting, auditing and bookkeeping services	862	5/7
c.	Taxation services	863	5/7
d.	Architectural services	8671	5/7
<b>e.</b>	<b>Engineering services</b>	<b>8672</b>	<b>5/7</b>
f.	Integrated engineering services	8673	5/7
g.	Urban planning and landscape architectural services	8674	5/7
h.	Medical and dental services	9312	5/7
i.	Veterinary services	932	5/7
j.	Services provided by midwives, nurses, physiotherapists and paramedical personnel	93191	5/7
<b>B</b>	<b><u>Research and development services</u></b>		
a.	R&D services on natural sciences	851	5/7
b.	R&D services on social sciences and humanities	852	5/7
c.	Interdisciplinary R&D services	853	5/7
<b>C.</b>	<b><u>Rental/Leasing services without operators</u></b>		
a.	Relating to ships	83103	5/7
b.	Relating to aircraft	83104	5/7
c.	Relating to other transport equipment	83101 83102 83105	5/7
d.	Relating to other machinery	83106-83109	5/7
<b>D</b>	<b><u>Other business services</u></b>		
a.	Advertising services	871	3/5
b.	Market research and public opinion polling services	864	3/5
c.	Management consulting service	865	3/5
d.	Services related to management consulting	866	3/5
<b>e.</b>	<b>Technical testing and analysis services</b>	<b>8676</b>	<b>3/5</b>
f.	Services incidental to agricultural, hunting and forestry	881	3/5
g.	Services incidental to fishing	882	3/5
h.	Services incidental to mining	883 5115	3/5
i.	Services incidental to manufacturing	884	3/5

		885	
j.	Services incidental to energy distribution	887	3/5
k.	Placement and supply services of personnel	872	3/5
l.	Investigation and security	873	3/5
m.	Related scientific and technical consulting services	8675	3/5
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633 8861-8866	3/5
o.	Building – cleaning services	874	3/5
p.	Photographic Services	875	3/5
q.	Packaging services	876	3/5
r.	Printing, publishing	88442	3/5
s.	Convention services	87909	3/5
<b>2</b>	<b>COMMUNICATION SERVICES</b>		
	<b>Audiovisual services</b>		
a.	Motion picture and video tape production and distribution service	9611	5/7
b.	Motion picture projection service	9612	5/7
c.	Radio and television services	9613	5/7
d.	Radio and television transmission services	7524	5/7
e.	Sound recording	n.a.	5/7
<b>3</b>	<b>CONSTRUCTION AND RELATED ENGINEERING SERVICES</b>		
A.	General Construction work for building	512	5/7
B.	General Construction work for Civil Engineering	513	5/7
C.	Installation and assembly work	514 516	5/7
D.	Building completion and finishing work	516	5/7
<b>4.</b>	<b>EDUCATIONAL SERVICES (Please refer Note-3)</b>		
A.	Primary education service	921	5/7
B.	Secondary education services	922	5/7
C.	Higher education services	923	5/7
D.	Adult education	924	5/7
<b>5</b>	<b>ENVIRONMENTAL SERVICES</b>		
A.	Sewage services	9401	5/7
B.	Refuse disposal services	9402	5/7
C.	Sanitation and similar services	9403	5/7
<b>6</b>	<b>HEALTH-RELATED AND SOCIAL SERVICES</b>		
A.	Hospital services	9311	5/7
<b>7</b>	<b>TOURISM AND TRAVEL-RELATED SERVICES</b>		
A.	Hotels and Restaurants (including catering)		
a.	Hotel	641-643	3/5
b.	Restaurants (including catering)	641-643	3/5
B.	Travel agencies and tour operators services	7471	5/7
C	Tourist guides services	7472	5/7
<b>8.</b>	<b>RECREATIONAL CULTURAL AND SPORTING SERVICES (other than audiovisual services)</b>		
A.	Entertainment services (including theatre, live bands and circus services)	9619	5/7
B.	News agency services	962	5/7
C.	Libraries archives, museums and other cultural services	963	5/7
D.	Sporting and other recreational services	964	5/7

<b>9</b>	<b>TRANSPORT SERVICE (Please refer Note 4)</b>		
<b>A.</b>	<b><u>Maritime Transport Services</u></b>		
a.	Passenger transportation*	7211	5/7
b.	Freight transportation*	7212	5/7
c.	Rental of vessels with crew*	7213	5/7
d.	Maintenance and repair of vessels	8868	5/7
e.	Pushing and towing services	7214	5/7
f.	Supporting services for maritime transport	745	5/7
<b>B.</b>	<b><u>Air Transport services</u></b>		
a.	Rental of aircraft with crew	734	5/7
b.	Maintenance and repair of aircraft	8868	5/7
c.	Airport Operations and ground handling		5/7
<b>C</b>	<b><u>Road Transport Services</u></b>		
a.	Passenger transportation	7121 7122	5/7
b.	Freight transportation	7123	5/7
c.	Rental of Commercial vehicles with operator	7124	5/7
d.	Maintenance and repair of road transport equipment	6112 8867	5/7
e.	Supporting services for road transport services	744	
<b>D</b>	<b><u>Services Auxiliary To All Modes of Transport</u></b>		
a.	Cargo handling services	741	5/7
b.	Storage and warehousing services	742	5/7
c.	Freight transport agency services	748	5/7

(emphasis added)

Clearly, in order to avail the benefit of SEIS schemes, the following conditions are to be met:-

- (i) Service must be exported
- (ii) Exported services must be notified
- (iii) Service provider must be located in India
- (iv) Services must be rendered in the manner as laid down in Para 9.51(i) and Para 9.51(ii) of the FTP 2015-2020

#### **NATURE OF SERVICE PROVIDED BY THE EXPORTER-**

**31.** I find that M/s. VMWARE Software India Pvt. Ltd. is a subsidiary of M/s. VMware International Ltd, Ireland and they in turn are the subsidiary of VMware Inc, California. During the relevant time, M/s. VMWARE Software India Pvt. Ltd. provided services of software development, IT enabled services (Call Centre Services) to VMWARE International (Ireland). Further they also performed services of Marketing of software products, promotional services of product, liaison between customers and the agents/distributors in the territory of India on behalf of M/s. VMWARE International (Ireland) Ltd.

**32.** As per the statement dated 13.05.2019 of Shri Dev Kumar Prabhu, Director Marketing of M/s. VMware software India Pvt Ltd. they (M/s. VMware software India) had executed three agreements with VMware International Ltd, Ireland for the following:-

- a. R&D (Development service agreement)-R&D vertical does research and development services relating to development and improvement of computer products/software, for their related company in Ireland. This was functioning as an STP unit.
- b. ITES (Call Centre service agreement)- The call centre advises and assists customer with respect to installation and configuration of software products and also advises and assists customers in resolving problems and issues encountered while in development or quality assurance. This was also an STP unit.
- c. MSS (Market Service agreement)-The marketing vertical performs general administrative marketing and promotional services, expanding the customer base in the territory (India), act as liaison between customers and agents.

**33.** I find that ShriBosco Noronha, Director, M/s. VMWare (India) in his statement dated 14.05.2019 stated that they were providing the same service as mentioned in their Service Tax Registration as Business Auxiliary Services, Information Technology, Software Services. He further stated that in Business Auxiliary services they had provided marketing services and under Information Technology services, they had provided Call Centre services. In software service, they had provided R & D of software development. All the three services provided by M/s. VMware Software India services were on behalf of VMware International Ltd., Ireland.

**34.** I find that As per the marketing Service Agreement executed between M/s. VSIPL, and M/s. VMware, Ireland, M/s. VSIPL provides services to the potential Indian customers of M/s. VMware, Ireland which include attending the queries of the clients in relation to the software products of M/s. VMware i.e. consultancy in respect of software products of M/s. VMware, Ireland. Further, M/s. VSIPL provided periodical reports to M/s. VMware, Ireland in respect of the customers need in India, which implies that M/s. VSIPL first analysed the clients need in respect of the software products and reported the same to M/s. VMware, Ireland.

**35.** Further, Shri Dev Kumar Prabhu, Director (Marketing) of M/s. VMware software India Pvt Ltd. stated in his statement dated 13.05.2019 that through Marketing Services provided by their company, they imparted knowledge about their software products to the customers of M/s. VMware, Ireland, in India, so that the customer better understand the functionality of their software technology & products that could be like servers, storage, virtualization, networking etc.

**36.** Further, as alleged in the show cause notice, it is pertinent to examine the service rendered by the exporter in terms of CPC Code 841 to 849 which are defined as under:

***DIVISION 84 COMPUTER AND RELATED SERVICES [RUD NO: - 06],***

***841 Consultancy services related to the installation of computer hardware***

***8410 84100 Consultancy services related to the installation of computer hardware***

*Assistance services to the clients in the installation of computer hardware (i.e. physical equipment) and computer networks.*

***842 Software implementation services***

*All services involving consultancy services on, development and implementation of software. The term "software" may be defined as the sets of instructions required to make computers work and communicate. A number of different programmes may be developed for specific applications (application software), and the customer may have a choice of using ready-made programmes off the shelf (packaged software), developing specific programmes for particular requirements (customized software) or using a combination of the two.*

***8421 84210 Systems and software consulting services***

*Services of a general nature prior to the development of data processing systems and applications. It might be management services, project planning services, etc.*

***8422 84220 Systems analysis services***

***Analysis services include analysis of the clients' needs, defining functional specification, and setting up the team. Also involved are project management, technical coordination and integration and definition of the systems architecture.***

***8423 84230 Systems design services***

*Design services include technical solutions, with respect to methodology, quality-assurance, choice of equipment software packages or new technologies, etc.*

***8424 84240 Programming services***

*Programming services include the implementation phase, i.e. writing and debugging programmes, conducting tests, and editing documentation.*

***8425 84250 Systems maintenance services***

*Maintenance services include consulting and technical assistance services of software products in use, rewriting or changing existing programmes or systems, and maintaining up-to-date software documentation and manuals. Also included are specialist work, e.g. conversions.*

***843 Data processing services***

***8431 84310 Input preparation services***

*Data recording services such as key punching, optical scanning or other methods for data entry.*

***8432 84320 Data-processing and tabulation services***

*Services such as data processing and tabulation services, computer calculating services, and rental services of computer time.*

**8433 84330 Time-sharing services**

*This seems to be the same type of services as 84320. Computer time only is bought; if it is bought from the customer's premises, telecommunications services are also bought. Data processing or tabulation services may also be bought from a service bureau. In both cases the services might be time sharing processed. Thus, there is no clear distinction between 84320 and 84330.*

**8439 84390 Other data processing services**

*Services which manage the full operations of a customer's facilities under contract: computer-room environmental quality control services; management services of in-place computer equipment combinations; and management services of computer work flows and distributions.*

**844 Database services**

**8440 84400 Database services**

*All services provided from primarily structured databases through a communication network.*

*Exclusions: Data and message transmission services (e.g. network operation services, value-added network services) are classified in class 7523 (Data and message transmission services). Documentation services consisting in information retrieval from databases are classified in subclass 96311 (Library services).*

**845 Maintenance and repair services of office machinery and equipment including computers**

*8450 84500 Maintenance and repair services of office machinery and equipment including computers*

*Repair and maintenance services of office machinery, computers and related equipment.*

**849 Other computer services**

**8491 84910 Data preparation services**

*Data preparation services for clients not involving data processing services.*

**8499 84990 Other computer services n.e.c.**

*Other computer related services, not elsewhere classified, e.g. training services for staff of clients, and other professional computer services.*

*(emphasis added)*

**37.** Clearly the service rendered by the exporter is falling within the CPC-84220 as given below-

**8422 84220 Systems analysis services**

*Analysis services include analysis of the clients' needs, defining functional specification, and setting up the team. Also involved are project management, technical coordination and integration and definition of the systems architecture*

38. Further, it is important to examine I find that the exporter has availed the benefit of SEIS after classifying their service as “Management Consulting Services” as given below-

The definition of “Management consulting services” as under CPC division-865 is given below. (**[RUD NO: - 07]**).

8650 Management consulting services

**86501 General management consulting services**

*Advisory, guidance and operational assistance services concerning business policy and strategy and the overall planning, structuring and control of an organization. More specifically, general management consulting assignments may deal with one or a combination of the following: policy formulation, determination of the organizational structure (decision-making system) that will most effectively meet the objectives of the organization, legal organization, strategic business plans, defining a management information system, development of management reports and controls, business turnaround plans, management audits, development of profit improvement programmes and other matters which are of particular interest to the higher management of an organization.*

**86502 Financial management consulting services (except business tax)**

*Advisory, guidance and operational assistance services concerning decision areas which are financial in nature, such as working capital and liquidity management, determination of an appropriate capital structure, analysis of capital investment proposals, development of accounting systems and budgetary controls, business valuations prior to mergers and/or acquisitions, etc., but excluding advisory services on short-term portfolio management which are normally offered by financial intermediaries.*

**86503 Marketing management consulting services.**

*Advisory, guidance and operational assistance services concerning the marketing strategy and marketing operation of an organization. Marketing consulting assignments may deal with one or a combination of the following: analysis and formulation of a marketing strategy, formulation of customer service and pricing policies, sales management and staff training, organization of distribution channels (sell to wholesalers or directly to retailers, direct mail, franchise, etc.), organization of the distribution process, package design and other matters related to the marketing strategy and operations of an organization.*

**86504 Human resources management consulting services**

*Advisory, guidance and operational assistance services concerning the human resources management of an organization. Human resources consulting assignments may deal with one or a combination of the following: audit of the personnel function, development of a human resource policy, human resource planning, recruitment procedures, motivation and remuneration strategies, human resource development, labour-management relations, absenteeism control, performance appraisal and other matters related to the personnel management function of an organization.*



### **86505 Production management consulting services**

*Advisory, guidance and operational assistance services concerning methods for improving productivity, reducing production costs and improving the quality of production. Production consulting assignments may deal with one or a combination of the following: effective utilization of materials in the production process, inventory management and control, quality control standards, time and motion studies, job and work methods, performance standards, safety standards, office management, planning and design and other matters related to production management, but excluding advisory services and design for plant layout and industrial processes which are normally offered by consulting engineering establishments.*

### **86506 Public relations services**

*Advisory, guidance and operational assistance services concerning methods to improve the image and relations of an organization or individual with the general public, government, voters, shareholders and others.*

### **86509 Other management consulting services**

*Advisory, guidance and operational assistance services concerning other matters. These services include industrial development consulting services, tourism development consulting services, etc.*

(emphasis added)

**39.** I find that the Management Consulting Services is a combination of services i.e. advisory, guidance and operational Assistance services concerning the marketing strategy and marketing operations, whereas as per the Marketing Services Agreement executed between M/s. VSIPL, and M/s. VMware, Ireland, M/s. VSIPL provides only operational assistance to M/s. VMware, Ireland, by way of attending queries to know the customers need and accordingly imparting knowledge to its existing and potential customers and liasoning between client and the distributors, in the territory of India.

**40.** Further, I find that Shri Bosco Noronha, Director of M/s. VMware software India Pvt Ltd., who had filed the SEIS application before, DGFT stated in his statement dated 14.05.2019 & 18.02.2020 that their company did not provide Marketing Management Consultancy to M/s. VMware, Ireland; they had declared their services in SEIS application as CPC- 865- Marketing Management Consultancy, as there was not any specific division in the CPC for the services provided by M/s. VSIPL. He further stated that they did not provide combination of services i.e. advisory, guidance and operational Assistance services concerning the marketing strategy and marketing operations to M/s. VMware, Ireland. Instead VMware, Ireland instructed/directed M/s. VSIPL in relation to the services provided to the Indian customer of VMware, Ireland in the territory of India on behalf of VMware, Ireland.

**41.** I find that Shri Dev Kumar Prabhu, Director (Marketing) of M/s. VMware software India Pvt Ltd. stated in his statement dated 13.05.2019 that through the Marketing Services provided by their company, they impart knowledge about their software products to the customers of M/s. VMware, Ireland, in India, so that the customer better understand the functionality of their

software technology & products that could be like servers, storage, virtualization, networking etc; which is covered under CPC code 841 to 849

**42.** Services registered in the Service Tax Registration Certificate does not mention “Management Consultancy Service. On perusal of the Service Tax Returns for the year 2015-16 to 2017-18 – **[RUD NO: - 10]** of M/s. VSIPL, I find that they had shown export only in Business Auxiliary Service and Information Technology Software services. M/s. VSIPL had obtained registration under Business Auxiliary Service (zzb) and Information Technology Software services (zzzze) and had shown exports only under these services in their Service Tax returns. Respective section for Business Auxiliary Service (zzb) and Information Technology Software services under Finance Act, 1994 65(105) are 65(105) (zzb) and 65(105) (zzzze) respectively, whereas, erstwhile section under Finance Act, 1994 for Management or Business Consultancy was 65(105) (r). Further, the said party had neither taken service tax registration (ST-2) under Management Consultancy Services nor they have declared any of their supply of service as Management Consultancy Services in their service tax returns (ST-3) for the period for which they have claimed SEIS benefits.

CENTRAL BOARD OF EXCISE AND CUSTOMS Ministry of Finance - 101, Queen's Road, New Delhi			
FORM ST-2			
Shri/Ms. VMWARE SOFTWARE INDIA PRIVATE LIMITED, 1,2,3,4&9TH FLOOR, 165/2, BLOCK I, KALYANI MAGNUM TOWER, DORAISANIPALYA, BANNERGHATA ROAD, IIM POST, BANGALORE URBAN, KARNATAKA, 560076 having undertaken to comply with the conditions prescribed in Chapter V of the Finance Act, 1994 read with the Service Tax Rules, 1994, and any orders issued thereunder is hereby certified to have been registered with the Central Excise Department. The Service Tax Code and other details are mentioned hereunder.			
Name :	VMWARE SOFTWARE INDIA PRIVATE LIMITED		
Address :	1,2,3,4&9TH FLOOR, 165/2, BLOCK I, KALYANI MAGNUM TOWER, DORAISANIPALYA, BANNERGHATA ROAD, IIM POST, BANGALORE URBAN, KARNATAKA, 560076		
PAN No :	AACCV4573E		
Name as in PAN :	VMWARE SOFTWARE INDIA PRIVATE LIMITED		
Nature of registration :	Centralized Registration for more than one premises		
Service Tax Code(Registration Number) :	AACCV4573EST002		
Taxable services :	BUSINESS AUXILIARY SERVICES, INFORMATION TECHNOLOGY SOFTWARE SERVICE		
ADDRESS OF BUSINESS PREMISES			
Name Of Premises/Building :	KALYANI MAGNUM TOWER	Flat / Door / Block No :	1,2,3,4 & 9TH FLOOR, 165/2
Road / Street / Lane :	BLOCK I	Village / Area / Lane :	DORAISANIPALYA
Block / Taluk / Sub-Division / Town :	BANNERGHATA ROAD	Post Office :	IIM POST
City / District :	BANGALORE URBAN	State / Union Territory :	KARNATAKA
PIN :	560076	Phone Number-1 :	08040646000
Phone Number-2 :		Fax Number-1 :	08040646070
Fax Number 2 :		Email Address :	vkanniap-pan@vmware.com
Premises Code :	SA0101A001		
Address of all the premises from where taxable services are provided or intended to be provided			
Name Of Premises/ Building :	VMWARE SOFTWARE INDIA PVT LTD	Flat / Door / Block No :	TATA COMMUNICATIONS
Road / Street / Lane :	NO. 18, 18&20,	Village / Area / Lane :	EPIP LAYOUT
Block / Taluk / Sub-Division / Town :	KAJIB	Post Office :	WHITEFIELD
City / District :	BANGALORE	State / Union Territory :	KARNATAKA
PIN :	560066	Phone Number-1 :	08040646000
Phone Number-2 :		Fax Number-1 :	
Fax Number-2 :		Email Address :	vkanniap-pan@vmware.com
Premises Code :	SA0101A010		
Taxable services :	BUSINESS AUXILIARY SERVICES, INFORMATION TECHNOLOGY SOFTWARE SERVICE		
Name Of Premises/ Building :	VMWARE SOFTWARE INDIA PVT LTD	Flat / Door / Block No :	LEVEL 5, WESTERN CENTRE 3
Road / Street / Lane :		Village / Area / Lane :	DP ROAD

Description of Taxable Services	Business auxiliary service				(2016)			
Taxable Service for which Tax is being Business auxiliary service paid								
A10	Assessee is liable to pay Service Tax on this taxable service as							
	A10.1 A Service Provider under Section 68(1)	Yes	A10.2 A Service Receiver under Section 68(2)	No				
	A10.3 A Service Provider under partial reverse charge under proviso to Section 68(2)	No	A10.4 A Service Receiver under partial reverse charge under proviso to Section 68(2)	No				
	A10.5 If covered by A10.3 above, then the percentage of Service Tax Payable as Provider of Service	0	A10.6 If covered by A10.4 above, then the percentage of Service Tax Payable as Recipient of Service	0				
A11 EXEMPTIONS								
A11.1	Has the assessee availed benefit of any exemption Notification ('Y'/'N')							N
A11.2	If reply to A11.1 is 'Y', Please furnish Notification No. and Sl. No. in the Notification under which such exemption is availed							
Sl. No.	Notification Number						Sl. No.	
1								
A12 ABATEMENTS								
A12.1	Has any abatement from the value of services been claimed ('Y'/'N')							N
A12.2	If reply to A12.1 is 'Y', Please furnish Notification No. and Sl. No. in the Notification under which such abatement is availed							
Sl. No.	Notification Number						Sl. No.	
1								
A13 PROVISIONAL ASSESSMENT								
A13.1	Whether provisionally assessed ('Y'/'N')							N
A13.2	If reply to A13.1 is 'Y', please furnish Provisional Assessment Order No. and Date							
	Provisional Assessment Order No.						Date	
PART - B	VALUE OF TAXABLE SERVICE AND SERVICE TAX PAYABLE							
PART - B1	FOR SERVICE PROVIDER							
Sl. No.	Month	Apr	May	June	Jul	Aug	Sep	Total
B1.1	Gross Amount (excluding amounts received in advance, amounts taxable on receipt basis, for which bills/invoices/challans or any other documents may not have been issued) for which bills/invoices/challans or any other documents are issued relating to service provided or to be provided (including export of service and exempted service)	5909498 27	9117276 73	7142518 31	7691496 87	5464049 15	5746979 97	4707151 900
B1.2	Amount received in advance for services for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0
B1.3	Amount taxable on receipt basis under third proviso to Rule 6(1) of Service Tax Rules, 1994 for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0
B1.4	Amount taxable for services provided for which bills/invoices/challans or any other documents have not been issued	0	0	0	0	0	0	0

Page 7 of 36

43. I further find that in Sample of Export Invoices, the description is shown as “Cost plus for Marketing Services” and not “Management Consultancy Services”.

**SUBMISSION OF M/s. VSIPL IN RESPECT OF CLASSIFICATION-**

44.1 I find that M/s. VSIPL has argued that the doubts raised by the customs authorities on the classification of the Noticee’s services to VMware Ireland are based on completely incorrect reading of the definition provided under the CPC. The Noticee submits that the CPC nowhere requires a combination of activities, for them to qualify as ‘management consulting service (CPC code 865)’. The ‘and’ used in the first part of the definition has to be read as ‘or’, given the context of the rest of the definition which specifically states that the “marketing consulting assignments may deal with one or a combination of the following...”. Further, it is to be noted if the CPC intended for there to be a combination of the specified services/ activities, it would have mentioned the same. However, such language is conspicuous by its absence. Therefore, it is clear that the doubts raised by the customs authorities are based on an incorrect reading of the definition and purposive addition of the text which is not present in the definition.

44.2 The Noticee also submits that the DGFT is the appropriate authority for administering the benefits under the FTP (including the SEIS), and the DGFT, on an independent review of the documents submitted by the Noticee, came to the same conclusion, i.e., the services provided by the Noticee are classifiable under ‘management consulting service (CPC code 865)’. As an authority tasked with export promotion of goods and services, the DGFT is entitled to adopt a more lenient or purposive interpretation (when two interpretations are possible), in order to further the objectives of export promotion and thereby, earning foreign exchange for India.”

**44.3** In this regard, it is pertinent to note that the Add. DGFT, Bangalore, after carefully considering the contentions raised by the office of DRI and arguments of the noticee, has already cancelled the said scrips vide Order issued from F. No. 07/21/094/98/SEIS/MISC/AM2020/DRI dated 27.05.2021[**RUD No. – 18**]. Further the argument of the noticee that ‘and’ used in the first part of the definition has to be read as ‘or’ has no merit.

In view of the above discussion and finding, it is evident that the services provided by M/s. VSIPL does not fall under CPC division-865 i.e. Management Consultancy Services. Thus, the second condition that the services must be notified in Appendix 3D of [FTP 2015-2020](#) is not fulfilled.

**Whether the services rendered by M/s. VSIPL, India to M/s. VSIPL qualify for the “export of services”.**

**45.** In this regard, I find that M/s. VSIPL entered into a Marketing Services Agreement with M/s. VMware, Ireland whereby M/s. VSIPL was required to provide operational assistance to M/s. VMware, Ireland, by way of attending queries to know the customers (located in India) need and accordingly imparting knowledge to its existing and potential customers and act as a liaison between client and the distributors, in the territory of India.

On careful reading of the agreement it is forthcoming that M/s. VMware, Ireland (parent) has provided services to its customers in Indian territory through its subsidiary i.e. M/s. VMware Software India Pvt. Ltd.

**46.** In this regard, it is pertinent to reproduce the definition of import and export provided in Section 2 of the Foreign Trade (Development & Regulation) Act, 1992 as given below:-

**“2(e) “import” and “export” means,—**

(I) in relation to goods, bringing into, or taking out of, India any goods by land, sea or air;

(II) in relation to services or technology,—

*(i) supplying, services or technology—*

(A) from the territory of another country into the territory of India;

(B) in the territory of another country to an Indian service consumer;

**(C) *by a service supplier of another country, through commercial presence in India;***

(D) by a service supplier of another country, through presence of their natural persons in India;

*(ii) supplying, services or technology—*

(A) from India into the territory of any other country;

(B) in India to the service consumer of any other country;

(C) by a service supplier of India, through commercial presence in the territory of any other country;

Clearly, as per the definition of Section 2(e)(II)(i)(C) of Foreign Trade (Development & Regulation) Act, 1992, M/s. VMware software, Ireland provided services to its customers in Indian territory through its subsidiary i.e. M/s.



VMware Software India Pvt. Ltd. Falls under the definition of “import of service” and not export of service.

**47.** Further, as per the World Trade Organization, GATS training module: Chapter-1 (Basic Purpose And Concepts) downloaded from [www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s3p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm) [WTO | Services - CBT - Basic Purpose and Concepts - Definition of Services Trade and Modes of Supply - Page 1](#) **[RUD NO: - 09]**, there are 04 modes of supply of service. As per mode ‘C’, the supply of service, “by a service supplier of one member, through commercial presence, in the territory of any other member” is said to be supply through “Mode 3- Commercial presence”. Further, as per the examples of the four modes of supply (from the prospective of an “importing” country A), the supply of services through “Mode 3- Commercial Presence” defined as “the service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company.

Considering the various facts and definitions mentioned above, the supply of services to the customers of M/s. VMware, Ireland in the territory of India through its subsidiary in India i.e. M/s. VMware Software India Pvt. Ltd., falls under import of service in India as per FTD & R and under “Mode 3- Commercial presence” of WTO GATS.

Further Shri Bosco Noronha, Director, M/s. VSIPL in his statement dated 18.02.2020 confirmed that their service falls u/s 2(e) (II)(i) of Foreign Trade (Development) and Regulation Act., 1992 (FTD & R), which is supply of service in India (import).

#### **SUBMISSION BY M/s. VSIPL IN RESPECT OF SERVICES RENDERED TO BE QUALIFIED FOR ‘EXPORT OF SERVICE’-**

**48. I find that M/s. VSIPL has argued that-**

*The services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the FTP 2015-20*

- i. The Noticee, at the outset, submits that the export status under the erstwhile service tax regime has no bearing on whether the provision of services by the Noticee to VMware Ireland would qualify as ‘export’ under the FTP 2015-20 read with the FTDR Act. For being eligible for the benefits under the SEIS, the services of the Noticee were required to qualify as exports as per the FTP 2015-20, and not under the erstwhile service tax law, i.e., as per the Finance Act, 1994.*
- ii. Without prejudice to the above, though the export status under the erstwhile service tax law is not required to be examined for determining the eligibility for SEIS benefits in the present case, the Noticee submits that, based on its reading of the provisions of the service tax law and the below judicial precedents on the issue where the export status was of services upheld in similar situations, the Noticee was under the bona fide belief that the services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the service tax law.*

*a. M/s Godaddy India Web Services Private Limited, 2016-TIOL-08-ARA-ST*

*b. Universal Services India Pvt Ltd., 2016 (42) STR 585 (AAA)*

*c. Lubrizol Advanced Materials India Pvt. Ltd. v. Commissioner of Central Excise, Belapur, 2019 (1) TMI 720 - CESTAT MUMBAI*

*d. M/s Verizon India Private Limited v. Commissioner of Service Tax, Delhi, TS-594-CESTAT-2019-ST*

*iii. The Noticee also submits that the services rendered by the Noticee to VMware Ireland under the MSA qualified for export status under the FTP 2015-2020. 'Export of services' is defined in Section 2 (e)(II)(ii) of the FTDR Act (under which the FTP 2015-2020 has also been issued) to mean supplying services:*

*(i) from India into the territory of any other country;*

*(ii) in India to the service consumer of any other country;*

*(iii) by a service supplier of India, through commercial presence in the territory of any other country;*

*(iv) by a service supplier of India, through presence of Indian natural persons in the territory of any other country.*

*iv. The Noticee submits that, in the present case, the Noticee was providing marketing services to VMware Ireland located outside India, who was the contractual recipient and the consumer of such services under the MSA. Thus, the services rendered by the Noticee to VMware Ireland were supplied 'from India into the territory of any other country' which is squarely covered under s. no. (i) of the definition of 'export of services' under the FTDR Act. Accordingly, the services provided by the Noticee to VMware Ireland qualified for export status under the FTP 2015-2020.*

**49.** I find that the noticee has argued that the noticee was providing marketing services to VMware Ireland located outside India, who was the contractual recipient and the consumer of such services under the MSA. In this regard, while going through the Sr.No. 1 (Provision of Service) of the MSA(Marketing service Agreement), I find that the agreement states that "During the term of this agreement, Provider shall, at International's request and in accordance with International's instructions, assist International by performing the following services for or on behalf of International ("Services");

- a) *Provide general and administrative, marketing and promotional services;*
- b) *Assist in developing and expanding the customer base in the Territory for the Products*
- c) *Act as liaison between customers and agents/distributors;*
- d) *Maintain appropriate contact with existing and potential customers, including attending to their enquiries on International's range of products and services,*
- e) *Provide periodic feedback to International in the form of reports or statistics on local conditions and customer needs.*
- f) *Any other services that International reasonably requests as may be agreed by the provider.*

**49.1** The argument of the noticee that they were providing services to the M/s. VMware Ireland has no merit as the above mentioned provision of service it is amply clear that they were acting as a subsidiary of the M/s. VMware, Ireland to provide the service for and on behalf of M/s. VMware, Ireland. They were to act as per the directions and instructions of M/s. VMware, Ireland and not on their account. Such arrangement of providing of service is clearly mentioned u/s 2(e) (II)(i) of Foreign Trade (Development) and Regulation Act., 1992 (FTD & R) as an import of service.

**49.2** Further, I find that Section 2(13) of IGST Act, 2017 defines such agent as 'Intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services on his own account.

**49.3** In view of the above discussion and findings, I hold that neither the services rendered would qualify as export of service nor the said services were eligible for SEIS benefits as the same were not listed/notified in Appendix-3D of the FTP 2015-2020.

## **RECOVERY OF DUTY UNDER SECTION 28AAA OF CUSTOMS ACT, 1962-**

**50.** I find that in cases where Scrips are obtained by means of collusion, or wilful misstatement or suppression of facts, duty relatable to utilisation of scrip by person other than to whom such scrips are issued, is recovered from the person to whom the said scrip was issued under Section 28AAA of the Customs Act, 1962, which is reproduced as given below:-

### ***28AAA- Recovery of duties in certain cases:***

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

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



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

**50.1** A plain reading of the section 28AAA of the Customs Act, 1962 provides a perspective that the customs authorities has the power to recover the amount that the transferee has utilized using an instrument, such as a duty credit, which was obtained by the transferor by suppression of facts or willful misstatement or collusion. The section states that where an instrument has been obtained from the appropriate licensing authority by suppression of facts or willful misstatement or collusion, then the customs authorities can initiate proceedings by issuing an SCN and adjudication thereof.

**50.2** In this regard, it is pertinent to note that the exporter becomes entitled to the SEIS benefits once it exports the notified services to the notified market and this benefit cannot be deprived except by cancellation of the said scrips by the DGFT itself after following due procedure. A detailed procedure for cancellation of the scrips has been set out under Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 (in short "FTDR") which is extracted as under:-

"9 (4) The Director General or the officer authorised under sub-section (2) may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any licence granted under this Act:

Provided that no such suspension or cancellation shall be made except after giving the holder of the licence a reasonable opportunity of being heard."

Therefore, unless and until this provision has been invoked by DGFT, the presumption is that the scrips are valid and exporter becomes entitled to the SEIS benefits once the services are exported.

**50.3** Rule 10 of Foreign Trade (Regulation) Rules, 1993 also provides that DGFT is the only authority which can withdraw the SEIS (or MEIS as the case may be) benefits by cancelling the license granted by them. For ease of reference the said Rule 10 is extracted as under:-

"10. Cancellation of a licence.-

The Director General or the licensing authority may by an order in writing cancel any licence granted under these rules if -

(a) *the licence has been obtained by fraud, suppression of facts or misrepresentation;* or

(b) the licensee has committed a breach of any of the conditions of the licence; or

(c) the licensee has tampered with the licence in any manner; or

(d) the licensee has contravened any law relating to customs or foreign exchange or the rules and regulations relating thereto."

**50.4** In the instant case, I find that the Add. DGFT, Bangalore, after carefully considering the contentions raised by the office of DRI and arguments of the noticee, has already cancelled the said scrips vide Order issued from F. No. 07/21/094/98/SEIS/MISC/AM2020/DRI dated 27.05.2021[RUD No. -18].

**50.5** I find that the Noticee has argued that that once the DGFT, which is the authority responsible for administering the SEIS and the benefits under it, has dropped the allegations of 'misdeclaration' and 'fraud', similar allegations cannot be brought in by the customs authorities on the same subject matter, i.e., obtaining the benefits under the SEIS. They have placed reliance on the case of ***Titan Medical Systems Pvt. Ltd. v. Collector of Customs, (2003) 9 SCC 133***, where the Hon'ble Supreme Court has held that in cases where there is misrepresentation to the licensing authority to obtain a license, scrip, etc., it is the licensing authority that has to produce evidence that there was any misrepresentation, and only then can the customs authority can allege misrepresentation and take action. Therefore, the Noticee has submitted that, in the absence of any findings by the DGFT on 'misstatement' and 'suppression', the same cannot be alleged against the Noticee by the customs authorities, and no proceedings can be initiated against the Noticee under Section 28AAA.

In this regard, I find that Para 2 of the Order of DGFT records that DRI, Ahmedabad informed the DGFT that the exporter had mis-classified their export service in the application filed before the office of DGFT and had fraudulently obtained SEIS scrips to the tune of total Rs. 12,89,98,640/-. Further the said Para records that their services don't fall under Management Consulting services and the Marketing services and Appendix 3D of [FTP 2015-2020](#). While applying to the DGFT they have mis-stated these services as 'Management Consulting services'.

Further, it is seen that the Additional DGFT, Bangalore in Para 18(b) held that the service rendered are not falling under the Management Consulting services. Thus, not eligible for SEIS. In view of the same, the Addl. DGFT, Bangalore vide Para 18(c) of the order cancelled the scrips. The findings of the DGFT clearly bring out the fact that the scrips were obtained by the exporter by way of wilfull mis-statement which makes the recovery of duty under Section 28AAA legally sustainable. I further find that the reliance of the noticee on the judgement of ***Titan Medical Systems Pvt. Ltd. v. Collector of Customs, (2003) 9 SCC 133*** is not applicable in the instant case as in the said case, the lice issuing authority had not cancelled the instrument, however, in the instant case, the scrips have been cancelled by the issuing authority i.e. DGFT.

**50.6** In view of the above, it is clear that M/s. VSIPL, Bangalore had obtained SEIS Scrips by means of suppression of facts regarding the nature of services rendered (and not exported) by them and wilful mis-statement regarding the classification of services rendered (and not exported) by them and M/s. VSIPL, Bangalore subsequently sold/transferred the same to various importers. The said various importers had utilised the said ineligible SEIS amount for payment of Customs duties against the imports made by them. Therefore, the import duties equivalent to the duty credit Scrips utilised by the other importers for their imports, as detailed in Column 15 of Annexure 'C' to the

SCN, is required to be recovered from M/s. VSIPL, Bangalore under Section 28AAA of the Customs Act, 1962 along with interest at applicable rate from the date of utilisation till the date of recovery of such duty under Section 28AA read with Section 28AAA(2) of the Customs Act, 1962

**CONFISCATION OF GOODS AND PENALTY UPON M/s. VSIPL, Bangalore AND ITS DIRECTOR:-**

**51.** I find that the goods imported, against the SEIS Scrips which were fraudulently obtained and which had been cancelled by DGFT, and which were not eligible to the benefit of exemption under Notification No. 25/2015-Customs dated 08th April, 2015 issued under Section 25 of the Customs Act, 1962 are also liable for confiscation under Section 111 of Customs Act, 1962. M/s VSIPL, Bangalore who in relation to the imported goods, did or omitted to do acts/omissions which had rendered such goods liable to confiscation under section 111 are liable to penalty under Section 112(a) of the Customs Act, 1962.

The relevant legal provisions under Customs Act, 1962 are as follows:

As per **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 transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;*

.....  
.....

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

**52.** I find that Section 111(m) is not attracted here as the Bills of Entry for importation of goods were filed by the respective importers therefore, the subject goods shall not be held liable for confiscation under Section 111(m) at the hands of the exporter i.e. M/s VSIPL, Bangalore.

**53.** However, M/s. VSIPL had mis-declared/mis-stated their Services in ANF-3B Form and fraudulently obtained SEIS Scrips. They had subsequently transferred/sold the Scrips to various importers. Therefore, their acts had rendered the goods liable for confiscation under Section 111(o) of the Customs

Act, 1962 since the condition no. 2(1) has been violated. The violation of Notification No. 25/2015-Customs dated 8th April, 2015 is given below:-

**Violation of Notification No. 25/2015-Customs dated 8<sup>th</sup> April, 2015 issued under Customs Act, 1962, by M/s. VSIPL, Bangalore:**

**As per the Notification:**

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

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

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

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

- (1) *that the duty credit in the said scrip is issued to a service provider located in India **against export of notified services listed in Appendix 3D** of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020*

\*

\*

**54.** In the instant case, it is clear that M/s. VSIPL, Bangalore provides 'Software/Information Technology Services related to Computer Programming and Consulting', which are not notified in Appendix 3D of Appendices of Foreign Trade Policy, 2015-20 therefore M/s. VSIPL, Bangalore has violated the condition 2 (1) of the Notification No. 25/2015-Customs dated 08th April, 2015 issued under section 25 of the Customs Act, 1962. Therefore, the imported goods have been rendered liable for confiscation under Section 111(o) of the Customs Act, 1962. However, redemption fine under Section 125 of the Customs Act, 1962 is imposable on the owner of goods, therefore, no redemption fine is imposable on M/s. VSIPL being the exporter in the instant case and not the owner of goods.

**PENALTY UNDER SECTION 114AA and 114AB-**

**55.** I find that M/s. VSIPL had mis-declared/mis-stated their exported Services in ANF-3B Form and fraudulently obtained SEIS Scrips. They had subsequently transferred/sold the Scrips to various importers. These Scrips were used by various importers for purpose of availing benefit of Customs Duty exemption available under Notification No. 25/2015-Customs dated 08<sup>th</sup> April, 2015 issued under Section 25 of the Customs Act, 1962. Therefore VSIPL, Bangalore had knowingly or intentionally made, signed and used, or caused to be made, signed

or used, Customs declarations/statements/documents and other declarations/statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act, 1962. Therefore M/s. VSIPL, Bangalore are liable for penalty under Section 114AA of the Customs Act, 1962.

### **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.*

**55.1** They have argued that penalty under Section 114AA is not sustainable as they had not given any false declaration to the Custom Authorities and all its dealings were only with the DGFT; that the actual importers who had actually used the scrips were also not known to the company since the Company had sold the scrips in the open market to a third party platform and had no direct dealings or relationship with the actual importers.

**55.2** I find no force in the argument of the M/s. VSIPL as they had knowingly or intentionally filed incorrect details in the ANF-3B, before DGFT, for availing scrips fraudulently. On going through the Section 114AA, it nowhere requires that the incorrect or false document must be filed before the Customs authorities. It is pertinent to note that the words, “*for the purposes of this Act*” clearly imply that if a false/incorrect document has been used for the purpose of this Act, penalty is attracted. In the instant case, the scrips were eventually used for the purpose of availing benefit of Customs Duty exemption available under Notification No. 25/2015-Customs dated 08<sup>th</sup> April, 2015 issued under Section 25 of the Customs Act, 1962. The argument of the noticee that the document was not filed before the Customs authorities is immaterial in the instant case as the scrip obtained by way of mis-declaration/mis-statement was for the purpose of Customs Act, 1962 only.

**56.** I find that the SCN has proposed that M/s. VSIPL, Bangalore had obtained SEIS Scrips fraudulently by way of wilful mis-statement and suppression of facts and such SEIS Scrips have been utilised by other persons for discharging their duty liability and therefore M/s. VSIPL, Bangalore have also rendered themselves liable for penalty under Section 114AB of the Customs Act, 1962.

### **SECTION 114AB**

*Penalty for obtaining instrument by fraud, etc. — Where any person has obtained any instrument by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.*

Explanation. — For the purposes of this section, the expression “instrument” shall have the same meaning as assigned to it in the Explanation 1 to section 28AAA

**56.1** M/s. VSIPL, during the course of personal hearing, submitted that penalty can not be imposed under Sec. 114AB, which was brought into effect on 01.08.2019 with prospective effect, and all scrips were issued before this date and also sold out immediately.

**56.2** In this regard, I find that the Section 114AB was introduced by Section 76 of the Finance Act, 2019 w.e.f. 01.08.2019. The details of scrips and its utilisation, as available in Annexure-C to the SCN, are reproduced below-

Detail of Bills of Entry / SEIS Scrips (Importation of Goods (by Other Person/s) using SEIS Scrips raruouiently obtained by M/s. Viwware Software India Pvt. Ltd., situated at 165/1, 165/17, Kaiyani Vista, Kaiyani Vista, 165/4, Doresanipalya, IIM Post Bannerghatta Road, Bangalore 560 076 (IEC no.0707022738). (SCN SCN: F. No. GEN/ADJ/COMM/144/2023-Adjn-O/o Commr-Cus-Kandla Dated 28.02.2023																
	C H Code	BE No.	BE Date	Licence No	Licence Date	Total SEIS amount	Name of Importer	BE IEC CODE	Item Description	CTH	QUAN TITY	UQC	UNITP RICE	ItemWi se Ass Val	SEIS amoun t utilised	Debit Date
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1	INIXY1	7516223	06-08-2018	719031528	12-07-2018	7000000	NOBLE NATURAL RESOURCES INDIA PRIVATE LIMITED	311046975	CRUDE PALM OIL (EDIBLE GRADE) IN BULK	15111000	1879.6	MTS	575	14387741	6999999	06-08-2018
2	INIXY1	7516223	06-08-2018	719031529	12-07-2018	7000000				15111000	1879.6	MTS	575	14387741	6999999	06-08-2018
3	INIXY1	7516223	06-08-2018	719031530	12-07-2018	7000000				15111000	1879.6	MTS	575	14387741	6999999	06-08-2018
4	INIXY1	7482767	03-08-2018	719031531	12-07-2018	7000000				15111000	977.3	MTS	580	11382442	5490105	03-08-2018
5	INIXY1	7516223	06-08-2018	719031531	12-07-2018					15111000	977.3	MTS	580	3103421.9	1509893	06-08-2018
5	INIXY1	7482767	03-08-2018	719031532	13-07-2018	7000000				15111000	977.3	MTS	580	200132500	6999999	03-08-2018
6	INIXY1	7482767	03-08-2018	719031533	12-07-2018	396571				15111000	977.3	MTS	580	822194.67	396569.87	03-08-2018
16	INIXY1	7482767	03-08-2018	719031522	12-07-2018	4000000				15111000	977.3	MTS	580	8293057.6	3999999	03-08-2018
17	INIXY1	7516223	06-08-2018	719031523	12-07-2018	4388507				15111000	1879.6	MTS	575	9020101.8	4388507	06-08-2018
7	INKRI1	7454134	01-08-2018	719031513	12-07-2018	4000000	GEMINI EDIBLES & FATS INDIA PRIVATE LIMITED	909014922		15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
8	INKRI1	7454134	01-08-2018	719031514	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
9	INKRI1	7454134	01-08-2018	719031515	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
10	INKRI1	7454134	01-08-2018	719031516	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
11	INKRI1	7454134	01-08-2018	719031517	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
12	INKRI1	7454134	01-08-2018	719031518	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
13	INKRI1	7454134	01-08-2018	719031519	12-07-2018	4000000				15111000	1694.8	MTS	626	9129798.4	3999999	01-08-2018
14	INKRI1	7454134	01-08-2018	719031520	12-07-2018	4000000				15111000	1694.8	MTS	626	9129784	3999992.7	01-08-2018
15	INNSA1	7441568	31-07-2018	719031521	12-07-2018	4000000	AAK KAMANI PRIVATE LIMITED	307097897		15132110	490.0	MTS	825	10389565	3999982.5	01-08-2018
16	INNSA1	9659653	16-01-2019	719037456	24-12-2018	25000000	HAVELLS INDIA LIMITED	0588160385	LLOYD BRAND SPLIT AIR CONDITIONER 3 STAR INV MODEL LS18I36FI(1.5 TON)	84151010	1584.0	UNT	199	26555630	5842238.6	16-01-2019
17	INNSA1	9722219	21-01-2019	719037456	24-12-2018					84151010	1584.0	UNT	199	23563582	5183988	21-01-2019
18	INNSA1	9728098	21-01-2019	719037456	24-12-2018					84151010	1584.0	UNT	199	26509030	5831986.5	21-01-2019
19	INNSA1	9728793	21-01-2019	719037456	24-12-2018					84151010	1584.0	UNT	199	26509030	5831986.5	21-01-2019
20	INNSA1	2670593	02-04-2019	719037456	24-12-2018					84151010	1584.0	UNT	199	2942460.2	647341.2	02-04-2019
21	INNSA1	2691577	03-04-2019	719037456	24-12-2018					84151010	1584.0	UNT	199	7554515.8	1661993.4	03-04-2019
22	INMAA1	9712470	19-01-2019	719037457	24-12-2018	24213561			SPLIT AIR CONDITIONER 1.0 TON 3 STAR MODEL NO: LS12I38FI(G)(R32GAS) BRAND:LLOYD	84151090	2340.0	UNT	168	29509641	6492121	19-01-2019
23	INMAA1	9712746	19-01-2019	719037457	24-12-2018					84151090	2340.0	UNT	168	35555226	7822149.8	19-01-2019
24	INMAA1	9712972	19-01-2019	719037457	24-12-2018					84151090	2340.0	UNT	168	29562206	6503685.2	19-01-2019
25	INMAA1	9713208	19-01-2019	719037457	24-12-2018					84151090	2340.0	UNT	168	15425407	3393589.6	19-01-2019
26	INMAA1	2021551	12-02-2019	719037457	24-12-2018					84151090	2340.0	UNT	168	14810.66	1629.2	12-02-2019
						128998640								583046436	128997763	

On perusal of the same, I find that all the Bills of Entry were filed on or before 12.02.2019 (the last Bill of Entry being filed on 12.02.2019), therefore, it is clear that all the scrips were utilised before the introduction of Section 114AB of the Customs Act, 1962. On perusal of the facts and records, we find that invocation of section 114AB in the instant case is clearly untenable in view of the fact that the alleged offence pre-dates the incorporation of said legal provision in the act. Section 114AB came into effect from 01.08.2019, while the

offence viz. application for ineligible scrips, its issuance and its utilization were much prior to 01.08.2019. It is well settled that penal provisions operate prospectively. Hence proposal to penalize under Section 114AB does not sustain.

**57.** Violation of statutory provisions by key person of M/s. VSIPL, Bangalore Shri Bosco Noronha, Director:-

**57.1** I find that mis-declaration of classification of services in the SEIS application viz., Form ANF-3B presented by M/s. VSIPL, Bangalore before DGFT, had been signed by Shri Bosco Noronha, Director of M/s. VSIPL, Bangalore, to suppress the facts and wilfully mis-state the true, correct, and actual classification of services to enable M/s VSIPL, Bangalore to fraudulently obtain SEIS Scrips from DGFT. Therefore, Shri Bosco Noronha, Director of M/s. VSIPL, Bangalore was primarily responsible for wrongful availment of export benefits under SEIS by M/s VSIPL, Bangalore; thereby enabling and abetting M/s VSIPL, Bangalore in availing undue benefit of SEIS Scheme and conversely facilitating various importers to utilise the wrongly obtained SEIS duty credit Scrips for their imports.

**57.2** I find that by his deliberate acts of commission and omission he has rendered the goods which were imported (by utilising the ineligible Scrips) liable for confiscation. Therefore, Shri Bosco Noronha, Director of M/s. VSIPL, Bangalore is liable for penalty under section 112(a) of the Customs Act, 1962.

**57.3** Further, Shri Bosco Noronha had knowingly or intentionally made, signed and used, or caused to be made, signed or used, Customs declarations/statements/documents and other declarations/statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act. Therefore he is also liable for penalty under Section 114AA of the Customs Act, 1962.

**57.4** I find that penalty under Section 114AB of the Customs Act, 1962 is proposed upon Shri Bosco Noronha, however, on careful reading of the said section, it is seen that the penalty under Section 114AB is liable to be paid by the person to whom such instrument was issued. In the instant case, the scrips were issued to M/s. VMware software India Pvt. Ltd, therefore, penalty under Section 114AB is not imposable upon Shri Bosco Noronha, Director, M/s. VMware software India Pvt. Ltd.

#### **CONFISCATION OF IMPORTED GOODS IN THE HANDS OF RESPECTIVE IMPORTERS-**

**58.** As established in the above paras, M/s. VSIPL, Bangalore have obtained SEIS Scrips from DGFT, fraudulently, by wilful mis-statement and suppression of various facts, and the total duty involved in these 19 Scrips/Licences is Rs. 12,89,98,640/- (Rupees Twelve Crore, Eighty Nine Lacs, Ninty Eight Thousand Six Hundred Forty Only).

**59.** It is also evident that M/s. VSIPL, Bangalore have transferred/sold the SEIS Scrips to other importer/s. The said importer/s (person/s other than the person to whom the instrument (SEIS Scrips) were issued) have imported their goods by utilizing the said transferred SEIS duty credit Scrips which were



fraudulently obtained from DGFT and later cancelled. The duty involved in these 19 SEIS Scrips which were transferred to other importer/s by M/s. VSIPL, Bangalore and subsequently utilised by the said importer/s, to the tune of Rs. **12,89,97,747/-** (Rupees Twelve Crore, Eighty Nine Lacs Ninty Seven Lacs Seven Hundred Forty Seven Only). The value of goods and duty relatable to utilisation of such cancelled instruments which is recoverable, is detailed below:-

Sr. No.	Bill of Entry/ SEIS Scrips Details	Name and IEC of Importer	Ineligible SEIS Amount transferred by M/s. VSIPL & thereafter utilised by other importers for their imports (In Rs.)	Total Assessable Value (Item Wise) of the Imported Goods (In Rs.)
(1)	(2)	(3)	(4)	(5)
1	As per Annexure 'C'	M/s. Havells India Limited [IEC- 0588160385]	2,42,13,175	11,00,67,291
2		M/s. Aak Kamani Private Limited [IEC- 307097897]	2,89,99,517	12,40,23,812
3		M/s. Noble Natural Resources India Private Ltd. [IEC- 0311046975]	4,37,85,070	27,59,16,942
4		M/s. Gemini Edibles & Fats India Private Limited [IEC- 909014922]	3,19,99,986	7,30,38,373
	<b>Total</b>		<b>12,89,97,763</b>	<b>58,30,46,418</b>

**60.** I find that the Show Cause notice has proposed confiscation of goods from the above mentioned importers under Section 111(m) and 111(o) of the Customs Act, 1962.

**SUBMISSION OF IMPORTERS IN RESPECT OF CONFISCATION OF GOODS-**

**61.** M/s. Gemini Edibles& Fats India Private Limited vide their submission dated 30.03.2023, interalia, submitted that the scrips were purchased by the noticee after payment of due consideration from the open market through agents dealing in scrips. Considering the elaborate procedure prescribed for issuance of SEIS scrips, the Noticee deduced that the verification as to the correctness and validity of the scrips is ensured by DGFT and Customs authorities at the time of issuance of and registration of the scrips.

**61.1** The impugned SCN prejudged the issue to the extent detrimental to the interests of the Noticee on the ground that, VSIPL may have misclassified the services in order to fraudulently obtain SEIS scrips. The impugned SCN in toto has only discussed about alleged misclassification made by VSIPL for claiming SEIS scrips and in the process failed to comprehend the general procedure of sale and procurement of the scrips. The impugned SCN failed to acknowledge that the ultimate importers in bonafide belief upon legally complying with all necessary customs provisions, purchased the scrips on monetary payment of necessary consideration as mutually agreed. It is humbly submitted that the

impugned SCN conveniently ignored the facts and proposed to confiscate the imported goods, mechanically. They have relied upon the judgement of Hon'ble Tribunal in the case of **Leadage Alloys (I) Ltd. Vs. CCE, ST & Customs, Bangalore** [2017 (5) TMI 1326 CESTAT Bangalore], wherein it was held that there cannot be confiscation without seizure when the goods are not available.

**61.2** The SEIS scrips purchased by the Noticee were valid and subsisting at the time of purchase. There was no caveat on the subject scrips by Customs or DGFT Authorities and there was no material evidence whatsoever to doubt the authenticity of scrips. The Noticee exercised all necessary precautions that ought to have been normally exercised by an ultimate user of SEIS scrips, at the time of its purchase and most importantly has purchased for monetary consideration the scrips in good faith in the open market.

**61.3** They have relied upon the judgement of Sumit Wool Processors Vs. Commissioner of Customs (Import/Export) [2015-TIOL-2090-CESTAT-Mumbai], the Hon'ble Tribunal held that in the event where importer had no knowledge of the misrepresentation made by exporters in obtaining the licences/scrips, no confiscation of goods imported by the transferee of licenses/scrips can be made and the demand of custom duty, interest and penalty are set aside.

**61.4** They have also referred to the decision of Hon'ble High Court of Punjab and Haryana in the case of Pee Jay International Vs. Commissioner of Customs [2016 (340) E.L.T 625(P&H)] wherein the Hon'ble Court while referring to the below mentioned cases, ruled that the importers were not a party to the fraud with the seller of DEPB, DEPB was found to be a genuine document, though obtained by seller by producing some forged documents, to which the appellant was not a party. In the below mentioned cases, it was ruled that the importer was not a party to the fraud and there is clear evidence that licences were purchased in open market by payment of monetary consideration in bonafide belief, duty cannot be demanded from the importer.

(a) CCus., Amritasr Vs. Vallabh Design Products [2007(219) E.L.T 73 (P&H)]

(b) CCus., Vs. Leader Valves Ltd., [2007 (218) E.L.T 349 (P&H)]

**61.5** They have also relied upon the judgement of the Hon'ble Tribunal of Delhi in the case of Singh World Vs. CCUs., New Delhi [2017 (353) E.L.T. 243 (Tri.-Del.)] where it was held that at the time of purchase, the scrips were valid and that penalty can be waived in cases where there is bonafide belief and there was no malafide intention for committing fraud. Considering that the license was issued by DGFT, which was purchased by the Appellant, the failure was on part of DGFT and not importer. Basing on this, the Tribunal held that no demand/penalties can be levied on the importer as the bonafide belief was established.

**61.6** Further, the noticee has relied upon various judgements wherein it is held that in absence of evidence to prove collusion, misstatement or suppression of facts by the importer, duty cannot be recovered from the importer.

**62.** M/s. Havells India Limited vide submission dated 27.11.2023, interalia, submitted that they purchased the SEIS scrips that were available in the open market for legitimate purchase. They were under bonafide belief that the

impugned scrips had been validly issued by the DGFT to VMware only after duly verifying its application for grant of the scrips. They were not a party to the alleged fraud committed by the exporter.

**62.1** They have relied upon the judgement of the Crafts Studio v. CCE Jaipur [2004(163) ELT 109] and Ram Khazana Electronics & Ors. V. CC, Air Cargo, Jaipur (Supra) [2003 (156) E.L.T 122(Tribunal)] to argue that since the goods had already been cleared, they could not have been confiscated and redemption fine imposed on them.

**63.** M/s. Noble natural resources India Pvt. Ltd vide their submission dated 31.07.2023, interalia, submitted that they were the bonafide purchaser of the scrips and relied upon the decision of Hon'ble High Court of Bombay in the matter of Taparia Overseas (P) Ltd. Vs. UoI 2003(161) ELT 47(Bom).

**64.** M/s. AAK Kamani pvt. Ltd vide their submission dated 08.03.2023 interalia, submitted that they were the bonafide purchaser of the said scrips without notice of alleged misclassification of services. They purchased the scrip from the open market and the scrip was validly issued by the DGFT and freely transferrable. They have also relied upon various judgements.

**65.** On going through the submissions made by the various importers, I find that they have mainly stated that-

- (i) they were the bonafide purchaser of scrips after paying due consideration;
- (ii) the scrips were valid when they were transferred and when they were utilised;
- (iii) the scrips were found to be fake after the same were utilised
- (iv) there is no evidence in the impugned SCN to establish the involvement of importers in the alleged fraud by the person to whom such scrips were issued.
- (v) they have relied on various judgements.

**66.** I find that the judgements relied upon by all the importers were in a context where demand of duty under Section 28 of the Customs Act, 1962 and consequent penalty against the importers utilising the Scrips was set aside. In the instant case, the question of payment of duty doesn't even arise as the same has to be paid by the exporter (the person to whom the instrument was issued). The relevant extract of judgement of Hon'ble High Court of Bombay in the matter of TAPARIA OVERSEAS (P) LTD. Versus UNION OF INDIA, *referred by them*, is reproduced below for ease of reference:-

*37. Alternatively, let us consider it from another angle assuming that licence comes to an end upon it is suspension and/or cancellation, in catena of cases, it is laid down that the date of import of goods would be the date on which the Bill of Entry was presented under section 46. This legal position is clear from the decision of the Apex Court as laid down in Union of India v. Apar Ltd. [1999 \(112\) E.L.T. 3](#) (S.C.) and Garden Silk Mills v. Union of India - [1999 \(113\) E.L.T. 358](#) (S.C.). The same is the view taken by the Apex Court in Sampat Raj Durgar case (cited supra). Imports against replenishment Licences were permitted duty free if the importers produced an import Replenishment Licence the goods or the materials were imported into India. In the instant cases when the goods were imported into India, and even when the Bills of Entry were filed, neither were the licences suspended nor the same cancelled. **In all these cases, Bills of Entry were filed by the petitioners well before the suspension and/or cancellation of the licences in question, thus the imports were made under valid licences, the goods could not be subjected to levy of customs duty in the peculiar facts and circumstances of the cases in hand.***

**67.** I find that before Section 28AAA was introduced by S.122 of Finance Act, 2012 w.e.f 28.05.2012, various cases were decided by the appropriate forums involving demand of duty, confiscation and penalty from the importers. However, with introduction of Section 28AAA, the cases where an instrument (scrip or authorisation or licence or certificate or such other document) issued to a person has been obtained by him by means of collusion or wilful misstatement or suppression of facts and such instrument is utilised by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty is recovered from the person to whom such instrument was issued. Therefore, the demand of duty from the person who has indulged in obtaining instrument by way of fraud has been rectified with the insertion of Section 28AAA of the Customs Act, 1962. In view of the same, I find that the said referred case laws are not applicable in the instant case.

**68.** Therefore, the pertinent questions that arise before me are:

- (i) Whether the goods imported are liable for confiscation even though the importers purchased the valid scrips and utilised the same for importing the goods.
- (ii) Whether the goods can be confiscated even though the same are not available for physical confiscation

***Whether the goods imported are liable for confiscation even though the importers purchased the valid scrips and utilised the same for importing the goods.***

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

**Section 111 of Customs Act, 1962:**

*Confiscation of improperly imported goods, etc.*

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

\*  
\*  
\*

- (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;*

.....  
.....

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

*observance of the condition was sanctioned by the proper officer;*

**70.** I find that Section 111(m) is not attracted here as there is no evidence to state that the details and particulars stated in the Bills of Entry did not correspond to the goods imported by the respective importers therefore, the subject goods shall not be held liable for confiscation under Section 111(m) at the hands of the exporter i.e. M/s VSIPL, Bangalore.

**71.** I find that Section 111(o) states that the goods brought from a place outside India shall be liable to confiscation if those goods were exempted subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, *in respect of which the condition is not observed* unless the non-observance of the condition was sanctioned by the proper officer. Therefore, clearly the section 111(o) mandates that all the conditions laid out under Customs Act, 1962 or any other law must be observed. It is pertinent to note that the provisions of Section 111(o) doesn't talk about the *intent of the importer of goods*, therefore, whether the scrip was purchased with malafide or bonafide is immaterial insofar as to the extent of confiscation of goods is concerned. It is further pertinent to note that such intent gains significance while imposing penalty under Section 112 for penalty for improper importation of goods as the said section clearly contains words or phrases "*who in relation to any goods, **does or omits to do any act which act or omission would render such goods liable to confiscation** under Section 111, or abets the doing or omission of such an act, or who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which **he knows or has reason to believe are liable to confiscation** under Section 111,*". Therefore, on careful reading of the Section 111(o) and 112, it is clear that section 111(o) mandates confiscation of goods even if the intent of the importer of goods was bonafide.

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

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

**As per the Notification:**

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

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

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

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

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

**73.** I find that the condition no. 2(1) if not fulfilled as the services rendered were neither exported nor notified in Appendix 3D as discussed in the foregoing paras. Clearly the condition no. 2(1) is violated which has rendered the goods liable for confiscation under Section 111(o) of the Customs Act, 1962.

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

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

**28AAA- Recovery of duties in certain cases:**

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

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

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

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

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

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

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

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

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

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that



section in respect of the goods which are not prohibited or restricted, no such fine shall be imposed.

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

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

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

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

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

so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No.(iii)”

**79.** Further, the above judgement has been relied upon by the Hon’ble High Court of Gujarat in the matter of SYNERGY FERTICHEM PVT. LTD. Versus STATE OF GUJARAT {2020 (33) G.S.T.L. 513 (Guj.)}. The relevant Paras of the said judgement are reproduced hereinbelow:-

“174. The per-requisite for making an offer of fine under Section 130 of the Act is pursuant to the finding that the goods are liable to be confiscated. In other words, if there is no authorisation for confiscation of such goods, the question of making an offer by the proper officer to pay the “redemption fine”, would not arise. Therefore, the basic premise upon which the citadel of Section 130 of the Act rests is that the goods in question are liable to be confiscated under the Act. It, therefore, follows that what is sought to be offered to be redeemed, are the goods, but not the improper conduct of the owner to transport the goods in contravention of the provisions of the Act or the Rules. We must also bare in mind that the owner of the goods is liable to pay penalty under Section 122 of the Act. The fine contemplated is for redeeming the goods, whereas the owner of the goods is penalized under Section 122 for doing or omitting to do any act which rendered such goods liable to be confiscated under Section 130 of the Act. In the aforesaid context, we may refer to and rely upon a decision of the Madras High Court in the case of M/s. Visteon Automotive Systems v. The Customs, Excise & Service Tax Appellate Tribunal, C.M.A. No. 2857 of 2011, decided on 11th August, 2017 [2018 (9) G.S.T.L. 142 (Mad.)], wherein the following has been observed in Para-23;

“23. The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, “Whenever confiscation of any goods is authorised by this Act....”, brings out the point clearly. ***The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant.*** The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii).”

**175. We would like to follow the dictum as laid down by the Madras High Court in Para-23, referred to above.**

176. We may also refer to and rely upon a Supreme Court decision in the case of M.G. Abrol v. M/s. ShantilalChhotalal& Co, AIR 1965 SC 197, wherein the Supreme Court dealt with the very same issue and held as under;

“Another contention raised for the respondent is that the Additional Collector could not confiscate the goods after they had left the country and that therefore his order of confiscation of the scrap which according to him was not steel skull scrap was bad in law. The affidavit filed by the Additional Collector, appellant No. 1, mentions the circumstances in which the scrap exported by respondent was allowed to leave the country. It was allowed to leave the country after the Collector had formally seized it

and after the agents of the shipping company had undertaken not to release the documents in respect of the cargo to its consignees. This undertaking meant that the cargo would remain under the control of the customs authorities as seized cargo till further orders from the Additional Collector releasing the cargo and making it available to the consignees by the delivery of the necessary documents to them. The documents were allowed to be delivered to them on the application of the respondents praying for the passing on of the necessary documents to the purchasers of the goods in Japan and on the respondents giving a bank guarantee that the full f.o.b. value to be released from the said parch would be paid to the customs authorities towards penalty or fine in lieu of confiscation that might be imposed upon the respondents by the adjudicating authority. The customs authorities had seized the goods when they were within their jurisdiction. It is immaterial where the seized goods be kept. In the circumstances of the case, the seized goods remained on the ship and were carried to Japan. The seizure was lifted by the Additional Collector only when the respondents requested and gave bank guarantee. "The effect of the guarantee was that in case the Additional Collector adjudicated that part of the goods exported was not in accordance with the licence and had to be confiscated, the respondents, would, in lieu of confiscation of the goods, pay the fine equivalent to the of the bank guarantee. Section 183 of the Act provides that whenever confiscation is authorised by the Act the Officer adjudging it would give the owner of the goods option to pay in lieu of confiscation such fine as the officer thinks fit. This option was extended to the respondent at the stage before the goods were released from seizure. The formal order of confiscation had to be passed after the necessary enquiry and therefore when passed in the present case after the goods had actually left this country cannot be said to be an order which could not be passed by the Customs Authorities. I, therefore, do not agree with this contention."

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

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

**A. ORDER IN RESPECT OF M/s. VMware Software India Pvt. Ltd.**

- (i) I determine and confirm the duty amount of **Rs. 12,89,97,763/-** (Rupees Twelve Crore, Eighty Nine Lacs Ninety Seven Thousand Seven Hundred and Sixty Three Only), an order to recover the same from them under Section 28AAA of the Customs Act, 1962.
- (ii) I order to recover interest at applicable rate on the amount confirmed at (i) above in terms of Section 28AAA(2) of the Customs Act, 1962 readwith Section 28AA of the Customs Act, 1962.
- (iii) I order to confiscate the goods, already cleared, totally valued at **Rs. 58,30,46,436/-** (Rupees Fifty Eight Crore, Thirty Lacs Forty Six Thousand Four Hundred thirty Six Only) under Section 111(o) of the Customs Act, 1962. However, I do not impose any redemption fine on M/s. VMware under Section 125 of the Customs Act, 1962 as they were not the owner of imported goods. However, such fine is imposed on importers of the goods as stated in Table below.

- (iv) I impose Penalty of **Rs. 1,28,99,776/-** (Rupees One Crore Twenty Eight lakhs Ninety Nine Thousands Seven Hundred and Seventy Six only) upon them under the provisions of Section 112(a) of the Customs Act, 1962.
- (v) I impose Penalty of **Rs. 5,83,04,643/-** (Rupees Five Crore Eighty Three lakhs Four Thousand Six Hundred and Forty Three Only) upon them under the provisions of Section 114AA of the Customs Act, 1962.
- (vi) I do not impose penalty under the provisions of Section 114AB of the Customs Act, 1962 for the reasons discussed in Para 56 above.
- (vii) I order to appropriate the amount of **Rs. 12,89,98,643** (Rupees Twelve Crore, Eighty Nine Lacs Ninety Seven Thousand Seven Hundred and Sixty Three Only) already paid by them against the amount of duty confirmed at (i) above;

**B. ORDER IN RESPECT OF SHRI BOSCO NORONHA, DIRECTOR, M/S. VSIPL, BANGALORE-**

- (i) I impose Penalty of **Rs 1,00,00,000/- (Rupees One Crore only)** upon him under the provisions of Section 112(a) of the Customs Act, 1962.
- (ii) I impose Penalty of **Rs. 1,00,00,000/- (Rupees One Crore only)** upon him under the provisions of Section 114AA of the Customs Act, 1962.
- (iii) I do not impose Penalty under the provisions of Section 114AB of the Customs Act, 1962.

**C. ORDER IN RESPECT OF IMPORTERS-**

I order to confiscate the goods imported by persons/firm/company/importer mentioned in Column (3) below under Section 111(o) of the Customs Act, 1962. However, since the goods are not available for physical confiscation, I impose redemption fine as mentioned in Column (6) below in lieu of confiscation:

Sr. No.	Bill of Entry/ SEIS Scrips Details	Name and IEC of Importer	Ineligible SEIS Amount transferred by M/s. VSIPL & thereafter utilised by importers for their imports (In Rs.)	Total Assessable Value (Item Wise) of the Imported Goods (In Rs.)	Redemption fine (in Rs.)
(1)	(2)	(3)	(4)	(5)	(6)
1	As per Annexure 'C'	M/s. Havells India Limited [IEC- 0588160385]	2,42,13,175	11,00,67,291	10,00,000/- (Ten Lakhs only)
2		M/s. Aak Kamani Private Limited [IEC- 307097897]	2,89,99,517	12,40,23,812	10,00,000/- (Ten Lakhs only)
3		M/s. Noble Natural Resources India Private Ltd. [IEC- 0311046975]	4,37,85,070	27,59,16,942	20,00,000/- (Twenty Lakhs only)



4	M/s. Gemini Edibles & Fats India Private Limited [IEC- 909014922]	3,19,99,986	7,30,38,373	15,00,000/- (Fifteen Lakhs only)
	<b>Total</b>	<b>12,89,97,763</b>	<b>58,30,46,418</b>	

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

*Overseen*  
31.01.2023  
(M. Ram Mohan Rao)  
Commissioner of Customs  
Custom House Kandla

F. No. GEN/ADJ/COMM/144/2023-Adjn-O/o Commr-Cus-Kandla

DIN-20250171ML000000B052

By Speed Post /E-Mail/Notice Board

**To (Noticees)-**

- M/s. VMware Software India Pvt. Ltd.,**  
165/1, 165/17, Kalyani Vista, Kalyani Vista,  
165/2, Doresanipalya, IIM Post Bannerghatta Road,  
Bangalore 560 076,
- Shri Bosco Noronha,**  
Director, M/s. VMware Software India Pvt. Ltd.  
165/1, 165/17, Kalyani Vista, Kalyani Vista,  
165/2, Doresanipalya, IIM Post Bannerghatta Road,  
Bangalore 560 076.
- M/s. Havells India Limited,**  
904, 9th Floor Surya Kiran Building,  
K.G. Marg, Connaught Place,  
New Delhi - 110001
- M/s. Aak Kamani Private Limited,**  
14th Floor, Quantum, Central Avenue,  
Hiranandani Estate, Hiranandani Business Park,  
Ghodbunder Road, Thane West, , Thane - 400607
- M/s. Noble Natural Resources India Private Limited,**  
Survey NO. 302/2, 303, opp. Rama  
Cylinder, Vil. Bhimasar, Taluka-Anjar,  
Kutch, Gujarat, 370240
- M/s. Gemini Edibles & Fats India Private Limited**  
Freedom House, NO. 8-2-334/70 & 71,  
Road NO. - 5, Banjara Hills, Hyderabad,  
Telangana, 500034

**Copy To:-**

1. The Additional Director General, DRI, AZU, 15, Magnet Corporate park,  
Off Sola Flyover, SG Highway, Thaltej, Ahmedabad.
2. The Additional Director General, Central Economic Intelligence Bureau,  
6<sup>th</sup> Floor, B Wing, Janpath Bhawan, Janpath, New Delhi-110001 for  
kind information please.
3. The Office of Chief Commissioner, Customs, Ahmedabad Zone,  
Ahmedabad for the purpose of Review.
4. The Superintendent (EDI/TRC) for necessary action at their end.