कार्यालयः प्रधान आयुक्त सीमा शुल्क, मुन्द्रा,
सीमा शुल्क भवन, मुन्द्रा बंदरगाह, कच्छ, गुजरात- **370421**
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE, MUNDRA PORT, KUTCH, GUJARAT-370421
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आज़ादी का अमृत महोत्सव

A. File No.	:	GEN/ADJ/COMM/37/2024-Adjn-O/o Pr Commr-Cus-Mundra
B. Order-in-Original No.	:	**MUN-CUSTM-OOO-COM- 036- 24-25**
C. Passed by	:	**K. Engineer,** **Principal Commissioner of Customs,** **Customs House, AP & SEZ, Mundra.**
D. Date of order and Date of issue:	:	15.01.2025. 15.01.2025
E. SCN No. & Date	:	SCN F. No. GEN/ADJ/COMM/37/2024-Adjn-O/o Pr Commr-Cus-Mundra, dated 17.01.2024.
F. Noticee(s) / Party / Importer	:	(i) **M/s. Rubamin Pvt. Ltd.**, R. S. No. 115, Village-Pratappura, Halol, Panchmahal, Gujarat - 389350; (ii) **M/s. MSA Shipping Pvt. Ltd.**, Office No.10, 11 & 12, 2nd Floor, Kesar Arcade, Plot No. 51, Sector-8, Gandhidham- 370201.. (iii) **M/s Tubby Impex Pvt. Ltd.,** C-54, 3rd Floor South Extension Part-2, New Delhi-110048.
G. DIN	:	**20250171MO0000000F1B**

1. यह अपील आदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।

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

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

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

   "केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर,

बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद-380 004"

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

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

4. उक्त अपील के साथ -/ 1000 रूपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो 5000/- रुपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्ड पीठ बेंचआहरितट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

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

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

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

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

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

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

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

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

BRIEF FACTS OF THE CASE:

Whereas it appears that **M/s. Rubamin Pvt. Ltd. (IEC-0888038135)**, R.S.No. 115, Village-Pratappura, Halol, Panchmahal, Gujarat-389350 (hereinafter referred as the *'Importer'* also for the sake of brevity), filed Bill of Entry No. 9570097 dated 14.11.2020 (hereinafter referred as *'BE'*) **(RUD-1)** with the help of Custom Broker M/s. Rishi Kiran Logistics Pvt. Ltd. (hereinafter referred as *'CB'*) for importation of goods, declared as 'Zinc Dross' (hereinafter referred as the *'imported goods'*) falling under CTH 26201910. The details of BE is as under:

BE No & date	Description of Goods & CTH declared	Container No(s)	Qty (Kgs)	Declared Asses.Value (Rs.)	Declared Duty Payable (Rs.)
BE No. 9570097 dated 14.11.2020	Zinc Dross CTH - 26201910	FCBU8502289	24020	38,10,597	9,33,215

2. Whereas, an information was received stating that the container tracking on PICT (Pakistan International Container Terminal Limited) divulged that the container had originated from Pakistan; that though the declared Country of Origin and Port of Shipment is UAE, the goods imported into India originated in Pakistan and hence the Country of Origin declared by the Importer seems incorrect; the screen-shot of tracking of container at PICT website was also forwarded.

3.1. Whereas vide Notification No.5/2019-Customs dated 16.02.2019, a tariff item 98060000 has been inserted in Chapter 98 under Section XXI of the First Schedule to the Customs Tariff Act, 1975 for all goods originating in or exported from the Islamic Republic of Pakistan, which attracts 200% BCD.

3.2. The BE was filed on 14.11.2020 and was out of charged on 19.11.2020, whereas the information was received on 18.01.2022. However, acting on the above information, Summon dated 04.02.2022 was issued to delivery Agency M/s. MSA Shipping Pvt. Ltd., Gandhidham to submit load port documents pertaining to the said imported goods transported under Bill of Lading No. EXPMUNCWL0001 dated 13.11.2020 and to tender statement.

3.3. A statement of **Shri Keshavkant Chaturvedi, Branch Incharge of M/s. MSA Shipping Pvt. Ltd.**, Gandhidham was recorded on 25.02.2022, wherein he interalia stated:

(i) that they were the delivery agent of M/s. Clear Freight International, Mundra;

(ii) that the container no. FCBU8502289 was loaded from Port of Karachi to Jebel Ali in the Vessel OEL KEDARNATH vide Bill of Lading No. EXP-0002-CWL dated 29.10.2020 and thereafter the said container was transshipped from Jebel Ali to Mundra in Vessel BSL LIMASSOL vide Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020;

(iii) that he is producing copies of both Bill of Lading No.EXP-0002-CWL dated 29.10.2020 and Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020;

(iv) that the container was not opened at Jebel Ali for any purpose and it was transshipped from Jebel Ali to Mundra as it was received from Karachi to Jebel Ali;

3.4. Whereas a Summon dated 04.03.2022 was issued to the Importer to submit documents pertaining to the said goods imported under BE No. 9570097 dated 14.11.2020 and to tender Statement. Statement of **Shri Akhilesh Kumar Singh, Assistant Manager (Logistics)** of the Importer was recorded on 17.03.2022, wherein he interalia stated:

(i) that they had imported 24.020 MTS Zinc Dross from UAE base company M/s. Jamaluddin Trading LLC vide invoice No. 072/786/11/20 dated 09.11.2020.

(ii) that they have not appointed M/s. Tubby Impex Pvt. Ltd. for any inspection and also not made any payment for inspection of the goods imported vide BE No. 9570097 dated 14.11.2020;

(iii) that the origin of the impugned goods under the said BE is UAE.

(iv) that he does not have any information whether the said goods are of Pakistan Origin or otherwise and General Manager of the Company can comment about the Country of Origin of the said imported goods;

(v) that the Pre-shipment Inspection Certificate issued by M/s. Tubby Impex Pvt. Ltd. was sent to them by their supplier M/s. Jamaluddin Trading LLC and accordingly they had e-sanchit the said document in the said BE;

(vi) that he has no idea about the container tracking system on the website https://pict.com.pk/en.

3.5. Whereas a Summon dated 24.03.2022 was issued to the General Manager of Importer to tender Statement. Statement of **Shri Ankur Shah, General Manager of the Importer** was recorded on 05.04.2022, wherein he interalia stated:

(i) he has no idea about the Bill of Lading no. EXP-0002-CWL dated 29.10.2020;

(ii) that they had imported 'Zinc Dross' from M/s. Jamaluddin Trading LLC vide BE No. 9570097 dated 14.11.2020 and shipping line who had transported the said goods is M/s. Clear Freight International;

(iii) that he has no idea about the details mentioned in the Statement dated 25.02.2022 of Shri Keshavkant Chaturvedi, Branch Incharge of M/s. MSA Shipping Pvt. Ltd., Gandhidham;

(iv) that he needs 15 days' time to revert back to the fact that the goods which have been imported by them were of Pakistan Origin in view of the Bill of Lading No.EXP-0002-CWL dated 29.10.2020.

3.6. Whereas, the importer vide its letter dated 19.04.2022 has submitted as under:

(i) that they import the 'Zinc Dross' on a regular basis and the quantity of import on yearly basis is around 8,000 tonnes or so;

(ii) that the goods are not of Pakistan Origin to the best of their knowledge and as informed by their supplier, these goods were of UAE origin;

(iii) that they have been importing 'Zinc Dross' from various countries including UK, USA, Singapore, Kong-Kong, France, Israel since many years through many suppliers including M/s. Jamaluddin Trading LLC since 2009 and there is no incentive to import specifically from

UAE;

(iv) that as an importer, they have no visibility on the actual shipment of the goods and they filed the bill of entry based on the documents namely Invoice, Bill of Lading, Country of Origin etc. supplied by the UAE supplier. Therefore, mis-declaration, if any, cannot be attributed to them and the same should be the responsibility of the supplier.

(v) that no document or information provided to them by their supplier from UAE ever hinted to the fact that the imported goods were originated or exported from Pakistan and therefore there is no mis-declaration on their part;

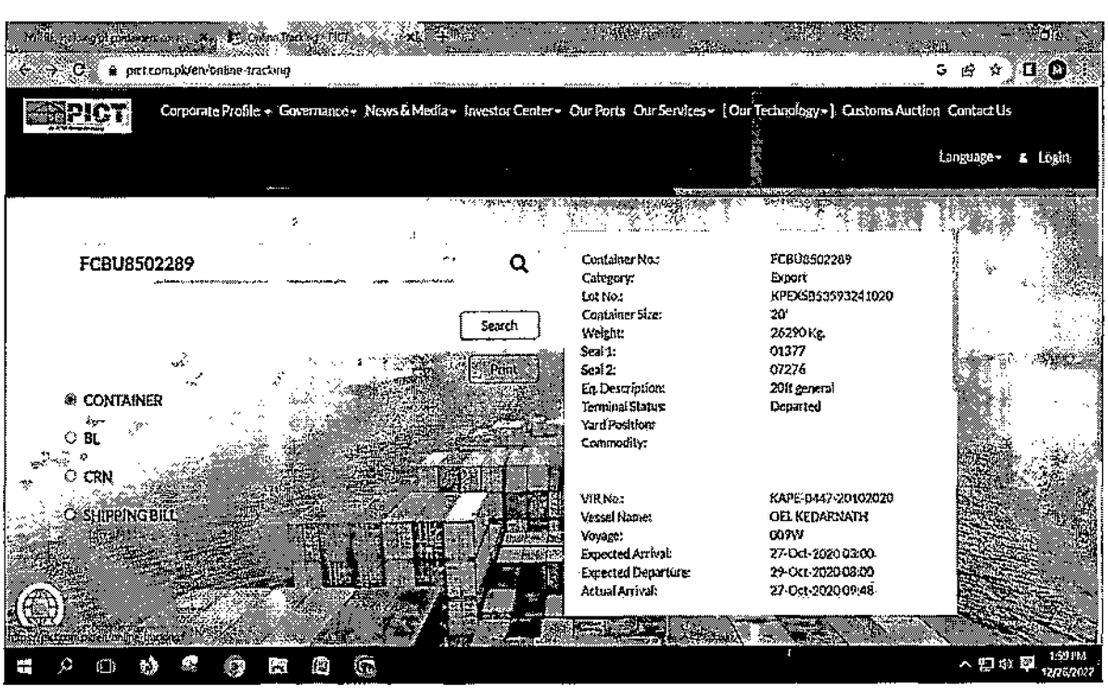
(vi) that 'Zinc Dross' is freely importable and also exempted from payment of basic customs duty in terms of Sr. No. 137 of Notification No. 50/2017-Customs dated 30.06.2017 as amended. Therefore, there is no incentive for them to mis-declare country of origin especially when imported goods are exempted irrespective of origin.

(vii) that they are bonafide importer of 'Zinc Dross' in bulk from various countries including UAE and their declaration on import were true and correct based on the documents provided by their supplier;

(viii) that they requested to close the investigation without further proceedings or to proceed with issuance of Show Cause Notice.

3.7. Whereas, Summons dated 08.02.2022 was issued to PSIA (i.e. Pre-Shipment Inspection Agency) M/s. Tubby Impex Pvt. Ltd., C-54, 3rd Floor, South Extension Part-2, New Delhi-110048 for production of documents pertaining to Pre-Shipment Inspection Certificate (Certificate No. TUBY/2020/1500118/TM) issued by them and to tender statement. However, the said PSIA, neither submitted any details nor appeared to tender any statement on scheduled date and time. Further, Summons dated 23.03.2022 issued to the PSIA which returned back with remark on the envelope as "Left the address" by the postal authorities.

4.1. The Screen Shots of tracking of the container no. FCBU8502289 on the website https://pict.com.pk/en are pasted/affixed hereunder:



4.2. The details of the Bill of Lading No. EXP-0002-CWL dated 29.10.2020 and

Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020, provided by the delivery agent i.e. M/s. MSA Shipping Pvt. Ltd., Gandhidham are as under:

Details mentioned in Bill of Lading	Bill of Lading No. EXP-0002-CWL dated 29.10.2020	Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020
Vessel/Voyage	OEL KEDARNATH	BSL LIMASSOL
Port of Loading	Karachi, Pakistan	Jebel Ali, UAE
Port of Discharge	Jebel Ali, UAE	Mundra, India
Name and Address of Shipper	M/s. International Industries Ltd. 101 Beaumont Plaza, 10-Beaumont Road, PO Box 4775, Karachi 75530, Pakistan.	M/s. Jamaluddin Trading LLC. PO Box 347, Ajman, UAE.
Name and Address of Consignee	M/s. Jamaluddin Trading LLC. PO Box 347, Ajman, UAE	M/s. Rubamin Private Limited. R.S.No. 115, Village-Pratappura, Halol, Dist PMS Halol, Panchmahals. Gujarat-389350.
Container No(s).	FCBU8502289	FCBU8502289
Seal No(s).	01377	01377
Package	Zinc Dross	Zinc Dross
Weight	24020 Kgs	24020 Kgs

4.3. From the above Screen-shot, details and the documents i.e. Bill of Lading No. EXP-0002-CWL dated 29.10.2020 and Bill of Lading no. EXPMUNCWL0001 dated 10.11.2020, provided by the Delivery Agency M/s. MSA Shipping Pvt. Ltd., Gandhidham, it appears that the said goods originated from Pakistan, from where the goods were exported to Jebel Ali vide Bill of Lading No. EXP-0002-CWL dated 29.10.2020 in Container No. FCBU8502289 sealed with Seal No. 01377. It further appears that the same goods were exported as it is, from Jebel Ali, UAE to Mundra vide Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020 in same Container No. i.e. FCBU8502289 sealed with same Seal No. i.e. 01377 respectively as neither the Container Number is different/changed nor the Seal Number is different/changed. Therefore, it appears that the goods imported at Mundra port (India) originated from Karachi, Pakistan.

4.4. Whereas from the Statement of **Assistant Manager (Logistics) and General Manager of the Importer**, it can be noticed that none of the person has provided any specific clarification in respect of the tracking of the containers on PICT website with same seal numbers. Further, they failed to give any justification in respect of Bill of Lading provided by the Delivery Agency for export of goods from Karachi, Pakistan to Jebel Ali. Hence, it appeared that the goods imported by the Importer originated from Pakistan. Moreover, vide letter dated 19.04.2022, the importer has submitted that their supplier had not provided any document or information nor ever hinted to the fact that the imported goods originated or exported from Pakistan. Hence, it appears that the importer themselves agreed to the facts that their supplier had mis-declared the Country of Origin.

4.5. As per Srl.No.3 of the Schedule-VIII of Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016 (Srl. 3 contains the

Zinc-containing Drosses under Column (3) heading "Description of other Waste") certain documents are required to be verified by Customs viz. Import Licence from DGFT, PSIC issued by Inspection Agency, chemical analysis report of the waste being imported, an acknowledged copy of the annual return filed with concerned SPCB for import in the last financial year etc. In this case the Pre-Shipment Inspection Certificate appears to be suspicious, as the container was never opened. From the facts mentioned above it appears that the container were never opened in the route from Karachi, Pakistan to Jebel Ali, UAE and thereafter from Jebel Ali, UAE to Mundra, India. Thus, it appears that the goods were never Inspected/examined in UAE and hence, the pre-shipment certificate submitted by the importer in the instant case appears to be bogus as informed to the Department. Further, letter to DGFT has been issued for taking required action against the importer M/s. Rubamin Pvt. Ltd. for violating trade regulations and causing significant economic repercussions.

4.6. Further, the PSIA (Pre-Shipment Inspection Agency) has also not responded to the correspondence & Summons and have not clarified the matter, whether the Pre-shipment Inspection Certificate has been issued by them or otherwise. Therefore, it appears that the PSIA was aware of the fact that the importer has furnished bogus PSIC (Pre-shipment Inspection Certificate) which said to have been issued by their agency, which was issued from their company. Further, letter to DGFT has been issued for taking the required action against the PSIA M/s. Tubby Impex Pvt. Ltd. for violating our trade regulations and causing significant economic repercussions.

5. Duties on import of Pakistan Originated Goods :

Vide Notification No.5/2019-Customs dated 16.02.2019, a tariff item 98060000 has been inserted in Chapter 98 under Section XXI of the First Schedule to the Customs Tariff Act, 1975 for all goods originating in or exported from the Islamic Republic of Pakistan, which attract 200% BCD.

6. Calculation of Duty on Goods :

Accordingly, the imported goods i.e. 'Zinc Dross' should be classifiable under CTH 98060000 and attracts duties as BCD @ 200% & SWS @ 10% with IGST @18%. The duty calculation on the said imported goods is as under :

Table-A

BE No & date	Description of Goods	Qty. (Kgs)	Declared Value (in Rs.)	Declared Duty (in Rs.)	Duty Payable (in Rs.)
BE No. 9570097 dated 14.11.2020	Zinc Dross CTH - 26201910	24020	38,10,597/-	9,33,215/-	1,05,78,217/-

***[BCD@200%: 76,21,194/- + SWS@10%: 7,62,119/- + IGST@18%: 21,94,904/- =1,05,78,217/-]**

7. Relevant Provisions of law:

The relevant provisions of law pertaining to the present matter are summarized as under:

7.1 Notification No.05/2019-Customs dated 16.02.2019:

G.S.R. .....(E). – WHEREAS, the Central Government is satisfied that the import duty leviable on all goods originating in or exported from the Islamic Republic of Pakistan, falling under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)

(hereinafter referred to as the Customs Tariff Act), should be increased and that circumstances exist which render it necessary to take immediate action.

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 8A of the Customs Tariff Act, the Central Government, hereby directs that the First Schedule to the Customs Tariff Act, shall be amended in the following manner, namely:-

In the First Schedule to the Customs Tariff Act, in Section XXI, in Chapter 98, after tariff item 9805 90 00 and the entries relating thereto, the following tariff item and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)
9806 00 00	All goods originating in or exported from the Islamic Republic of Pakistan	-	200 %	-

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

7.3. Section 46 : Entry of goods on importation *:*

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

(4A)The importer who presents a BE shall ensure the following :

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

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

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

7.4. Section 28 : Recover of duties not levied or not paid or short-levied or short-paid or erroneously refunded

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

(a) collusion; or

(b) any willful mis-statement; or

(c) suppression of facts,

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

(5) Where any duty has not been levied or not paid or has been short-levied or short paid or the interest has not been charged or has been part-paid or the duty or interest

has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to fifteen per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

Explanation 1 : For the purposes of this section, "relevant date" means, -

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

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

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

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

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

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

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

...

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

...

7.7. Section 112: Penalty for improper importation of goods, etc.

Any person,—

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

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

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

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty 219 [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty 220 [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

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

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

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

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

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

Provided *also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with*

the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

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

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

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

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

***7.9. 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.*

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

8. Contravention of Provisions:

8.1. Section 46(4) of the Customs Act, 1962, stipulates that the importer, while presenting a BE shall make and subscribe to a declaration as to the truth of the contents of such BE. Further, Section 46(4A) stipulates that the importer who presents a BE shall ensure the accuracy and completeness of the information given therein, the authenticity and validity of any document supporting it and compliance with restriction or prohibition, if any, relating to the goods under this act or under any other law for the time being in force.

8.2. The said BE has been self-assessed by the Importer in terms of Section 17(1) of the Customs Act, 1962 considering the benefit of Notification No. 50/2017 dated 30.06.2017 where BCD is 5% only. However, since the said imported goods appeared to be of Pakistan Origin, which attract BCD@ 200% with applicable SWS @ 10% and IGST @ 18%, the self-assessment made by the Importer appears to be incorrect and thereby they have contravened the provisions of Section 17 of the Customs Act, 1962.

8.3. From the above discussed facts and statutory provisions, it appears that the imported goods i.e. "Zinc Dross" classified by the importer under CTH 26201910 originated from Pakistan and is classifiable under CTH 98060000 which attract higher rate of BCD. Therefore the imported goods appeared liable for confiscation under Section 111(m) of the Customs Act, 1962 and required to be seized under Section 110 of the Customs Act, 1962. However, as the goods were not available for seizure, the same could not be seized, but the importer appeared liable for penal

action under Section 112(b) (ii) of the Customs Act, 1962. Further, the total duty payable as per Notification no. 05/2019-Customs dated 16.02.2019, as detailed in Table-A at para-6, comes to **Rs.1,05,78,217/- (BCD@200%; SWS@10% & IGST@18%) (Rupees One Crore Five Lakh Seventy Eight Thousand Two Hundred and Seventeen only)**, which is required to be recovered from the Importer under Section 28(4) along with applicable interest under Section 28AA of the Customs Act, 1962. Further, the duty amounting to **Rs. 9,33,215/-** paid by the Importer at the time of clearance of goods, is required to be appropriated against the duty so demanded. In the present matter, the Importer was well aware of the facts that the goods stuffed in the said container was originated from Pakistan and that the said containers was not opened during the route to Mundra Port, India. Hence, it appears that the Importer knowingly and intentionally made incorrect declaration for the COO of the goods with a willful intension to evade payment of duty applicable on the goods originated from Pakistan and Imported into India. Therefore, the Importer rendered themselves liable for penalty under Section 114A of the Customs Act, 1962 for short payment of duty on the importation of Pakistan originated goods.

8.4. Further, it appears that the Importer knowingly and intentionally made incorrect declaration for the COO and made mis-declaration of the goods in terms of classification and applicable duties with a willful intension to evade payment of appropriate customs duty leviable on the imported goods. Further, the importer has submitted pre-shipment inspection certificate which appears to be bogus as the container was never opened and goods were never examined by the Inspection Agency. Moreover, they also failed to submit the required documents as stipulated under Schedule-VIII of the Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016. Hence, the importer rendered themselves liable for imposition of penalty under Section 114AA for submitting false and incorrect material.

8.5. Further, It further appeared that **M/s. MSA Shipping Pvt. Ltd.,** Gandhidham did not carry out due diligence to find the correct fact that the goods were loaded at Karachi Port and filed Bill of lading provided by the Load Port Shipping line which shows goods loaded at Jebel Ali and therefore, it appears that by their said act of omission and commission which led to evasion of duty and caused loss to Government revenue, M/s. MSA Shipping Pvt. Ltd., Gandhidham has rendered themselves liable for imposition of penalty under Section 117 of Customs Act, 1962.

8.6. Further, the PSIA (i.e. Pre-shipment Inspection Agent/Agency) **M/s. Tubby Impex Pvt. Ltd.** has not responded to the Summon/correspondence and have not clarified the matter, whether the Pre-shipment Inspection Certificate has been issued by them or otherwise. Moreover, the PSIA has issued Pre-shipment Inspection Certificate which appears to be bogus, as the Container was never opened and goods were not examined by them in UAE, as the same seal number was noticed on the said Container from Pakistan to Jebel Ali, UAE and from Jebel Ali to Mundra, India. Hence, the PSIA rendered themselves liable for imposition of penalty under Section 114AA for submitting/issuing false and incorrect document/material and thereby involved themselves by helping in evasion of duty.

9. In view of above, a Show Cause Notice bearing F.No.

GEN/ADJ/COMM/37/2024-Adj dated 17.01.2024 was issued to the importer, **M/s. Rubamin Private Limited (IEC-0888038135)**, R. S. No. 115, Village-Pratappura, Halol, Panchmahal, Gujarat – 389350, wherein the importer was called upon to show cause to the Commissioner of Customs, Mundra having his office at 'Custom House', 1st Floor, Port User Building, Mundra, within 30 days of the receipt of the Notice as to why:

(i) 24020 Kgs of "Zinc Dross" imported in Container No. FCBU8502289 covered under Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020 pertaining to BE No. 9570097 dated 14.11.2020 valued at **Rs. 38,10,597/- *(Rupees Thirty Eight Lakhs Ten Thousand Five Hundred and Ninety Seven Only)*** should not be confiscated under Section 111 (m) of the Customs Act, 1962;

(ii) classification of 24020 Kgs of "Zinc Dross" declared by them under Chapter Tariff Heading No. 26201910 should not be rejected & the same should not be classified under Chapter Tariff Heading No. 98060000 of the Customs Tariff Act, 1975;

(iii) Duty of **Rs.1,05,78,217/-** (BCD@200%; SWS@10% & IGST@18%) ***(Rupees One Crore Five Lakh Seventy-Eight Thousand Two Hundred and Seventeen only)*** should not be demanded and recovered from them under the provisions of Section 28(4) of the Customs Act, 1962;

(iv) Duty amounting to **Rs. 9,33,215/- (*Rupees Nine Lakhs Thirty-Three Thousand Two Hundred and Fifteen only)*** paid by the Importer at the time of clearance of goods, should not be appropriated against the duty demanded at (iii) above.

(v) Interest at appropriate rate should not be charged and recovered from them under the provisions of Section 28AA of the Customs Act, 1962 on the amount mentioned at (iii) above;

(vi) Penalty should not be imposed upon them under the provisions of Section 112 and/or under Section114A of the Customs Act, 1962;

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

9.2. Vide the above show cause notice dated 17.01.2025, **M/s. MSA Shipping Pvt. Ltd.**, Office No.10, 11 & 12, 2nd Floor, Kesar Arcade, Plot No. 51, Sector-8, Gandhidham-370201, were hereby called upon to show cause to the Commissioner of Customs, Customs House, Mundra having his office situated at 1st Floor, Custom House, Port User Building, Mundra, within 30 days of the receipt of the Notice as to why Penalty should not be imposed upon them under Section 117 of the Customs Act, 1962.

9.3. Vide the above show cause notice dated 17.01.2025, **M/s Tubby Impex Pvt. Ltd.** C-54, 3rd Floor, South Extension Part-2, New Delhi-110048 (the Pre-shipment Inspection Agency) were also called upon to show cause to the Commissioner of Customs, Mundra having his office at Custom House, 1st Floor, Port User Building, Mundra, within 30 days of the receipt of the Notice as to why Penalty should not be imposed upon them under the provisions of Section 114AA of the Customs Act, 1962.

WRITTEN SUBMISSION

10. The importer M/s. Rubamin Pvt. Ltd., Panchmahal, vide letter dated 20.05.2024 received in this office on 28.05.2024, have filed their written submission. The contents of their written submission are as under: -

10.1 1. The aforesaid Show Cause Notice dated 17.1.2024 (hereinafter referred to as the '**SCN**'), has been issued to Rubamin Pvt. Ltd. (hereinafter referred to as the '**Noticee**'). Vide the SCN dated 17.01.2024, the Noticee has been called upon to show cause as to why:

a. 24020 kgs of "Zinc Dross" imported in Container No. FCBU8502289 covered by bill of lading no. EXPMUNCWL0001 dated 10.11.20 pertaining to bill of entry no. 9570097 dated 14.11.20 should not be confiscated under Section 111(m) of the Customs Act, 1962;

b. classification of the above-mentioned goods under Tariff Item 2620 19 10 should not be rejected and the goods should not be re-classified under Tariff Item 9806 00 00 of the Customs Tariff;

c. customs duty amounting to Rs.1,05,78,217/- should not be demanded and recovered from the Noticee under the provisions of Sections 28(4) along with applicable interest under Section 28AA of the Customs Act, 1962;

d. duty amounting to Rs.9,33,215/- paid by the Noticee at the time of clearance of goods, should not be appropriated towards the above duty liability; and

e. penalty under Section 112(a) and/or Section 114A and 114AA of the Customs Act, 1962 should not be imposed.

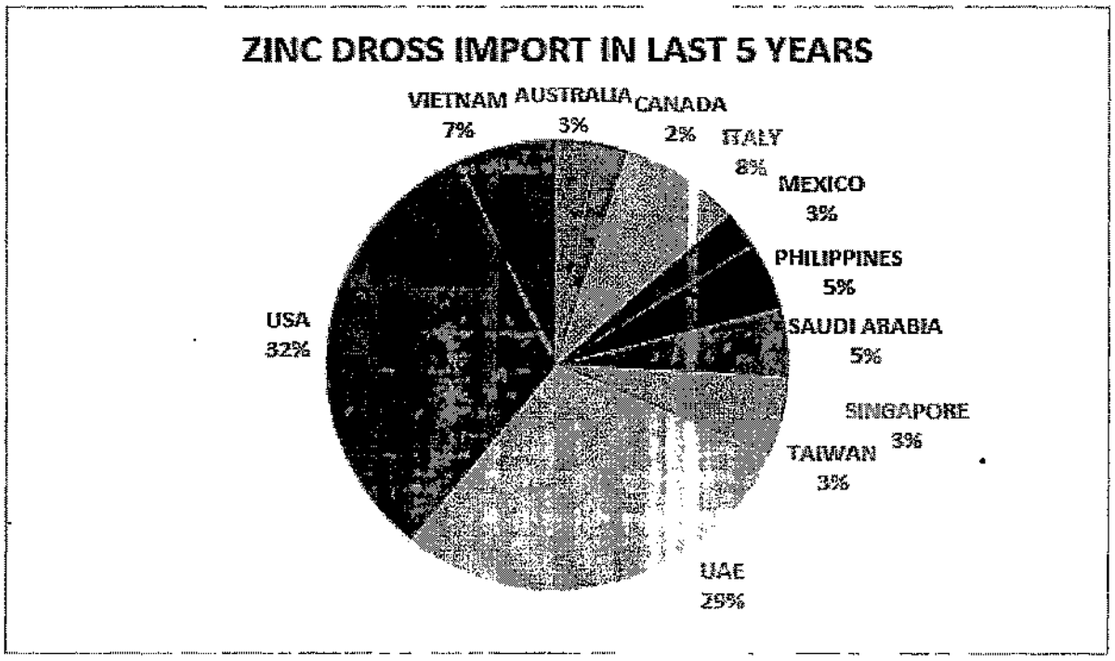
About the Noticee:

2. The Noticee, a private limited company, is engaged in the import of Zinc Dross for the manufacture of various grades of Zinc Oxide. The Noticee also manufactures Molybdenum Derivates. These goods are exported as well as cleared into the domestic market, as the case may be.

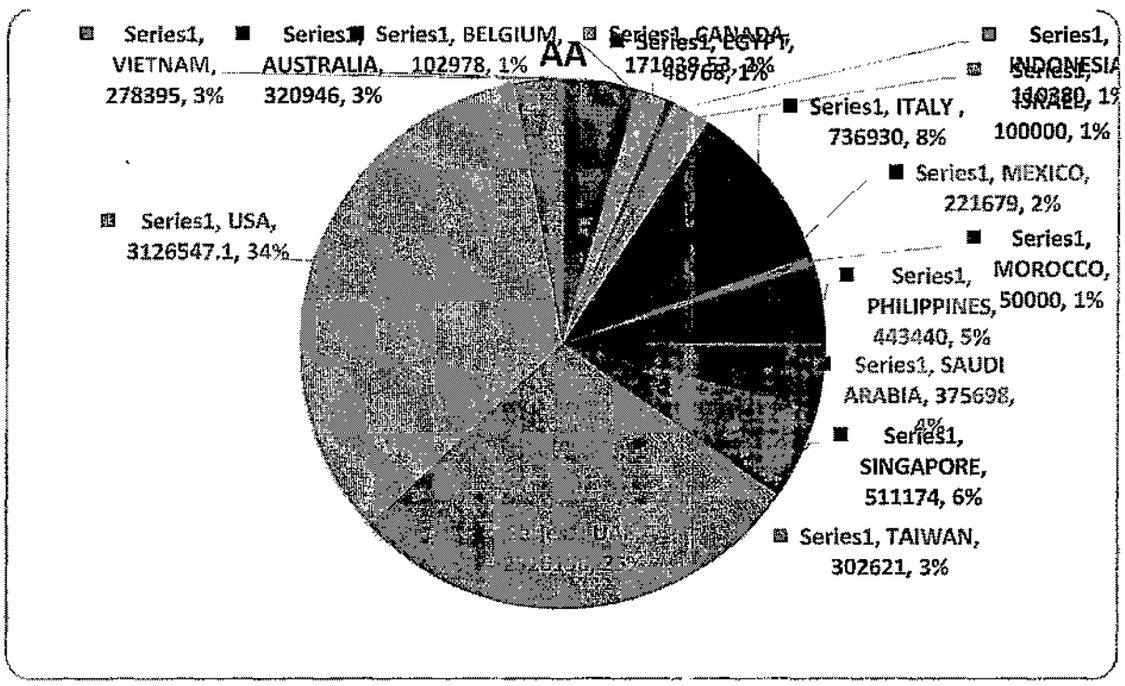
3. Apart from manufacturing, the Noticee was engaged in trading activity, wherein, it used to procure the goods from domestic market and export the same (as a merchant exporter). The Noticee is also in the business of catalyst recycling, lithium-ion battery recycling etc.

About the imported goods:

4. The imported Zinc Dross ("**impugned goods**") is used in the manufacture of various grades of Zinc Oxide. The impugned goods are procured both locally and imported from more than 10 countries all over the globe, like USA, Canada, France, Australia. A percentage wise analysis of the procurement made from different parts of the world for the last five years is as under :



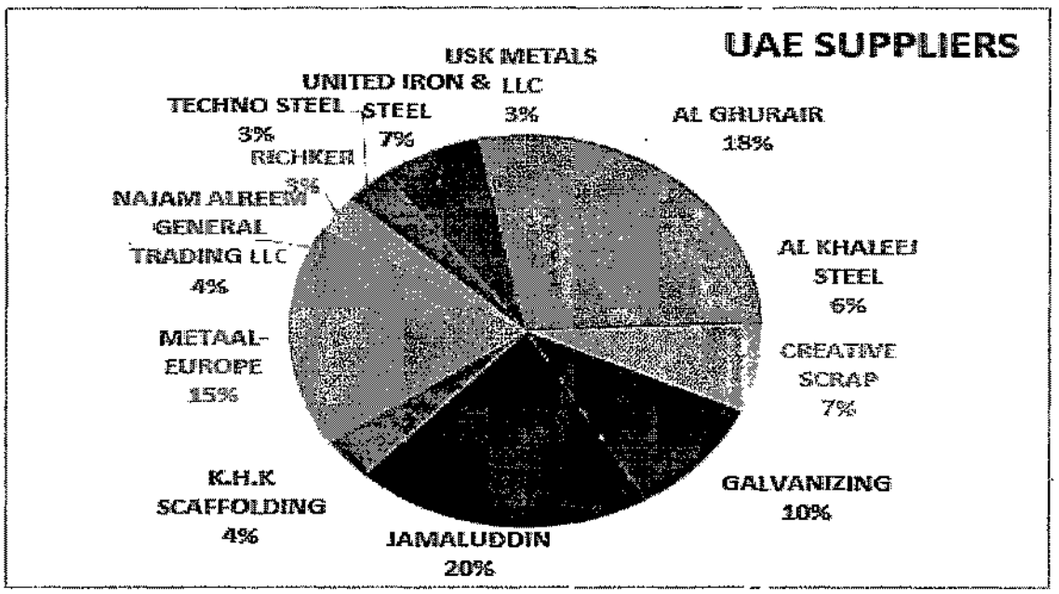
5. The Noticee also imports the impugned goods under Advance License from across the globe including UAE, USA etc. A percentage wise analysis of the procurement made from different parts of the world under Advance License for the last five years is as under :



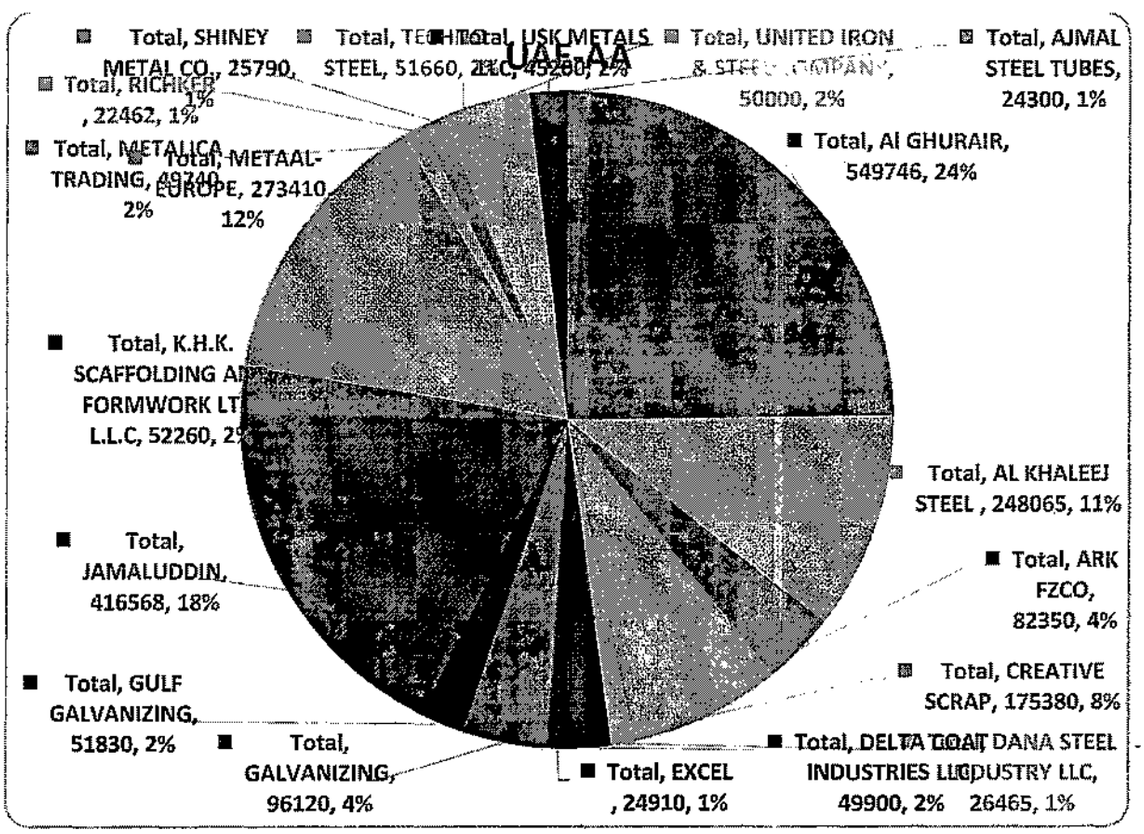
Imports from UAE:

6. The Noticee has been importing the impugned goods regularly from UAE since over a decade. The impugned goods are declared as "Zinc Dross" and classified under Tariff Item 2620 19 10. The Noticee has also been availing the benefit of Sr. No. 137 of Notification No. 50/2017-Cus. dated 30.6.2017 (**N/N 50/2017**) and discharging concessional rate of Basic Customs Duty ('**BCD**') @5%.

7. The Noticee imports the impugned goods from various suppliers in UAE such as Al Ghurair, K.H.K. Scaffolding and Formwork Ltd. LLC, Jamaluddin Trading LLC etc. A percentage wise analysis of the procurement made from different suppliers from UAE for the last five years is as under :



8. Further, the impugned goods are also imported from different suppliers in UAE under Advance License. A percentage wise analysis of the procurement made from different parts of the world under Advance License for the last five years is as under :



9. For all the imports, Pre-Shipment Inspection Certificates (**'PSIC'**), duly issued by recognized inspection & certification agencies and duly authorized by DGFT, are obtained, and submitted at the time of import. The PSIC submitted for previous imports and imports from other countries have never been questioned by the Customs Department. Illustrative copy of the PSIC certificates issued by Tubby Impex Ltd. (*PSIC issued by this agency in the present case*) in the past are enclosed as **Annexure-1**. In addition, the suppliers provide country of origin certificate on their letterhead to certify the country of origin as UAE.

Import in dispute:

10. In the regular course of business, the Noticee imported the impugned goods vide bill of entry no. 9570097 dated 14.11.20 and used them for manufacture of Zinc Oxide.

The impugned goods were described as Zinc Dross and classified under 2620 19 10. The Noticee also claimed the benefit of Sr. No. 137 of N/N 50/2017. Copy of the bill of entry no. 9570097 dated 14.11.20 along with corresponding import documents viz., invoice, packing list, letter from supplier stating the country of origin as UAE, and other import documents is collectively enclosed as **Annexure-2**.

11. In and around the disputed period, the Noticee imported the impugned goods from various suppliers from UAE namely, Universal tube and plastic, Galvanizing, Metalica, Al Ghurair, Richker, etc. Illustrative sale contracts entered with these suppliers by the Noticee are enclosed as **Annexure-3**.

12. No disputes were ever raised at the time of clearance of the impugned goods. In fact, as a matter of practice, the Noticee makes all the necessary declarations including classification, description, country of origin, exemption notification, etc. in connection with the imports made by them which are always subject to examination / verification by the customs authorities. The Noticee always files requisite documents including bill of lading, supplier's invoice, packing list, supplier's letter indicating the country of origin etc., with the customs department at the time of import for assessment of the imported goods. After due examination and satisfaction to the declarations made by the Noticee, the Customs department grants out-of-charge for home consumption. Thus, the Customs department was always aware of the nature and country of origin of the imported goods.

Investigation by the Special Intelligence & Investigation Branch (SIIB), Mundra:

13. Based on information received from the National Customs Targeting Centre ('**NCTC**'), the Special Intelligence & Investigation Branch, Mundra ('**SIIB**') initiated an investigation against the Noticee for the goods imported vide bill of entry no. 9570097 dated 14.11.20 from UAE.

14. As per the preliminary investigation, the SIIB alleged that the impugned goods have originated from Pakistan and hence the Noticee has mis-declared the origin and mis-classified the impugned goods.

15. As per the SIIB, the Noticee ought to have classified the impugned goods under Tariff Item 9806 00 00 and discharged 200% BCD basis the allegation that goods have originated from Pakistan. This Tariff Item was introduced and made part of Chapter 98 of Schedule I of the Customs Tariff Act, 1975 vide N/N 05/2019-Cus., dated 16.2.2019 by virtue of which goods originating in or exported from Pakistan were made classifiable under Tariff Item 9806 00 00 with BCD @200%.

16. As part of the investigation, statements of officials of the Noticee were recorded. The Noticee fully cooperated in the investigation and provided all the information as was sought from it.

17. The SIIB also recorded the statements of MSA Shipping Pvt. Ltd. (hereinafter referred to as "**Indian Agent**") who was the delivery agent of M/s Clear Freight International, Mundra and was used for transport of the impugned goods.

18. It is pertinent to note here that the statement of the above agent has been heavily relied upon in the SCN to allege mis-declaration against the Noticee. The Indian Agent during his statement submitted copy of bills of lading ('**B/Ls**') which were supposedly filed for the same set of impugned goods for their journey from Karachi port in Pakistan to Jabel Ali port in UAE. However, these bills of lading were not authenticated documents.

Issuance of Show Cause Notice dated 17.01.2024:

19. The above proceedings culminated in the issuance of the present Show Cause Notice dated ('SCN') 17.01.2024. Gist of the proposals in the SCN is at paragraph 2 above.

20. The SCN dated 17.01.2024 has made the following allegations:

a. The impugned goods were *originated in Karachi*, basis the bill of lading, as has been submitted by the Indian Agent, which were supposedly filed in Karachi for the same set of impugned goods for their journey from Karachi port in Pakistan to Jabel Ali port in UAE and tracking information of containers procured from Pakistan Inland Container Terminal (**'PICT'**) (para 4.3 of the SCN);

b. The impugned goods being *of Pakistan Origin* are classifiable under Tariff Item 9806 00 00 and BCD @200% is leviable on the impugned goods (para 5 of the SCN);

c. There was no inspection carried out at UAE, therefore the PSIC certificate submitted by the Noticee is false. (para 4.5 of the SCN);

d. The Noticee has mis-declared the country of origin as UAE instead of Pakistan and mis-classified the impugned goods under Tariff Item 2620 19 10 instead of Tariff Item 9806 00 00 by submitting false and incorrect documents with the intent to evade customs duty resulting in contravention of Section 46(4) and 46(4A) read with Section 17(1) of the Act. (paras 8.1-8.2 of the SCN);

21. In view of the above background, the Noticee is hereby making the following submissions which are without prejudice to each other.

SUBMISSIONS ON BEHALF OF THE NOTICEE

A. PRELIMINARY SUBMISSIONS.

A.1. At the outset itself, the Noticee submits that the present SCN is ex-facie erroneous, perverse, illegal, and bad on facts and hence on this ground itself the present SCN is liable to be dropped.

A.2. The Noticee further submits that the present SCN has been issued on the basis of presumptions and assumptions and without any shred of evidence. The Hon'ble Tribunal in **Electronik Lab Vs. CC – 2005 (187) ELT 362** had set aside the penalty on the ground that the same cannot be imposed based on presumptions and assumptions. The Hon'ble Tribunal further held that such presumptions and assumptions, however strong, cannot be a substitute for evidence. In the present case, the adjudicating authority has proposed duty demand and imposed penalty on the Noticee based on his disbelief and assumptions. It is submitted that someone's disbelief and assumptions cannot be a ground for duty demand or imposition of penalty on the Noticee, especially in the absence of any evidence. Reliance is also placed on **Govind Laskar Vs. CCE – 1991 (52) ELT 529, para 8.**

A.3. In any case, it is submitted that the Noticee imports the very same goods in dispute i.e., 'Zinc Dross' on payment of duty and under export incentive schemes particularly under Advance Authorization which are value-based schemes. Under Advance Authorization, import of specified items is allowed duty free, irrespective of its origin. During the relevant period, the Noticee has been duly issued with number of Advance Authorizations which allowed duty free import of 'zinc dross'. If the purported import of Pakistan origin (Bill of Entry 9570097 dated 14.11.20) in question is swapped with other imports of zinc dross covered / debited against the said Advance

Authorizations, then, there will be no differential duty at all. In other words, de-logging of bill of entry considered in AA which is filed for imported zinc dross for country other than UAE, and logging of this bill of entry in question in the AA. The Noticees in the last five years for the import of Zinc Dross from across the globe and has duly discharged its export obligations in respect of the same. Therefore, the Noticee submits that Bill of Entry 9570097 dated 14.11.20 may be considered against Advance Authorization No. 3410046270 dated 07.08.2020 issued for import of Zinc Dross. This will essentially neutralize the present duty demand as the Noticee has already paid 5% BCD in terms of Sl. No. 137 of N/N 50/2017-Cus., dated 30.06.17 and there is no duty liability for goods imported under Advance Authorization.

A.4. On the above ground itself, the entire demand is liable to be dropped.

B. THE IMPUGNED GOODS ARE NOT CLASSIFIABLE UNDER HEADING 98.06 AS THE GOODS ARE NOT OF PAKISTAN ORIGIN.

B.1. Tariff Item 9806 00 00 was introduced and made part of Chapter 98 of Schedule I of the Customs Tariff Act, 1975 vide N/N 5/2019-Cus dated 16.2.2019 by virtue of which goods originating in or exported from Pakistan were made classifiable under Tariff Item 9806 00 00 attracting 200% BCD. Relevant portion of the Customs Tariff is extracted below:

Tariff Item	Description	Unit	Rate of Duty	Preferential Area Rate
(1)	(2)	(3)	(4)	5
98060000	**All goods originating in or exported from the Islamic Republic of Pakistan**	-	**200%**	-

B.2. It is submitted that below two categories of goods are covered under Tariff Item 9806 0000 :

a. goods originating in Pakistan – such goods may be exported from any country; and

b. goods exported from Pakistan – such goods shall be exported from Pakistan to India and can / may be originated from any other country.

B.3. According to the SCN, the impugned goods have originated in Pakistan and therefore fall in the first category as mentioned above. It is not in dispute in the SCN that the impugned goods do not fall in the second category as they have admittedly been exported from UAE (Jabel Ali port) to India.

There is no evidence adduced to show that the impugned goods were produced / had originated in Pakistan.

B.4. The evidence that are on record and that has been relied upon by Customs Department to allege that the Noticee has imported the impugned goods from Pakistan is just the B/L of the impugned goods, that can at the most show alleged movement of the container containing the impugned goods from Pakistan to UAE. There is no proof of or even any discussion regarding the impugned goods being produced in or originating in Pakistan itself.

B.5. The Noticee submits that there is no proof adduced by the customs department which shows that the impugned goods were not imported from somewhere else to Pakistan.

B.6. The Noticee submits that for any goods to be considered as having been originated in Pakistan, i.e. to fall in the first category, they should have been manufactured / produced / assembled in Pakistan or some activity must take place in Pakistan by way of which it could be said that such goods have emanated from Pakistan.

B.7. The Noticee submits that for wholistic understanding of the English Notification, the Hindi version of the same should also be read to aid interpretation of the law as a whole. In fact, that is the settled position in law as well.

B.8. In the matter of **Pee Cee Cosma Sope Vs. CCE - 2020 (372) ELT 281 (Tri. - All.),** the Hon'ble Allahabad CESTAT, while trying to interpret the meaning of "power" in the context of interpreting the exemption Notification No. 3/2005-Central Excise dated 24th February 2005, they stated the following:

"...

39. The matter can be examined from another angle and that is to look to the Hindi version of the Tariff Act and the Exemption Notification. The Hindi version of sub-heading 3401.12 of the Tariff Act is as follows :-

3401.12	---	,slk lkcqu ftlds fofuekZ.k esa ;k mlds laca/k esa dksbZ rkiu izfØ;k fo|qr ;k Hkki dh lgk;rk ls u dh tkrh gksA

40. The Hindi version of the Exemption Notification dated 24 February, 2005 that came into effect from 28 February, 2005 is as follows :-

Øe la	**v/;k; ;k 'kh"kZ ;k mi'kh"kZ ;k VSfjQ en**	**eky o.kZu**	**'kqYd dh nj**
(1)	(2)	(3)	(4)
33	3401	lkcqu] ftlds fofuekZ.k ;k mlds laca/k esa fdlh izfØ;k esa fo|qr ;k Hkki dh lgk;rk ugha yh tkrh gSA	dqN ugha

41. Both the Hindi version of the Tariff Act and the Exemption Notification use the word 'vidyut', whereas the word 'power' has been used in the English version of the Tariff Act and the Exemption Notification. The word 'vidyut' means 'electricity' and so 'power' as used in English should be understood to mean 'electricity' alone.

42. In Pappu Sweets, the Supreme Court also examined the Hindi version of the Notification where the word 'mithai' was used. The Supreme Court observed that the word 'mithai' has a definite connotation and it can be said with a reasonable amount of certainty that people in this country do not consider 'toffee' as 'mithai'. This is what was also observed by the Supreme Court in Commissioner of Trade Tax, Uttar Pradesh v. Associated Distributors Ltd. [(2008) 7 SCC 409] and Park Leather Industry (P) Ltd. and Another v. State of U.P. and Others [(2001) 3 SCC 135]. Paragraph 23 of the decision of the Supreme Court in Park Leather Industry is reproduced below :

"23. Even otherwise, our above view is supported by the Hindi version of the definition. As has been set out in the case of Krishi Utpadan Mandi Samiti it is well known that in U.P. all legislations are in Hindi. Of course as

English version is simultaneously published. Undoubtedly, if there is conflict between the two then the English version would prevail. However, if there is no conflict then one can always have assistance of the Hindi version in order to find out whether the word used in English includes a particular item or not. In the Hindi version the word used as "Chamra". There can be no dispute that the term "Chamra" would include "leather" in all its forms."

43. In the instant case, there is no apparent conflict in the English and Hindi version of the Tariff Act and the Exemption Notification and, therefore, assistance can be taken of the Hindi version. The Hindi version removes all doubts since the word 'vidyut' has been used, which means 'electricity'.

44. In view of the aforesaid, a restricted meaning to the expression 'power' should be given by confining it to 'electricity', which view is duly supported by the Hindi version of the Tariff Act and the Exemption Notification. ..."

...[Emphasis Supplied]

B.9. Therefore, the Noticee wishes to draw attention to the Hindi version of Notification No. 05/2019-Cus., dated 16.2.2019 which is extracted below for ready reference:

सीमा-शुल्क टैरिफ अधिनियम की प्रथम अनुसूची में, धारा XXI में, अध्याय 98 में, टैरिफ मद 9805 90 00 और उससे सम्बंधित प्रविष्टियों के पश्चात्, निम्नलिखित टैरिफ मद और उससे प्रविष्टियों को अंत:स्थापित किया जाएगा, यथा:—

(1)	(2)	(3)	(4)	(5)
"9806 00 00	सभी वस्तुएं जोकि इस्लामिक पाकिस्तान गणतंत्र में मूलतः उत्पादित हों या निर्यात की गयी हों	-	200 %	-"।

B.10. As per the Oxford Hindi to English Dictionary Edition 15 (2004) the word मूलतः (at page 830 of the dictionary) translates to 'basically' in English and the word उत्पादित (at page 122 of the dictionary) translates to 'produced' in English. Relevant portion of the Dictionary is enclosed as **Annexure-4**. Therefore, it is abundantly clear that for goods to be considered as having originated in a particular country, they should be basically produced in that country. There is no proof whatsoever adduced by the customs department to conclusively prove that the goods were produced in Pakistan. Hence the requirement of the notification itself is not fulfilled in this case.

B.11. Furthermore, as per the Handbook of Rules of Origin issued by the WCO (World Customs Organization)[1] criteria for determining origin of goods and when the goods can be considered as wholly obtained from a country is discussed in the following manner:

4. Origin criteria

There are two basic criteria to determine the country of origin of goods. These are:

- Wholly obtained criterion, and
- Substantial/sufficient transformation criterion.

4.1. Wholly obtained goods

Wholly obtained goods are: goods naturally occurring; or live animals born and raised in a given country; or plants harvested in a given country; or minerals extracted or taken in a single country. The definition of wholly obtained also covers goods produced from wholly obtained goods alone or scrap and waste derived from manufacturing or processing operations or from consumption.

[1] https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/overview/origin-handbook/rules-of-origin-handbook.pdf

B.12. Furthermore, we may also refer to Rule 5(i) of the Rules of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA), which is extracted below for reference:

> "Rule 5: Wholly produced or obtained
>
> Within the meaning of Rule 4(a), the following shall be considered as wholly produced or obtained in the territory of the exporting Contracting State
>
> ...
>
> (i) waste and scrap resulting from manufacturing operations conducted there;..."

B.13. Even the Rules of Origin say the very same thing that scrap will be considered to have wholly originated in a particular country if it is resulting from manufacturing operations conducted in such country.

B.14. The Noticee submits that the customs department has adduced no evidence to prove that the impugned goods have indeed emanated from Pakistan or if there was any manufacturing / scrapping activity in Pakistan. There is no proof adduced by the customs department which shows that the impugned goods were not imported from somewhere else to Pakistan (*assuming not admitting that the impugned goods were shipped from Karachi to Jabel Ali as alleged in the SCN*). Therefore, the entire premise of the SCN to demand duty that the goods are of Pakistan Origin is without any evidence. On this ground itself, the SCN is liable to be dropped.

B.15. Further, as for the second category - All the import documents that the UAE supplier has adduced clearly show that the impugned goods had originated from and were exported from UAE. In fact, it is an undisputed fact that the impugned goods were exported from UAE. It is submitted that for the second category, goods shall be exported by Pakistan to be imported in India. If an exporter in a third country, first imports the goods from Pakistan, and thereafter if such goods are exported from such third country to India, it cannot be considered as exported from Pakistan. Without prejudice, like mentioned above, the journey for the impugned goods could have been initiated in a third country like United Kingdom to Pakistan to UAE to India.

B.16. Therefore, since the impugned goods were neither proved to be of Pakistan origin nor exported from Pakistan to India, the proposal to re-classify the impugned goods under Tariff Item 9806 00 00 is untenable.

> In any case, the onus to re-classify goods under another entry as opposed to the one declared by the assessee lies on the Department. Such burden has not been discharged in the present case.

B.17. It is submitted that the SCN has adduced no concrete evidence whatsoever that the impugned goods, originated in Pakistan. The Noticee therefore submits that the customs department has not completely discharged his burden of proof and established that the impugned goods are of Pakistan origin.

B.18. The Noticee humbly submits that burden of proof lies upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. This rule, derived from the maxim of Roman Law, *ei qui affirmat, non ei qui negat, incumbit probatio,* is adopted partly because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative.

B.19. The phrase 'burden of proof' is used in two distinct meanings in the law of evidence, viz., the burden of establishing a case and burden of introducing evidence.

The burden of establishing a case remains throughout the trial where it was originally placed; it never shifts. The burden of producing evidence may shift constantly as the evidence is introduced by one side or the other. The burden of producing evidence is also known as 'onus of proof'. In support of this, the Appellants place reliance on the decision of **Rajendra Jagannath Parekh and Ajay Shashikant Parekh Vs. CC – 2004 (175) ELT 238 (Tri-Mumbai).** In that case, the Hon'ble Tribunal referred to various judgments of Hon'ble Supreme Court and observed as follows:

"26. There is an essential difference between "burden of proof as a matter of law and pleading and as a matter of adducing evidence. The burden in the former sense is upon the party who invites a decision in the existence of certain facts which he asserts. This burden is constant and never shifts. But the burden to prove in the sense of adducing evidence, i.e. onus of proof shifts from time to time having regard to the evidence adduced by one party or the other, or the presumption of fact or law raised in favour of the one or the other. Such shifting of onus is a continuous process in the evaluation of evidence. When sufficient evidence either direct or circumstantial in respect of its contention is disclosed by the revenue adverse inference could be drawn against the assessee if he fails to rebut it by materials in his exclusive possession. It is only on the application of the principles of shifting onus, the rule relating to burden of proof in Section 106 and the presumption that may be drawn under Section 104 of the Evidence Act can sustain (AIR 1961 SC 1474; AIR 1964 SC 136; AIR 1966 1867 SC; AIR 1972 SC 2136; AIR 1974 SC 859; AIR 1975 SC 182; AIR 1975 SC 2083 and 1983 (13) ELT 1620 referred to)." ...
(Emphasis Supplied)

B.20. It is submitted that the parties, on whom 'onus of proof' lies must, in order to succeed, establish a *prima facie* case. On the other hand, the burden of proof should be strictly discharged. In other words, one has to prove the point which he asserts on his own evidence and not by any weakness in the case of the defendant. Further, it is a settled legal position that the burden of proof never shifts. Therefore, in a matter where Revenue has raised demand of duty by alleging short/non-levy, the burden of proof is always on the Revenue to prove such allegations/assertions and it never shifts.

B.21. It is submitted that the Bill of Lading of the so called first leg of the journey relied upon in the SCN merely demonstrates that the impugned goods were exported from Pakistan to UAE and do not prove that the impugned goods were produced in Pakistan. The Noticee submits that as far as the Noticee is concerned, the goods have been exported to it from UAE and not Pakistan so whether the supplier had imported or sourced the impugned goods from Pakistan or elsewhere is inconsequential for the Noticee since there is no doubt in the fact that the goods were most definitely exported from UAE to India.

B.22. It is also submitted that it is an established principle of law that when a classification is proposed by the Department, the burden to prove the correctness of such proposed classification is strictly on the Department, by adducing proper evidence and duly discharging the burden of proof. In the present case, the Department has clearly failed to discharge such liability.

B.23. Reliance in this regard is placed on the judgement in **H.P.L. Chemicals Vs. CCE – 2006 (197) ELT 324 (SC)**, wherein the Hon'ble Apex Court held that if department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce evidence and discharge the burden of proof.

B.24. The customs department ought to have provided concrete and verifiable evidence to establish that the imported goods are of Pakistan origin and not sourced

from elsewhere into Pakistan. The SCN also does not adduce evidence demonstrating to the effect that the impugned goods have not been imported from elsewhere into Pakistan or at least if they are believed to be of Pakistan origin, where were they produced etc. In this regard, the Noticee relies on the case of **Hindustan Ferodo Vs. CCE – 1997 (89) ELT 16 (SC)**, wherein the Hon'ble Supreme Court held that the onus of establishing that goods are classifiable under a particular tariff entry lay upon the Revenue. Relevant paragraphs of the judgment are reproduced below :

> "3. It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.
>
> 4. It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that a party before it has failed to lead. Other than supposition, there is no material on record that suggests that a small scale or medium scale manufacturer of brake linings and clutch facings "would be interested in buying" the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants' averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself. Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution."

B.25. In the present case, the lackadaisical approach of the department is evident from the fact the custom department has made no effort whatsoever to discharge the burden to establish that the impugned goods are indeed classifiable under Tariff Item 9806 00 00. Mere allegation that the impugned goods originated in Pakistan does not support re-classification of the goods.

B.26. It is settled law that once the department has failed to discharge the burden of proof, the allegation of mis-classification cannot be sustained. In this regard, reliance is placed on the following decisions wherein, it has been held that the burden of proof to levy tax is on the revenue:

a. UOI Vs. Garware Nylons - (1996) 10 SCC 413;

b. CC Vs. Foto Centre Trading – 2008 (225) ELT 193 (Bom.);

c. CCE Vs. Khalsa Charan Singh – 2010 (255) ELT 379 (P&H); and

d. CCE Vs. Railway Equipment and Engg. Works – 2015 (325) ELT 184 (Tri. - Del.);

B.27. In these circumstances, the Noticee submits that the burden of reclassifying the subject goods has not been discharged by the department. Accordingly, the SCN is liable to be dropped forthwith.

C. THE STATEMENTS OF THE REPRESENTATIVE OF THE INDIAN AGENT FOR THE SHIPPING LINE ABROAD CANNOT BE RELIED UPON WITHOUT FOLLOWING PROVISIONS OF SECTION 138B OF THE CUSTOMS ACT, 1962.

C.1. It is submitted that the statement of the representative of the Indian Agent of the shipping lines of the supplier located in India should not be relied upon without following provision of Section 138B of the Customs Act, 1962.

C.2. The Noticee in this regard relies on Section 138B of the Customs Act, 1962 regarding the admissibility of the statements recorded in the course of inquiry. The relevant portion of Section 138B is extracted below for a ready reference:

> **"SECTION 138B. Relevancy of statements under certain circumstances.** — (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -
>
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.
>
> (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

C.3. From a bare reading of the aforesaid provision it is evident that a statement recorded before an Officer can be relevant for the purpose of proving the truth of the facts contained therein only when the person who made the statement is examined as a witness before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice, except where the person who has tendered the statement is dead or cannot be found etc. Further, sub-section (2) of Section 138B provides that the provisions of sub-section (1) shall apply in relation to any proceedings under the Customs Act, 1962 as they apply in relation to a proceeding before a Court. Therefore, your good-self is requested to ensure compliance with the provisions of Section 138B of the Customs Act before admitting any statement as evidence against the Noticee.

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

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

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

C.5. Once this determination regarding admissibility of statement of witness is made by the Adjudicating Authority, an opportunity of cross-examination of the witnesses is required to be given to the person against whom such statements have been made / used.

C.6. Such statements without following the mandate enunciated under Section 138B of the Customs Act are not admissible as they appear to be extracted to suit the needs of building a case by the Customs Department. In view of the above, the Noticee submits that such statements cannot be relied upon and if the adjudicating authority wants to rely on these statements, the Noticee seeks an opportunity to cross-examine the representative of the Indian Agent before any reliance is placed on his statement.

C.7. In the absence of an opportunity of cross-examination, it is most humbly submitted by the Noticee that the statements given by, and the documents submitted by the Indian Agent should be ignored and the decision should not be taken based on the same.

C.8. In this regard, reliance is placed on the following decisions / judgements :

a. Him logistics Vs. Principal CC – 2016 (336) ELT 15 (Del.);

b. Basudev Garg Vs. CC – 2013 (294) ELT 353 (Del.);

c. J & K Cigarettes Vs. CC – 2009 (242) ELT 189 (Del.).

C.9. Therefore, mere reliance on the statements recorded under Section 108 of the Customs Act is not sufficient unless it is in consonance with provision of Section 138B of the Customs Act.

C.10. Hence, in view of the above submissions, the opportunity to conduct cross-examination should be granted to the Noticee else these statements should not be taken into consideration.

There is no evidence corroborating the statement of the Indian Agent with respect to receipt of the first leg of b/ls by the Indian agent.

C.11. Without prejudice, it is further submitted that, the SCN has relied upon the statement of the representative of the Indian Agent who is merely a delivery agent for another international agent to conclude that the impugned goods have originated from Pakistan. The only documentary corroboration given in support of such statements by the Indian Agent is B/Ls supposedly issued from Karachi for the containers allegedly containing the impugned goods destined to Jebel Ali. No proof of receipt of such documents has been provided by the Indian Agent and neither has the SIIB nor the Customs Department have inquired about the authenticity of these documents. Therefore, it is submitted that the possibility of such B/Ls being forged cannot be ruled out in the absence of proper chain of transfer of the documents.

C.12. It is submitted that simply stating that the B/Ls provided by the Indian Agent are inadmissible as evidence as there is no documentary evidence corroborating the source of such B/Ls and whether the same have been obtained from an authentic source. Further, the B/L allegedly issued from Karachi has no official stamp or even signature of any official.

C.13. Further, for the reasons best known to the SIIB, they have conveniently failed to verify the genuineness / correctness of the B/Ls produced by the Indian Agent. The SIIB, being an office of the Indian Customs should have approached their counterpart in Dubai or Karachi to verify the veracity of the B/L and the origin of the container containing the impugned goods. Instead, the SIIB has solely relied upon the Indian Agent, who does not give any proof of receipt of the B/Ls provided by them.

C.14. Reliance is placed on the decision in the case of **I.S. Corporation Vs. CC – 2016 (339) ELT A125 (Tri. – Mum.)**. In the above case, the SCN was issued by solely relying on the statement of the assessee, for alleging undervaluation. The Hon'ble CESTAT held that, without undertaking any further investigation to determine veracity of

statement, merely the statement cannot be relied upon to allege undervaluation. Relevant extracts are as follows:

> "The statement of Shri Pragnesh Jariwala is thus not a conclusive evidence of undervaluation of imported goods as it is not corroborated with any evidence. The investigation did not come out with any instance as to who were the persons to whom such amount was paid or when such amount was paid and how the amount was paid , No investigation was conducted at the supplier's end and in absence of any investigation the statement of Shri Pragnesh Jariwala· cannot be a reason to allege undervaluation. Our view is based upon the judgment of Tribunal in the case of M/s VIKRAM CEMENT (P) LTD. Vs. CCE, KANPUR 2012 (286) E.L. T. 615 (Tri. - Del.) upheld by the Hon'ble High Court as reported in 2012 (286) E.L. T. 615 (Tri. - Del.)."

C.15. The aforesaid case was further relied upon by the Hon'ble CESTAT in **Rajesh Gandhi Vs. CC – 2019 (366) ELT 529 (Tri. - Mumbai)**

C.16. The Noticee also relies on the decision in **Vikram Cement Vs. CCE – 2012 (286) E.L. T. 615 (Tri. – Del)** [affirmed by the Allahabad High Court in **2014 (303) ELT A82]** wherein it has been held as under:

> "9. The issue required to be decided is as to whether the said statement alone can be made the basis for arriving at the finding of clandestine removal. What is evidentiary value of the said statement, in the absence of other corroborative evidence on record. The Hon'ble Delhi High Court in a recent judgment in the case of Commissioner of Income Tax v. Dhingra Metal Works has considered the evidentiary value of the statement of Director given at the time of search of the factory sought to be relied upon by the Revenue. While examining the evidentiary value of the said statement in the absence of any other evidence, the Hon'ble High Court observed that it is settled law that though the admission is extremely important piece of evidence it cannot be said to be conclusive and it is open to the person who has made the admission to show that this is incorrect. I also note that there are numerous decision of the Tribunal laying down that such admission of shortages without there being any admission of clandestine removal, cannot be considered to be conclusive evidence to establish the guilt of the assessee. Burden of proof is on the Revenue and is required to be discharged effectively. Clandestine removal cannot be presumed merely because there was shortages of the stock or on the recovery of some loose papers.
>
> 10. As such, I am of the view that the statement, which was recorded on the date of visit of the officers, cannot, when standing alone, take the place of evidence so as to hold against them, especially when the appellant have explained that the said loose papers may relate to various stockists, which are working from their premises on rental basis."

C.17. It is submitted that even in the present case, the sole evidence being relied upon by the SCN is the statement and the B/Ls produced by the Indian Agent which is a mere photocopy without any signature or stamp. Thus, in the absence of any supporting proof, statement alone cannot be relied upon to allege misdeclaration. Similarly, the B/Ls produced without any signature or stamp, cannot be considered genuine or authentic. Therefore, reliance placed on the same to allege mis-declaration is bad in law and the SCN is liable to be dropped.

D. <u>THE BILL OF LADING OF THE ALLEGED FIRST LEG IS NOT AN AUTHENTICATED DOCUMENT AND CANNOT BE PRESUMED TO BE TRUE AS HAS BEEN ENSHRINED UNDER SECTION 139 OF THE CUSTOMS ACT, 1962.</u>

D.1. Section 139 of the Customs Act, 1962 states that:

SECTION 139. Presumption as to documents in certain cases. - Where any document -

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall -

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.

Explanation. - For the purposes of this section, "document" includes inventories, photographs and lists certified by a Magistrate under sub-section (1C) of section 110 [1][a Magistrate under sub-section (1C), or Commissioner (Appeals) under sub-section (1D), of section 110.

...[Emphasis supplied]

D.2. From the above provision it is clear that clause (i) to the section does not apply in the case of the Noticee. Therefore, the truthfulness of the information mentioned in the so-called unstamped B/Ls of the first leg of the journey cannot be presumed and has to be proved with positive corroborative evidence by the Revenue.

D.3. Now, coming to clause (ii) of Section 139, this clause allows the Court to admit evidence procured from outside India even if the same are not stamped and unless it is proved to the contrary, such unstamped document would be presumed to be authentic. In this regard the Noticee submits that in this context, for the so-called B/Ls of the first leg to be considered to be true and authentic under section 139 of the Custom Act, the same ought to have been issued by some recognized Government Body or any recognized organization for that matter of fact. It is irrespective whether such B/Ls are stamped or not but at least such documents should not be amenable to manipulation, which they are in this case.

D.4. As a matter of fact, the relied upon documents are rife with discrepancies so apparent that it is rather appalling that they have been relied upon at all by the customs department to even build a case in their favour.

D.5. The above position is a settled law and has been re-iterated time and again vide several judicial pronouncements a few of which are listed herein below:

D.6. In the case of **Martwin Electronics Vs. CCE – 2016 (331) ELT 85 (Tri. - Ahmd.)** the department had built up its case based on export declarations filed by the suppliers of the goods Batshita International Limited of Hong Kong. The assessee contended that

the enquiry reports obtained from the Customs at Hong Kong and the export declarations are inadmissible as evidence. These declarations were photocopies, and they were not signed by the authorized signatory, and there were many discrepancies between the export declarations and in the invoices, etc. Whereas the Department pointed out that the export declarations were obtained through official channels from the Customs and Excise Department of Hong Kong under proper signature and seal of the concerned authorities. The department also submitted that these declarations are signed by the merchandiser and the exporters, and they are legal documents binding on the exporters and appellants who imported the said goods under the said documents. Based on the above the CESTAT Ahmedabad decided in favour of the Department.

D.7. It is evident from the above case law that for any evidence to be presumed as authentic, the standard for such presumption to be made is such that the documents should be coming from official channels and/or otherwise authenticated by some authentic source. However, the so-called B/Ls of the first leg being considered as conclusive evidence against the Noticee by the customs department meets neither of the above standards because there is no clarity with respect to the origin of these documents. The Indian Agent has provided the so-called B/Ls without giving the source of the documents and the customs department has placed sole reliance on such unreliable sources to make grave allegations of deliberate misdeclaration on the Noticee. Moreover, and strangely enough, the Indian Agent has self-attested the so-called B/Ls of the first leg which were neither issued by them nor did they possess the original copy or at least verify the original copy of the same. This is completely perverse and bad in law.

D.8. In the case of **CC Vs. East Punjab Traders – 1997 (89) ELT 11 (SC)** documents were obtained by Indian Customs Officer during visit to Japan for enquiry. Photocopies of such documents did not bear any signatures. It was held by the Apex Court that authenticity of photocopies of the documents when itself is suspected, presumption under Section 139(ii) of the Customs Act, 1962 not available, especially when documents have not come from proper custody or obtained by Indian Customs from Japanese Customs. Department's offer for cross-examination of Steamer Agent, from whom such export declaration obtained is of no avail for raising the presumption. Discrepancy regarding the copies bearing the seal of Customs also raises doubt with respect to their authenticity and hence reliance was not to be placed on such documents. The relevant portion of the judgement is extracted hereinbelow :

> **5.** The single Technical Member, who wrote the minority judgment, however, held the view that it was not essential on the part of the Customs Officer to strictly prove the documents as required by the Evidence Act and that the authenticity of the documents, though copies, could not be doubted as they had been collected by the Collector from foreign sources and could be admitted in evidence by virtue of Section 139(ii) of the Customs Act, 1962 which permits the raising of a presumption in respect of documents received from any place outside Indian in the course of investigation of any offence alleged to have been committed by any person under the Act. The majority points out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs Officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents is suspect and it is not possible to presume that the originals are duly signed. It is for this reason that the majority did not consider it safe to place reliance on photocopies of copies of the documents recovered by the Customs Officer not from the Customs Department in Japan but from the

agencies which are stated to have exported the material in question. It is also found that one of these copies of the alleged declarations bears the seal of the Customs at Kobe and the name of the vessel is shown to be 'Raya Fortune' but the itinerary of that vessel collected at the instance of the Indian Customs shows that the said vessel had never touched Kobe which raises a serious doubt as to how far this document is authentic. The majority raises the question as to how the declaration at Kobe and shipment from Osaka are reconcilable noting that there is no explanation coming forth. The majority feels that the authenticity of the documents itself is suspect. In these circumstances, the presumption to be raised under Section 139(ii) of the Customs Act could not be raised because the document did not bear any signature, did not come from proper custody and it is difficult to understand why the Indian Customs did not interact with the Japan Customs and obtain authentic copies of the document from the latter. Merely because the Department offered cross-examination of the steamer agent from whom the export declaration had been obtained and the respondents chose not to avail of that opportunity is no ground for holding that the requirements of Section 139 are satisfied for the purpose of raising the presumption. In order to raise the presumption under the said provision, the basic facts had to be laid. Even though they bear a serial number and stamp of Japan Customs, the fact remains that they are copies of copies and indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Customs Officer; no signature at all of any of them. The discrepancy in regard to copies bearing the seal of customs at Kobe also raises a serious doubt whether the copies relate to any of the consignments in question. In these circumstances, if the majority was disinclined to place reliance on these documents we find it difficult to hold that it was in error in doing so.

...[Emphasis supplied]

D.9. The Hon'ble CESTAT in the case of **Hem Chand Gupta & Sons Vs. CC – 2015 (330) ELT 161 (Tri. - Del.)** has held as under :

"21.4 In absence of objective enquiry, the respondent Revenue had no answer on each shipping bill when the overseas report relied by them was challenged by appellant on two counts viz., (1) the reports were made on hearsay material and (2) authenticity thereof doubted since signature of foreign agency officer differed on each document and following the Apex Court decision in Collector of Customs, Bombay v. East Punjab Traders - 1997 (89) E.L.T. 11 (S.C.), copy of a copy is not admissible in evidence.

21.5 In this case Hon'ble Supreme Court noticed that majority of members of the Tribunal pointed out that the documents obtained from Japan was inadmissible in evidence as the documents were copies of copies not duly authenticated and could not, therefore be relied upon for concluding that there was a misdeclaration of value as alleged by the Customs authorities in the Show Cause notice. The majority of members also pointed out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents was suspected and it was not possible to presume that the originals were duly signed. Hon'ble Court held that in order to raise presumption under Section 139 of the Customs Act, 1962, the basic facts is to be laid. Even though they bear serial number and stamp of Japan Customs, the fact remains that they are copies of copies and indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Custom Officer; no signature at all of any of them. The discrepancy in regard to copies bearing the seal of Customs,

Hon'ble Supreme Court accepted majority view of Tribunal. In the present case the overseas report suffering from above defects became in-admissible in evidence and failed to be credible. Further there was apparent difference in three signatures of same Officer of foreign agency on three different reports. Even here was change of designation apparent from one of the reports [Ref: Letter dated 11-7.2005 - Pages 1223-1224 of SCN enclosed to letter dated 3-10-2005 of Embassy of India in Moscow, letter dated 21-2-2006 of Central Enforcement Department of Russia - Page 1663 of SCN, letter dated 28-4-2006 of Central Enforcement Department of Russia - Pages 1636-1637 of SCN]."

... [Emphasis Supplied]

D.10. In the current context also, the SIIB has failed to establish that the B/L of the first leg has been obtained from an authentic source and was simply not being fabricated by the Indian Agent. As the B/L provided by the Indian Agent did not bear any signature or stamp of the concerned person / department, going by the ratio of the above judgements, such evidence cannot be admissible.

D.11. In the case of **Kemtech International Vs. CC – 2013 (292) ELT 336 (Tri. - Del.),** the dispute centered around the Revenue trying to establish undervaluation done by the assessee of goods imported by them. The Tribunal made several notings at para 12.10 with respect to the fact that evidence cannot be considered in the context of sale of goods by a foreign manufacturer to third party. The Tribunal held that the price remaining unauthenticated and source from which it was obtained being not disclosed, such evidence is to be discarded. The Tribunal also observed at para 12.12. that documents relied upon were not authenticated by anyone except for a seal of Consulate General of India New York. The source from which these documents were obtained was not disclosed. So, these documents cannot be accepted as evidence.

D.12. In the present case, after receiving the so-called B/L of the first leg of the journey, the customs department has made no efforts to then approach customs office at Dubai or Karachi to verify the authenticity of the documents shared by the India Agents. They should have followed the proper procedure of law, approached the entities mentioned as suppliers or consignees in the first leg B/L to verify whether they even exist or not. The customs department should have also approached shipping lines to confirm the first leg of the journey. None of these procedures were followed and hence the evidence relied upon so heavily to build the case in the SCN falls flat.

D.13. In the matter of **Bussa Overseas Properties Vs. CC – 2001 (137) ELT 637 (Tri. – Mum.)**, the assessee was charged with undervaluing Scotch Whisky based on some evidence of extra remittance. It was held that the evidence adduced was insufficient and unclear since the statement of Ross, an official of a foreign supplier, was inconclusive and not definite in linking the extra payment to the importer. Moreover, it was observed that the invoices were unsigned, and it was not clear in what circumstances they were issued. None of the invoices referred to any imports made by, or orders placed by, the appellant. They did not, in fact, record the name of any individual and are stated to be towards "additional selling price on sundry shipments to Indian customers." They are therefore entirely insufficient to show that any payment had been made by Bussa. The document referred to as extract of ledger sheet is itself unsigned and was held to be having no evidentiary value. It was finally held that it cannot lead to the presumption raised in Section 139 of Customs Act, 1962. The relevant portion of the judgement is extracted hereinbelow for ease of reference:

"19....

It will be clear from this provision that where any document such as ledger entry

is considered, the only presumption that is available to the department, and this being rebuttable, is that the signature or the handwriting of the person who has inscribed the contents of the document is that of the person who purportedly signed it or made the entries. The documents that we are concerned with, bears no signature at all or bear the name of the person made entries in it. We do not propose to go into the question as to whether the presumption under Section 139 would be available in a case where the document is tendered in the proceedings other than prosecution proceedings, and will answer that it is available in a case like this. Therefore, as we have noted, it is not possible for us to conclude that it is signed by any official of MBL. In similar circumstances, the Supreme Court refused to accept that the presumption under Section 139 would apply to such a document. In C.C. v. East Punjab Traders - 1997 (89) E.L.T. 11 affirmed the refusal by the members of the Tribunal to place reliance on photo copies of documents received by the Customs department, some agencies which exported the goods which were under consideration. It took into consideration the fact that although the document bore a serial number and stamp of the Japanese Customs, it bore no signature of the exporter, forwarding agent, steamer agent or custom officers. It has therefore to be concluded that no reliance can be placed upon these documents."

...[Emphasis Supplied]

The evidentiary value of the B/L adduced as basis to issue the SCN is nil and ought to be written off as inadmissible.

D.14. Section 62 of the Evidence Act, 1872 defines "Primary Evidence" as under :

"Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1. -- Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. -- Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original."

D.15. Primary documentary evidence of a transaction evidenced by writing is the document itself which should be produced in original to prove the terms of the contract[2] if it exists and is obtainable. This is the best attainable evidence. The existence of primary evidence generally excludes secondary evidence. Secondary evidence of contents of written instruments cannot be given unless there is some legal excuse for non-production of the original[3].

D.16. The Hon'ble Supreme Court in the case **Tukaram S. Dighole Vs. Manik Rao Shivaji - (2010) 4 SCC 329** observed that the general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved. Only the original document is primary evidence as has been propounded in **Aktiebolaget Volvo Vs. R. Venkatachalam – 2010 (1) Cur Civ Cases 1 (Del).**

[2] Section 91 of the Evidence Act, 1872.
[3] Section 65 of the Evidence Act, 1872.

D.17. The evidence adduced by the customs department to substantiate the allegations in the SCN is not Primary Evidence and is not admissible in the same capacity as Primary Evidence. No original B/L of the so-called first leg of the journey has been provided or even relied upon in the SCN. If the customs department wanted, they could have easily procured one of the original triplicate copies of the B/L filed with the UAE Customs Authorities or available with the shipping lines, but the department has failed to do the due diligence thereby depreciating the evidentiary value of the B/Ls of the first leg.

D.18. Furthermore, where the genuineness of a document is fundamental question the photostat copies thereof should be accepted after examining the original record as has been propounded in the judgement of **Govt. of A.P. Vs. Karrichinna Venkate Reddy – AIR 1994 SC 591**. In this case the originals were never produced to begin with so no such verification of authenticity of the document was done.

D.19. The Noticee further submits that a document can always be created falsely by obtaining signatures of few persons but the said document when produced in evidence must be able to stand the test of genuineness as was held in **Hardip Singh Vs. State of Punjab - (2008) 8 SCC 557**. In the present case, unsigned and unstamped B/Ls have been relied upon to allege that the Noticee has mis-declared the country of origin in order to evade higher rate of duty. In view of the various decisions and judgements cited hereinabove, such a document fails to stand the test of genuineness in all accounts.

D.20. Section 63 of the Evidence Act, 1872 defines secondary evidence as :

Secondary evidence means and includes –

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

D.21. The evidence adduced in the present case does not satisfy any of the above categories to qualify as secondary evidence. The same is explained in further detail hereinbelow:

Certified copies given under the provisions hereinafter contained	The B/L of the first leg is not certified by any authority. Further the Indian Agent has given no information with respect to the origin of such document. The customs department could have easily obtained certified copies from the UAE Customs Authorities or at least verified the authenticity of such documents from the UAE Customs Authority which they have not in the present case.
Copies made from the original by mechanical	How the B/L of the first leg has been copied and whether they are forged or original has not been

processes which in themselves ensure the accuracy of the copy, and copies compared with such copies	verified and it was never compared with the original copy from any authentic source like the UAE Customs Authorities or the supplier themselves who would be having one copy each of the original triplicates of B/Ls that are issued.
Copies made from or compared with the original	Original B/L was never obtained, so there is no proof as to whether it is a copy of the original or even comparable.
Counterparts of documents as against the parties who did not execute them	B/L is issued by the shipping line and is issued in triplicate, one goes to the exporter/shipper, one to Customs and one is handed over to the consignee. None of these three counterparts of the B/L of the first leg has been accounted for or at least verified by the customs department.
Oral accounts of the contents of a document given by some person who has himself seen it	There is no evidence as to whether the Indian Agent has ever seen the original B/L of the first leg. There is also no evidence deduced with respect to the source of receipt of the B/L by the Indian Agent. Therefore, it is only their oral account which has been relied upon in the SCN which is completely incorrect.

D.22. Therefore, the Noticee submits that the document that is supposedly B/L of the first leg, as has been relied upon in the SCN, does not qualify as secondary evidence also.

D.23. The standard that is followed as per the Evidence Act, 1872 is elaborated herein below by the Noticee by relying on various case laws :

a. **CC Vs. Ganpati Overseas – 2023 (386) ELT 802 (SC) -** In this matter the Apex Court held that initial export declarations filed by foreign supplier with Hong Kong Customs showing higher value being unattested photocopies, would have no evidentiary value. The relevant portion of the judgement is extracted herein below for ease of reference:

> "17. We concur with the view taken by CESTAT. First and foremost, the export declarations relied upon by the appellant and earlier by the Directorate of Revenue Intelligence were unattested photocopies. Since those documents were used as a piece of evidence against the respondents, it was necessary that those documents were required to have been proved as is understood in law. **Unattested photocopies of the relied upon documents without anyone proving or owning up the veracity of the same would not have any evidentiary value.** It is another matter that the very substratum of these documents was subsequently removed when the foreign supplier filed a second set of export declarations before the Hong Kong customs authority showing lower price matching the price of the goods declared in the import invoices. We need not go into the reasons necessitating filing of the second set of export declarations simply because, the Hong Kong customs authority had accepted the second set of export declarations albeit imposition of penalty for mis-declaration of price at the initial stage. It has also come on record that the foreign supplier had paid the penalty. If

this be the position, there can be no justifiable reason for the appellant to harp upon the price of the goods as per the initial export declarations by placing reliance on the unattested photocopies of the first set of export declarations to prove under-invoicing for the purpose of evading customs duty."

b. **Truwoods Vs. CC – 2005 (186) ELT 135 (Tri. - Del.) affirmed in 2016 (331) ELT 15 (SC)** – The dispute pertained to enhancement of value sought on the basis of photocopies of export declarations obtained from Italian/US Customs, original copies of which were not brought on record. It was held that such documents being unsigned, no presumption can be raised under Section 139 of Customs Act, 1962 in respect of same. The Appellants submitted manufacturer's invoices, packing list, and other material including evidence relating to contemporaneous exports in support of price declared by them. The Commissioner (Appeals) himself observed in impugned order that evidence of contemporaneous imports is equally tilted on both sides, therefore, Revenue cannot disregard transaction value. Revenue brought no concrete material to prove that invoices submitted were not genuine therefore, it was ruled that value not to be enhanced. (paras 8 and 9).

c. **Sai Steel Traders Vs. CCE - (2023) 4 Centax 252 (Tri.-Chan), para 13** - In this matter the Hon'ble CESTAT held that photocopy of documents cannot be admitted without production of original documents as per Section 65 of Indian Evidence Act, 1872.

d. **Shree Nakoda Ispat Vs. CCE – 2017 (348) ELT 313 (Tri. - Del.), para 5** – The matter pertained to clandestine removal of goods wherein the question of admissibility of photocopies of invoices was raised. The invoices themselves were not recovered during search at factory premises. No reference of source of receipt of such photocopies could be recovered. Originals were not produced for verification/comparison. There was no confirmation from buyers regarding receipt of goods. It was held that in absence of the original documents, the photocopies, not being even secondary evidence, are not admissible in evidence. No enquiries have been conducted by the Department at the buyer's end to verify whether they have purchased the goods covered under the alleged photocopy of invoices from the appellant. Therefore, it was held that demand of duty in such an eventuality will not sustain.

There are clear discrepancies conspicuously discernable in the evidence adduced in form of RUDs.

D.24. The Noticee submits that the evidence relied upon are rife with discrepancies that are rather apparent on the face of the documents. They are all listed herein below:

S.N	What the RUD Shows	The discrepancy	Relevant document
1.	Ship on Board dates absent for the first leg of the journey. Ship on Board date present for the second leg of journey.	Ship on Board dates cannot be absent on a B/L.	RUD 4 & RUD 5
2.	B/L for the first leg is unsigned and unstamped.	B/L cannot be an unsigned and blank document.	RUD 4
3.	The consignee mentioned in the B/L at Karachi to Jebel Ali is different from the consignor mentioned in the B/L at Jebel	If the same consignment has travelled from Karachi to Jebel Ali to India, then the person who received the goods at Jebel Ali from Karachi	RUD 4 & 5

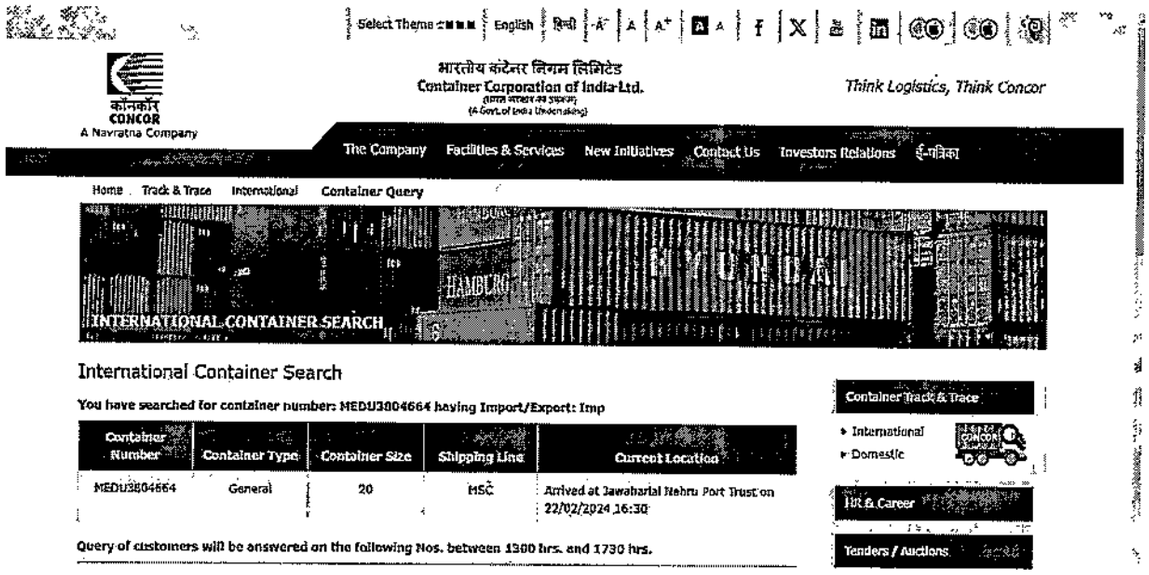
	Ali to India.	would be the same person who sent the goods from Jebel Ali to India. If the link is breaking at Jebel Ali, then there must have been some change in hand of the goods at UAE which customs department ought to have established before alleging that the same goods have travelled from Pakistan to India when they themselves have not been able to show a consistent trail of movement of the goods.	
4.	Indian Agent has confirmed the route of consignments at.	Indian Agent cannot confirm on behalf of other shipping line's number.	
5.	There is no corresponding tracking available on the PICT website for the so called first leg of the journey for the B/L, as on date.	The B/Ls are still alleged to be coming from Pakistan.	

D.25. It is evident from the above that the standard required for evidence to be considered by the Court to be presumed as admissible under Section 139 of the Customs Act is not met by the B/L copy shared by the Indian Agent without any information of the source of the document.

D.26. From the above submissions, it is clear that the B/L of the first leg seems to be poorly fabricated and ought to be dismissed as evidence altogether. Therefore, the SCN should be dropped on this ground alone.

D.27. It is further submitted that the PICT tracking information provided as RUD-1 (pages ... to ...) appears incomplete & unauthenticated prints of unverified set of information. The reason for concluding the same is the fact that the tracking information of the containers carrying impugned goods from the PICT website does not contain any website link at the bottom of the page or any logo of the website on the tracking information itself. It is not authenticated or attested by any authority. In fact, when the Noticee tried to verify the same from its end, however, no such information is available on the website. A screenshot of the same is enclosed as **Annexure-5**.

D.28. There are several container tracking sites of different countries that allow tracking to be done in a comprehensive manner and the data that is provided or rather displayed on their respective websites. For example, in India, the website of CONCOR (Container Corporation of India Ltd.) displays container tracking data in the following manner:



D.29. The site address for the above is https://concorindia.co.in/containerquery.aspx and as is evident from the above image, the tracking information is displayed on the site with the logo of the Company and if the information is printed, the print copy will show the logo and the information thereby can be considered to have been obtained from an authentic source. Whereas the data at RUD-4 obtained apparently from the PICT site looks like a page which has been typed out with random information.

E. IN ANY CASE, THE IMPUGNED GOODS ARE ELIGIBLE FOR CONCESSIONAL RATE OF BCD UNDER NOTIFICATION 50/17-CUS., DATED 30.06.17, IRRESPECTIVE OF THE COUNTRY OF ORIGIN.

E.1. The Noticee submits that the preamble to the N/N 50/2017 states as under:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and sub-section (12) of section 3, of Customs Tariff Act, 1975 (51 of 1975), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012 -Customs, dated the 17th March, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 185 (E) dated the [17th March, 2012], except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the said Customs Tariff Act, as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table; and

(b) from so much of integrated tax leviable thereon under sub-section (7) of section 3 of said Customs Tariff Act, read with section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table,

subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of the said Table: ...."

...(Emphasis supplied)

E.2. The Noticee submits that the preamble to the aforementioned notification categorically states that as long as the goods fit the description mentioned in the table in column (3) and **fall under** the heading, sub heading or tariff item mentioned in column (2) of the table, the goods in concern would be eligible to avail benefit of the notification.

E.3. It is to be noted that what is required to satisfy compliance of Column (2) is that the goods shall fall under a particular heading, sub heading or tariff item. It is not required that such goods are actually classified under such heading, sub heading or tariff item to become eligible to avail the exemption. The actual classification of a product can be different.

E.4. Goods falling under Sub-heading 2620.19, if they satisfy the criteria of Heading 98.06, shall be liable to be classified under Heading 98.06. The Noticee refers to Chapter Note 1 to Chapter 98 in this regard, which reads as "*1. This Chapter is to be taken to apply to all goods which satisfy the conditions prescribed therein, even though they may be covered by a more specific heading elsewhere in this Schedule.*"

E.5. The Noticee has imported Zinc Dross which falls under Sub-Heading 2620.19. The SCN also has not disputed the same. The only dispute is with respect to the origin of the goods. The impugned goods otherwise classifiable under Sub-Heading 2620.19, have been proposed to be re-classified under Heading 98.06 solely on the ground that the impugned goods are allegedly originating from Pakistan and not because they do not satisfy the scope of Sub-Heading 2620.19. Therefore, it is submitted that it is abundantly clear that the impugned goods do fall under Sub-Heading 2620.19.

E.6. Therefore, without prejudice to the submissions above that the impugned goods do not fall under Heading 98.06, it is submitted that even if the impugned goods are re-classified under Heading 98.06, they would still remain eligible for the benefit originally availed under NN 50/2017 as the impugned goods fall under Sub-Heading 2620.19 and also satisfy the description given under Column 3 against Sl. No. 137 of NN 50/2017.

F. NO PROOF PROVIDED TO INVOKE EXTENDED PERIOD OF LIMITATION. HENCE, INVOCATION OF THE SAME IS BAD IN LAW.

F.1. The Noticee submits that the SCN is bad in law and facts as the impugned goods have been supplied from and originated in UAE. Each and every document on record provided by the supplier reflects that the impugned goods are in fact from UAE. Be it the B/L, Invoice, PSIC, packing list, certification of the supplier of country of origin. Also, these documents came directly from the supplier in original form and from verified channels unlike the so-called B/L of the first leg provided by the Indian Agent.

F.2. The Noticee further submits that it has operated on the bona fide belief that the impugned goods have come from UAE basis each and every import document, be it the Bills of lading, invoice, certificate of origin, PSIC - every single document reflected that the impugned goods have come from UAE. The Noticee had no reason to believe otherwise or doubt the authenticity of the same. Neither did the assessing officer who cleared those impugned goods. Therefore, to build a half-baked case basis unsigned B/L copy and other documents rife with discrepancies mentioned in detail herein above, does not stand the test of law. Therefore, it is safe to conclude that there was no misstatement or suppression of fact or collusion by the Noticee.

F.3. Furthermore, the Noticee submits that the SCN does not provide any cogent reason in order to substantiate as to why duty is payable with respect to the impugned

goods. It is submitted that no duty is payable as the impugned goods are not of Pakistan origin and they are imported from and originated in UAE.

F.4. The communication of the Noticee with the shipping line agents in UAE (**Annexure-6**), which clearly shows that the impugned goods are of UAE origin. The Noticee has never conducted any business with any Pakistani supplier and there has been no link established whatsoever that the Noticee ever placed any order through any channel with any Pakistani supplier.

F.5. The SCN has alleged that the PSIC provided by the Noticee is false without further backing up such an allegation with any reason or proof. The SCN merely relies on the communication received from NCTC which states that the consignment in which the impugned goods have been imported was never opened, however, no evidence whatsoever has been provided for such an allegation.

F.6. In this regard the Noticee submits that the PSIC has been issued by Tubby Impex Private Limited, who is accredited by the DGFT to issue such PSIC, and the same is reflected in Appendix 2H of the Foreign Trade Policy. The NCTC or the SIIB had no basis to allege that such a certificate is false. Neither have they provided any positive evidence to prove that the documents have been forged or tampered with. Therefore, without such proof it cannot be alleged that no inspection was done in UAE.

F.7. It is further submitted that the basis for customs department & the SIIB to allege that the impugned goods have travelled from Karachi to India is that the container numbers of the so called-first and second leg of the journeys match. The Noticee would like to point out in this regard that Containers are of fixed number, and they move around carrying different consignments, therefore, it is not a conclusive proof of same goods moving from Karachi to Mundra. This is not really a very strong proof of any continuity of movement of the impugned goods. Rather it is a common occurrence in the cargo business.

F.8. The SCN has also alleged that the Country-of-Origin certificate was given merely by the supplier, and hence the veracity of the same is doubtful. The Noticee submits that since they were not availing any FTA benefit there was no requirement to procure a country-of-origin certificate from the Ministry of Commerce of UAE. Hence, the supplier's certification is sufficient in this context.

F.9. In any case, the entire premise of the SCN is that the impugned goods are of Pakistan origin. However, the only evidence of "container tracking website" allege it purported to be transported from Pakistan via UAE to India. The website nowhere proves that these goods are of Pakistan Origin. Therefore, the entire basis of issuing the SCN is without any evidence.

F.10. In view of the above, the present SCN ought to be dropped forthwith.

G. THERE IS NO MIS-DECLARATION AS FAR AS ANY MATERIAL PARTICULAR IS CONCERNED. THEREFORE, INVOCATION OF EXTENDED PERIOD OF LIMITATION IS BAD IN LAW.

G.1. In the present case, the SCN was issued on 17.01.2024 in respect of the imports made by the Noticee on 14.11.2020. Section 28(1) provides a limitation period of two years from the relevant date (or the date of import) for issuance of show cause notice demanding payment of customs duty.

G.2. However, Section 28(4) of the Customs Act provides for an extended period of five years for raising the demand, which is applicable only in cases where the duty has not been levied or has been short-levied, etc. by reason of collusion or any wilful mis-

statement or suppression of facts by the importer. The relevant portion has been extracted below for reference:

> "SECTION 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —
>
> (a) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,—
>
> (b) the proper officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied [or paid] or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;
>
> .....
>
> (4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —
>
> (a) collusion; or
>
> (b) any wilful mis-statement; or
>
> (c) suppression of facts,
>
> by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

G.3. In the instant case, the SCN is issued by invoking the extended period of five years under Section 28(4), alleging that the Noticee had willfully mis-declared the country of origin and accordingly mis-classified the impugned goods with an intent to evade the payment of customs duty @ 200%.

G.4. In this regard, it is submitted that the Noticee has not suppressed any information from the customs department and all the relevant information was provided by the Noticee at the time of import. Therefore, invocation of extended period is completely incorrect and bad in law, especially when the entire demand is completely time-barred.

G.5. It is submitted that there is no dispute as far as the description, value or any other material particular pertaining to the impugned goods, as declared in the bill of entry is incorrect. In other words, there is no mis-declaration as to any material particulars of the goods. The sole ground on which an extended period has been invoked is mis-declaration of the country of origin of the goods, which is not a material particular.

> Extended period cannot be invoked as there was no mis-declaration/ suppression of facts.

G.6. The Noticee humbly submits that the extended period is not invokable since no suppression of facts / mis-declaration can be attributed to it – which are sin qua non for invoking extended period of limitation under Section 28(4) of the Customs Act.

G.7. It is submitted that the Noticee has never mis-declared the impugned goods whether pertaining to its description, classification or country of origin. The impugned goods are correctly classified under Tariff Item 2620 19 10 and not under Tariff Item 9806 00 00, since the same were never exported from or originated in Pakistan.

G.8. As far as the Noticee is concerned, it has properly declared and adduced the requisite import documents at the time of import with the correct information that the impugned goods were originating and being imported from UAE. On the basis of such documents, duly examined by Customs at the time of import, the impugned goods were cleared.

G.9. In fact, a few of the earlier consignments of the same goods imported from UAE from the same supplier and other suppliers were duly examined and verified by the customs department before granting them out-of-charge. Therefore, no mis-declaration can be alleged on part of the Noticee.

G.10. In fact, the Noticee has never availed any FTA benefit basis the country of origin of the goods which is an undisputed fact. In any case, incorrect mentioning of country of origin without availing any benefit will not be covered by the expression "goods not corresponding with the particulars mentioned in the Bill of Entry".

G.11. It is submitted that the Noticee had duly followed the law and had classified the subject goods under Tariff Item 2620 19 10 and not under Tariff Item 9806 00 00 under a genuine bona fide understanding that the impugned goods were classifiable under such entry having originated from UAE.

G.12. The normal transaction undertaken by the Noticee is that it first negotiates with the supplier in UAE on call who then issues a sales contract (*Annexure-3* above) and thereafter purchases the impugned goods from its suppliers in UAE. The supplier duly issues invoice and also shares declaration with each shipment regarding the origin of the goods. The impugned goods are also inspected in UAE basis which PSIC is issued. The Noticee has no business connection whatsoever with any supplier in Pakistan. The Noticee is not aware of the documents shown as 1st leg of B/L in the RUDs. As per all the documents shared with it by its suppliers, the Noticee was and is of the bona fide belief that the impugned goods are of UAE origin only and not from Pakistan. All the documents as were received by it from its suppliers were submitted to Customs at the time of filing of bills of entry. Thus, no mala fides can be imputed against the Noticee, and extended period of limitation could not have been invoked.

G.13. The SCN alleges that the Noticee was well aware about the appropriate classification of the impugned goods and also that the impugned goods were deliberately sourced from Pakistan, therefore, the Noticee willingly misclassified the impugned goods under Tariff Item 2620 19 10 with the sole intent to avoid payment of 200% BCD.

G.14. In this regard, it is humbly submitted that out of the total amount of Zinc Dross imported in the last five years, only 29% has been sourced from UAE. Majority of the Zinc Dross imported by the Noticee was from USA.

G.15. The import data from all the countries mentioned in the pie chart above, which forms the basis for the above analysis is enclosed as Annexure-7

G.16. As can be seen from above, the percentage of procurement of impugned goods from UAE accounts for 29% of the total overall imports made in the last five years. It

is quite evident that the maximum imports of impugned goods were made from various countries other than UAE. Illustrative import documents of Zinc Dross imported from countries other than UAE are enclosed as Annexure-8.

G.17. In any case impugned goods imported from anywhere in the world enjoyed the benefit of concessional rate of BCD of 5% under S.N. 137 of N/N 50/2017-Cus. Therefore, for a seasoned importer like the Noticee, there is no reason for it to import the goods from Pakistan that too surreptitiously, risking payment of 200% BCD.

G.18. Furthermore, Pakistan is not even known to have any upper hand over the quality of Zinc Dross being produced in that country. So practically also, there is no substantial reason to undertake any amount of risk to divert imports from Pakistan through UAE.

G.19. Only one consignment of Zinc Dross is in dispute in the present SCN. A total of 30,000/- metric tons of Zinc Dross were imported in the last five years, of which only 24020 kgs is being disputed to be from Pakistan. Out of the total import in the last five years, 8,000/- metric tons have been imported from UAE and is not being disputed either. Therefore, it makes no commercial or economic sense for the Noticee to resort to mis-declaration for such insignificant amount of the impugned goods.

G.20. It is further submitted that although the RUDs adduced do not possess the credibility to create reasonable doubt about the country of origin of the impugned goods, despite that being the case, the Noticee re-iterates that as far as the Noticee is concerned, a contract for sale was executed by the supplier located in UAE and the import documents of the impugned goods also confirm that the supply has been made from UAE and the goods are of UAE origin.

G.21. The proof of the fact that the Noticee sought to source impugned goods from UAE supplier is evident from the sales contract issued by the supplier (*Annexure-3*), like it has sourced numerous times in the past without any dispute having arisen out of it. The same can be evidenced from the illustrative copy of bills of entry along with other corresponding import documents enclosed as Annexure-9. The consignments in dispute are also no exceptional purchase made by the Noticee.

G.22. Without prejudice, if anything to the contrary has been unearthed after investigation by the Revenue, it is not owing to any deliberate or surreptitious act of the Noticee to evade duty. If it is actually the case that the impugned goods were originally exported from Pakistan to Jabel Ali, then in such a case, the Noticee is nothing but a victim of the alleged misrepresentation/misdeclaration, if any, by its supplier. If the impugned goods have actually been first imported from Pakistan to UAE and then sent to India to the Noticee as per the allegations made in the SCN, that has been done without the knowledge of the Noticee.

G.23. It is submitted that the Noticee was never intimated of the alleged sourcing of the impugned goods from Pakistan by the supplier, neither is there any proof on record nor adduced in the SCN to show explicit action of the Noticee which led the supplier in UAE to source scraps from Pakistan. If the supplier in UAE chose to source the impugned goods from Pakistan, they did so out of their own volition and not because the Noticee had asked them to. If they were unable to sell Zinc Dross as per the Noticee's requirement, they could have very well intimated the Noticee of such a situation and the Noticee would have procured the same from some other supplier. There is no dearth of impugned goods all over the globe that the Noticee would have to resort to sourcing it that too surreptitiously from Pakistan.

G.24. The Noticee submits that it could not even have had an inkling of the alleged origin of the impugned goods to be Pakistan when all documents pertaining to import

and the supplier themselves clearly stated vide certification that the same are from UAE.

G.25. The above clearly establishes the bona fide under which the Noticee has always operated and acted and hence the allegation of suppression/misrepresentation cannot stand.

Without prejudice, an innocent purchaser ought not to be held accountable for fraud for its genuine purchase.

G.26. Without prejudice, it is submitted that the Noticee has purchased the impugned goods with the knowledge that it is buying the impugned goods from UAE supplier who is procuring the same from UAE. The Noticee had every intention to buy UAE origin goods and hence had initiated purchase from UAE supplier. In fact, the supplier had also held themselves out to have supplied the impugned goods having procured the same from UAE which is evidenced by the import documents all of which indicate that the impugned goods are of UAE origin. Therefore, to hold a genuine purchaser like the Noticee accountable for fraud that it never committed is unfair to say the least.

G.27. The Hon'ble High Court of Bombay in **Taparia Overseas Vs. UOI – 2003 (161) ELT 47 (Bom)** has held as under :

> "36. ...It is thus no doubt true that as a general rule, if a transaction has been originally founded on fraud, the original vice will continue to taint it, and not only is the person who has committed fraud is precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself. In the cases at hand, it is not in dispute that all the petitioners had obtained licences for valuable consideration without any notice of the fraud alleged to have been committed by the original licence holders while obtaining licences. If that be so, the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute."
>
> ... (Emphasis supplied)

G.28. While passing the judgment in the case of *Taparia Overseas (supra)*, the Hon'ble High Court distinguished the case of **Fedco Private Vs. S.N. Billigram – 1999 (110) ELT 92 (SC),** wherein it was held that fraud vitiates everything, and nothing survives. After going through all the aspects of Fedco (supra), vis-à-vis, other judgments of the Hon'ble Supreme Court in **East India Commercial Company and CCE Vs. Sneha Sales Corporation - 2000 (121) ELT 577 (SC)**, the Hon'ble High Court distinguished the case of *Fedco (supra)* on the ground that in that case the importer of the goods was itself a party to the fraud. By analysing the principles of law of contract, the Hon'ble High Court held that where the transferee of the licence is either party to the fraud or had notice of such fraud being committed, only then the ratio of *Fedco (supra)* can be applied and not otherwise. It was further held that in a situation where the transferee has obtained a license for value and has no knowledge of any fraud committed by the exporter of the goods, in such a case, the ratio of *Fedco (supra)* shall not apply. Therefore, the licence, if valid on the date of importation of the goods, cannot be considered as void ab initio.

G.29. The judgement in **Taparia Overseas (supra)** has been maintained by the Hon'ble Supreme Court in the case of **Union of India Vs. Blue Blends & Textur. – 2017 (349) ELT A93 (SC)**.

G.30. The aforesaid judgment was also followed by the Hon'ble High Court of Bombay in the case of **Sanjay Sanwarmal Agarwal Vs. UOI – 2004 (169) ELT 261 (Bom)**. In

that case, the Customs Department had not allowed clearance of consignments on the ground that the transferred advance license was obtained by fraud by the original license holder. Following *Taparia Overseas (supra)*, the Hon'ble High Court held that the action of the Customs Department was bad in law and allowed the importer refund of duty paid under protest for clearance of the imported goods.

G.31. It is submitted that the decisions of the Hon'ble High Court of Bombay follow the well-settled principle that an innocent party should not suffer a fraud committed by another.

G.32. Similarly, the Hon'ble Tribunal in the case of **Sumit Woolen Processors Vs. CC – 2014 (312) ELT 401 (Tri.-Mum.)** ruled in favour of transferees holding that the transferees cannot be said to have knowledge of misrepresentation by the exporters. The Hon'ble Tribunal placed reliance on the judgement of the Hon'ble High Court of Bombay in the case of *Taparia Overseas (supra)* and the judgment of the Hon'ble Supreme Court in the case of *East India Commercial (supra)*.

G.33. Without prejudice, in the present case, even if it is assumed that the goods were brought from Pakistan to UAE, the Noticee was never aware of there being any so-called first leg to the journey of the impugned goods, if any. All documents that the Noticee was in possession of emanated from UAE and the supplier themselves have created the façade that the impugned goods are being supplied from UAE. That being the case the Noticee cannot be punished for bona fide purchase made by it.

G.34. Further, it is submitted that the allegation that Noticee has knowingly and intentionally submitted false and forged documents with the intention to evade customs duty is absolutely baseless.

G.35. Firstly, it is unclear as to which are the documents that the customs department is alleging to be false and forged since the customs department itself has built its case based on the documents on record that the Noticee has out of their own volition disclosed. If they were false documents, then the customs department itself has built its case basis false documents.

G.36. Secondly, the import documents are all given by the UAE exporter and admittedly so. The Noticee's CHA has simply filed Bills of Entry basis the documents given by the supplier/exporter so none of these documents were made by the Noticee. The Noticee has simply made declarations basis what was given to it by the supplier.

G.37. Besides, there is no dispute that the impugned goods have moved from Jebel Ali to Mundra. So, the import documents pertaining to such movement of the impugned goods cannot be false documents. The only document that the customs department seems to be disputing is the PSIC and the country-of-origin certification, none of which are issued by the Noticee. It is impossible for the Noticee to forge false documents which are not even issued by it. The documents which the customs department has alleged to be forged and false are the ones that the Noticee had no control over. Even if assuming without admitting that they were forged and are false, they were submitted by the Noticee as was received from the supplier, hence the Noticee had no knowledge of them being forge or false. It is beyond the scope of Noticee to even influence the forging of such documents. The Noticee has always been of the belief that these documents are genuine. Hence the allegation is baseless to say the least.

G.38. A perusal of the above submissions show that the Noticee had accurately described the impugned goods to the best of their knowledge, therefore, this is not a case of suppression or willful misdeclaration or collusion, and the extended period of limitation could not have been invoked.

G.39. Therefore, to summarize the above it is submitted that there are 3 ingredients that are essential for invocation of extended period of limitation or even section 28(4) which are mentioned and refuted herein below:

a. Suppression of facts: the Noticee has declared everything as per the import documents provided by the supplier and there is no dispute with this regard.

b. Willful misstatement: the Noticee has not willfully mis stated anything to begin with. All import documents stand as evidence of the fact that as far as the Noticee is concerned it has imported the impugned goods from UAE, besides it has nothing to gain out of deliberately misstating the country of origin for such small amount of import when more than 71% of the imports are being made seamlessly without any dispute. It makes no economic or commercial sense for the business.

c. Collusion: Customs department has failed to put on record any positive proof which incriminates the Noticee or remotely establish any communication or link between the Noticee and the Pakistani supplier.

G.40. In this regard, the Noticee relies on the case of **Cosmic Dye Chemical Vs. CCE - (1995) 6 SCC 117,** wherein the Hon'ble Supreme Court held that suppression and mis-representation of fact should be wilful in order to constitute a permissible ground for invoking extended period of limitation.

G.41. The Hon'ble Supreme Court of India vide various judgements has laid down the parameters for invoking extended period of limitation. The Hon'ble Supreme Court in **CCE Vs. Chemphar Drugs & Liniments - (1989) 2 SCC 127** held as under :

> "8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence.

9. In that view of the matter and in view of the requirements of Section 11A of the Act, the claim had to be limited for a period of six months as the Tribunal did. We are, therefore, of the opinion that the Tribunal was right in its conclusion. The appeal therefore fails and is accordingly dismissed."
...(Emphasis Supplied)

G.42. Reliance is also placed on the judgement in **Anand Nishikawa Vs. CCE - (2005) 7 SCC 749**, wherein the Hon'ble Supreme Court has held that mere failure to declare, without any positive act from the side of the assessee, would not amount to wilful suppression of facts. Relevant portion of the judgment is reproduced below:

"...we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."

G.43. The Noticee also places reliance on the judgement in **CCE Vs. Bajaj Auto Limited - 2010 (260) ELT 17 (SC)**, wherein it was held by the Hon'ble Supreme Court that the proviso to Section 11A(1) of the Central Excise Act, 1944 can only be invoked when there is a conscious act of either fraud, collusion, wilful mis-statement, suppression of fact, or contravention of the provisions of the Central Excise Act or any of the rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty.

G.44. The Hon'ble Supreme Court in **Uniworth Textiles Vs. CCE - 2013 (288) ELT 161 (SC)** has held as under :

"12...We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

G.45. It is submitted that the wordings of the proviso to Section 11A of the Central Excise Act, 1944 are in pari-materia with Section 28 of the Customs Act. Therefore, the ratio of the aforesaid judgments will be applicable to the present case as well.

G.46. Based upon the above referred judgments, it can be said that to invoke extended period under Section 28 of the Customs Act, it has to be proved that there was a conscious or intentional act of collusion wilful mis-statement or suppression of fact, on part of the importer. The intention or deliberate attempt, on the part of the importer, to evade duty, has to be proved beyond reasonable doubt to justify invocation of extended period.

G.47. In this regard, it is submitted that there has been no wilful mis-statement or suppression of fact or collusion, on part of the Noticee. It is also noteworthy that the Noticee has always acted on bona fide belief and have never been pulled up for any

such mistake in classification of the impugned goods in the past. In fact, the Noticee has been importing the impugned goods since 1995, without there being any dispute.

G.48. Furthermore, there is no link established by the customs department rather no positive evidence adduced by the customs department which shows that the Noticee has actually communicated with a supplier in Pakistan or even communicated to the UAE supplier to secure supply from Pakistan. Rather, the payments made by the Noticee are through secure banking channels.

G.49. Therefore, in absence of any intentional act of collusion, wilful mis-statement or suppression of fact on the part of the Noticee, the duty demand would become time-barred as the SCN has been issued after two years from the relevant date of imports made into India.

The onus to prove suppression of facts has not been discharged in the present case.

G.50. It is further submitted that it is an equally settled law that the burden of proof for establishing the grounds for invocation of extended period of limitation is on the department. The show cause notice has to clearly bring out the reasons for invoking extended period of limitation. In this regard, reliance is placed on the following decisions:

a. **CC Vs. HMM Limited - 1995 (76) ELT 497 (SC);**

b. **Kaur & Singh Vs. CC - 1997 (94) ELT 289 (SC); and**

c. **Nizam Sugar Factory Vs. Commissioner, 2006 (197) ELT 465 (SC).**

Merely because demand is raised basis an investigation by the SIIB does not automatically mean that there was suppression.

G.51. As already submitted, the SCN does not disclose any evidence of any positive act of fraud, suppression, wilful misstatement, with intention to evade payment of duty on the part of the Noticee. It is submitted that mere fact of detection by the Department, does not by itself prove that the Noticee suppressed the facts with intention to evade duty. In this regard, reliance is placed on the judgment of Hon'ble Tribunal in the case of **Sands Hotel Vs. CST - 2009 (16) STR 329** wherein it was inter alia, observed as under:

"Mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that the Appellant was in the know that service tax was payable on such services but still the assessee chose not to pay the tax in order to evade the same."

G.52. On the collective strength of the above arguments, it is submitted that the extended period is not invocable in the present case, and the demand raised is substantially time-barred.

Extended period cannot be invoked as the Customs Department was always aware regarding the classification of the imported goods.

G.53. The present SCN at has alleged that since the imports have taken place post the introduction of self-assessment, it was incumbent on the Noticee to correctly declare all the necessary particulars.

G.54. The Noticee humbly submits that they have been importing the goods in dispute from UAE and other countries since over a decade.

G.55. It is submitted that in the present case, a few of the past consignments of the impugned goods were also examined by the customs department, which were duly

cleared by the customs department after verification. Apart from the consignment cleared under RMS, these very goods were subjected to regular assessment procedure i.e., inspection and verification by the customs department before granting out-of-charge.

G.56. Para 2.7 of Chapter 3 of the CBEC Manual on Procedure for clearance of imported and export good, states that while filing an EDI bill of entry, all the necessary declarations have to be made electronically. The original documents such as signed invoice, packing list, certificate of origin, test report, technical write-up etc. are required to be submitted by the importer at the time of examination. The importer/CHA also needs to sign on the final documents before Customs clearance.

G.57. This situation did not change after introduction of 'self-assessment' in the Customs laws by Finance Act, 2011 on 08.04.2011 by amendment of Section 17 of the Act.

G.58. The self-assessment only requires (as in the case of Central Excise – Self Removal Procedure), that the importer must himself indicate the classification of the imported goods in the Bill of Entry. This does not mean that in every case of self-assessment, the department is entitled to invoke the extended period of limitation as provided in Section 28(4) of the Customs Act, 1962. Hence the department cannot make the self -assessment done by the Noticees as an alibi to invoke the extended period citing mis-declaration or suppression of facts as a reason.

G.59. It is mandatory on the part of the department to prove that the assessment of the imported goods at the time of import was obtained by mis-declaration or suppression of facts etc. – whether it is a self-assessed bill of entry or customs system assessed bill of entry or officer-assessed bill of entry. The Noticee had made all the requisite declarations at the time of assessment. These declarations have been completely ignored and disregarded while issuing the present SCN.

G.60. Recently, the Hon'ble CESTAT, New Delhi Bench in **Midas Fertchem Impex Vs. Principal CC – 2023 (1) TMI 998**, at paragraph 50 has held as under :

> 50. In practice, the importer makes an entry under section 46 and also self-assesses duty under section 17(1) by filing the Bill of Entry. There is no separate mechanism to self-assess duty. The columns pertaining to classification, valuation, rate of duty and exemption notifications which determine the duty liability are part of the Bill of Entry which is also an entry under section 46. Thus, although the Bill of Entry requires the importer to make a true declaration and further to confirm that the contents of the Bill of Entry are true and correct, the columns pertaining to classification, exemption notifications claimed and, in some cases, even the valuation are matters of self-assessment and are not matters of fact. Self-assessment is also a form of assessment but the importer is not an expert in assessment of duty and can make mistakes and it is for this reason, there is a provision for re-assessment of duty by the officer. Simply because the importer claimed a wrong classification or claimed an ineligible exemption notification or in some cases, has not done the valuation fully as per the law, it cannot be said that the importer mis-declared. As far as the description of the goods, quantity, etc. are concerned, the importer is bound to state the truth in the Bill of Entry. Thus, simply claiming a wrong classification or an ineligible exemption notification is not a mis-statement. Assessment, including self-assessment is a matter of considered judgment and remedies are available against them. While self-assessment may be modified by through re-assessment by the proper officer, both self-assessment and the assessment by the proper officer can be assailed in an appeal before the Commissioner

(Appeals) or reviewed through an SCN under section 28. Therefore, any wrong classification or claim of an ineligible notification or wrong self-assessment of duty by an importer will not amount to mis-statement or suppression.

...[Emphasis Supplied]

G.61. Even, in **Challenger Cargo Carriers Vs. Principal CC – 2022 (12) TMI 621** at paragraph 13, the Hon'ble CESTAT New Delhi has held as under :

> **13.** ... Section 17 requires the importer to self-assess duty and empowers the officer to re-assess the duty so self-assessed by the importer. There is no separate mechanism or procedure or form in which the importer can self-assess duty. It is part of the Bill of Entry itself. Assessment of Customs duty involves classification of the goods under the CTH, their valuation as per Section 14 and Customs Valuation Rules and application of the exemption notifications. These fields, when filled in the Bill of Entry filed under section 46 by the importer (or his agent) complete the self-assessment of duty. Evidently, these are not facts but are views. While the importer is required to subscribe to the truth of the contents of the Bill of Entry, it refers to facts and not opinions. There cannot be any absolute true or false views. The importer may self-assess the duty under a particular tariff heading as per its view and understanding, the officer re-assessing the Bill of Entry may take hold a different view. In the subsequent chain of appeals through Commissioner (Appeals), Tribunal and Supreme Court, different views may be taken and at any point of time, the view of the higher judicial/ quasi-judicial authority prevails over the view of the lower authority. There could be some situations, where the reassessment of duty by the officer is necessitated not just because he is of a different view but because the facts disclosed in the Bill of Entry were not correct – such as the quantity or description or the specifications of the imported goods being found on examination or testing to be different from what is declared or the actual transaction value is more than what is declared, etc. However, as far as mere classification, exemption notifications, etc. are concerned, they are just matters of self-assessment by the importer.
>
> **... [Emphasis Supplied]**

G.62. It is submitted that in the present case, the SCN has not proved any conscious or intentional act of collusion, wilful mis-statement or suppression of fact on the part of the Noticee.

G.63. Even if no examination of the goods in question was undertaken by the department at the time of assessment itself for clearance made under RMS, the burden to disturb the classification given in the bills of entry is on the department. Based on the documents available with the department, they could have issued the show cause notice within the normal period of limitation. Thus, the present proceedings are vitiated by a delay at the end of the department.

G.64. The Courts have time and again held in respect of invocation of extended period of limitation under indirect tax laws that something positive other than mere inaction or failure on the part of the Noticee or conscious or deliberate withholding of information when the Noticees knew otherwise, is required before they are saddled with any liability beyond the period of normal period of limitation had to be established. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. Reliance is placed on the following decisions:

a) **Padmini Products Vs. CC – 1989 (43) ELT 195 (SC)**

b) **Gammon India Ltd. Vs. CCE – 2002 (146) ELT 173 (Tri.),**

Affirmed by the Hon'ble Supreme Court in 2002 (146) ELT A313;

c) **Lovely Food Industries Vs. CCE – 2006 (195) ELT 90 (Tri.);**

d) **Vaspar Concepts (P) Ltd. Vs. CCE – 2006 (199) ELT 711 (Tri.).**

G.65. It is a settled legal position that in case of any delay in the issuance of a show cause notice by the department, after having knowledge about the alleged transactions, extended period of limitation cannot be invoked. In support of the above contention the Noticee relies on the case of **Orissa Bridge & Construction Corp. Vs. CCE, Bhubaneshwar -- 2011 (264) ELT 14 (SC)**. Here, the Hon'ble Supreme Court held that the extended period of limitation would not be applicable, under Central Excise Salt Act, when the show cause notice was issued two years after the activities of the assessee were detected.

H. INTEREST CANNOT BE DEMANDED WHEN DUTY ITSELF IS NOT RECOVERABLE.

H.1. In the present case, the SCN proposes recovery of interest under Section 28AA of the Customs Act. As established in the foregoing paras, the demand raised vide the SCN is unsustainable, and therefore, the question of recovery of interest does not arise.

H.2. As per Section 28AA of the Customs Act, interest is demandable only if the assessee is liable to pay the principal amount. It is a cardinal principle of law that when the principal demand is not sustainable, there is no liability to pay ancillary demands. From the submissions made above, it is evident that since the demand of duty is not sustainable, the question of recovering interest does not arise. Therefore, the Noticee is not liable to pay interest under Section 28AA of the Customs Act.

H.3. In this regard, the Noticee places reliance on the case of **Pratibha Processors Vs. UOI – 1996 (88) ELT 12 (SC)** wherein it has been held as follows:

> "14. ... Calculation of interest is always on the principal amount. The "interest" payable under Section 61(1)(2) of the Act is a mere "accessory" of the principal and if the principal is not recoverable/payable, so is the interest on it. This is a basic principle based on common sense and also flowing from the language of Section 61(1)(2) of the Act. The principal amount herein is the amount of duty payable on clearance of goods. When such principal amount is nil because of the exemption, a fortiori, interest payable is also nil. In other words, we are clear in our mind that the interest is necessarily linked to the duty payable. The interest provided under Section 61(2) has no independent or separate existence. When the goods are wholly exempted from the payment of duty on removal from the warehouse, one cannot be saddled with the liability to pay interest on a non-existing duty. Payment of interest under Section 61(2) is solely dependent upon the exigibility or factual liability to pay the principal amount, that is, the duty on the warehoused goods at the time of delivery. At that time, the principal amount (duty) is not payable due to exemption. So, there is no occasion or basis to levy any interest, either."

H.4. A similar finding has also been given in the case of **CC Vs. Jayathi Krishna – 2000 (119) ELT 4 (SC)**.

H.5. It is submitted that the liability of interest is inseparably linked with the demand of duty. Therefore, if the demand itself is not sustainable, the question of demanding interest does not arise. In light of the same, it is submitted that the proposal for recovery of interest is liable to be dropped.

I. THE IMPUGNED GOODS ARE NOT LIABLE TO CONFISCATION UNDER SECTION 111 (M) OF THE CUSTOMS ACT.

I.1. The SCN has proposed confiscation of the impugned goods under Section 111(m) of the Customs Act on the ground that the Noticee has willfully mis-declared the country of origin of the impugned goods to avail the exemption benefit under Sl. No. 137 of Notification No. 50/2017. The Noticee humbly submits that imported goods are not liable for confiscation for the following reasons:

Confiscation under Section 111(m) of the Customs Act is not sustainable as there is no wilful mis-declaration of the part of the Noticee.

I.2. The SCN has invoked Section 111(m) of the Customs Act which provides that when the imported goods do not correspond in value or any other particular with the bill of entry filed under the Customs Act, such goods would be liable for confiscation. For ready reference, Section 111(m) is extracted below:

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

I.3. The said provision provides for confiscation of any goods which do not correspond in respect of value or in any other particular with the entry made under the Act. In terms of the provisions of Section 2(16) of the Customs Act, "entry" in relation to goods means an entry made in a bill of entry.

I.4. It is submitted that there was no mis-declaration either in respect of value, description, classification or in any other material particular with the entry made under the Customs Act. The Noticee did not mention incorrect details of the impugned goods in the Bills of Entry- the SCN fails in demonstrating any facts to the contrary. The Noticee has correctly described the impugned goods and all the other details including the country of origin. It is, therefore, respectfully submitted that the impugned goods are not liable for confiscation under Section 111(m) of the Customs Act. For the sake of brevity and in order to avoid unnecessary repetition, we request that the submissions made with regard to the extended period above shall be considered as part of the submissions relating to confiscation as well.

Mis-declaration has to be deliberate or intentional in order to confiscate the goods.

I.5. It is further submitted, mis-declaration as contemplated by Section 111(m) of Customs Act has to be 'willful', 'deliberate' or 'intentional' act/omission on the part of the assessee, and the same has to be shown beyond a reasonable doubt which is definitely not satisfied in this present case.

I.6. The courts have very clearly and consistently, in a catena of judgements, held that the term 'misdeclaration' in the context of fiscal statute means 'intentional', 'willful' or 'deliberate' act / omission on the part of an assessee to evade the payment of duty.

I.7. The Hon'ble Allahabad High Cort in **Shahnaz Ayurveda's Vs. CCE - 2004 (173) ELT 337 (All.)**, has held that to impute 'misdeclaration' on the petitioner, it has to be shown that the declaration was deliberate or intentional to evade the duty payment. The issue before the Court was whether the petitioners were guilty of misdeclaration of tariff classification of products manufactured by the petitioner, in view of the fact that the petitioners were acting under a bona fide belief as to the tariff classification. The Court held as under:

> "78. Similarly, the wilfulness and intent refer to mental state at the time of doing or omitting to do an act by a person. Thus, it has to be gathered from assessing the overall facts and circumstances of the case as to whether the assessee intended to evade duty. Same remained the position regarding misdeclaration and in case declaration has been made by the assessee to the best of its knowledge considering the facts and circumstances of the case and the quality of the product, the charge of misdeclaration cannot be sustained. The concealment and suppression must be in order to deceit the Revenue keeping it in dark so that its acquiescence and endorses an unlawful act thinking that it is lawful when it approved Customs Act in the full knowledge of the relevant particulars to it in good faith, that cannot be a case of deceit, fraud or concealment or suppression."
> ...(Emphasis Supplied)

I.8. In the present case also, there was no misdeclaration with respect to the country-of-origin certification which correctly states that the impugned goods have originated in UAE. For there to be wilful misdeclaration, the Noticee ought to have had the knowledge of the impugned goods to have originated from anywhere else other than UAE which it did not.

I.9. The Hon'ble Allahabad High Court in the above judgement further held that whenever the customs department alleges misdeclaration on the assessee, the initial burden of proving that the assessee deliberately acted with an intention to defraud lies with the revenue. Unless this burden is discharged, the assessee cannot be held guilty of misdeclaration. It is only after this burden has been discharged by the customs department that the burden of disproving the misdeclaration shifts onto the assessee. The Court further held that the evidence led by the assessee which proves the bona fide of the assessee cannot be brushed aside by the Revenue. The court in this regard held as under:

> "79. The onus to prove fraud, misstatement is on the Revenue and not otherwise. It is only when the Revenue discharges its onus, the burden is shifted to the assessee to prove that he never intended to evade the liability. Evidence led by the assessee cannot be brushed aside by the authority concerned rather it has to be dealt with in accordance with law. Nor it is permissible for the authority to ignore the relevant evidence/factors, taking into consideration irrelevant documents."

I.10. In the present case, the customs department has failed to prove beyond doubt that the Noticee had knowledge of the fact that the impugned goods as has been alleged had originated from Pakistan. The Noticee has always maintained that it was never aware about the alleged first leg of transaction of import of goods from Pakistan to UAE, as alleged by the customs department.

I.11. The above decision of the High court has been affirmed by the Supreme court in the case of **CCE Vs. Shahnaz Ayurvedics - 2004 (174) ELT A34 (SC).**

I.12. As already stated above, the Noticee has given accurate description in Bills of Entry stating that the goods are Zinc Dross. There is no dispute as regards the same. This description prima facie shows that the Noticee had no intention to suppress any information thereof. For this reason, no suppression or mis-declaration can be attributed to the Noticee.

I.13. In light of the above submissions, the Noticee humbly submits that the impugned goods are not liable for confiscation under Section 111(m) of the Customs Act.

Provisions of Section 111 are not invokable where the goods have already been cleared.

I.14. Without prejudice to the above submissions, it is respectfully submitted that Section 111 provides for liability for confiscation of the improperly imported products. It is, therefore, respectfully submitted that only imported products can be confiscated under Section 111. 'Imported products' have been defined under Section 2(25) as:

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

I.15. In the case of **Bussa Overseas & Properties Vs. C.L. Mahar, Assistant Commissioner of Customs – 2004 (163) ELT 304 (Bom.),** the Hon'ble Bombay High Court held that once the goods are cleared for home consumption, they cease to be imported goods as defined in Section 2(25) of the Act and consequently are not liable to confiscation under Section 111 of the Act. This case has been maintained by the Hon'ble Supreme Court of India at **2004 (163) ELT A160 (SC).** The Hon'ble High Court held as under:

"7..... The learned counsel urged that once the goods are cleared for home consumption, then the goods covered by the consignments cease to be imported goods in accordance with the definition of expression 'imported goods' under Section 2 of the Act and consequently such goods are not liable for confiscation. There is considerable merit in the submission of the learned counsel. The goods lose its character of imported goods on being granted clearance for home consumption and thereafter the power to confiscate can be exercised only in cases where the order of clearance is revised and cancelled..."

...(Emphasis Supplied)

I.16. Relying upon the aforesaid judgment, Hon'ble tribunal in the case of **Southern Enterprises Vs. CC - 2005 (186) E.L.T. 324 (Tri. – Bang.),** held that imported goods having already been cleared for home consumption, cannot be confiscated as they cease to be imported goods. Relevant portion of the aforesaid judgment has been reproduced below:

"Furthermore, Revenue cannot confiscate the goods which have already been cleared for home consumption as they ceased to be imported goods as defined in Section 2 of the Customs Act and as held by the Bombay High Court in the case of Bussa Overseas & Properties P. Ltd. (cited supra). The same view has been expressed by the Tribunal in the case of Kishandas & Sons; Sources India Impex P. Ltd. and in the case of Leela Dhar Maheswari v. CCE."

... (Emphasis Supplied)

I.17. In light of the aforesaid judgments, it is submitted that in the present case since the impugned goods in question have been cleared for home consumption, they have lost the character of being imported goods under the Customs Act and therefore, cannot be held liable for confiscation under Section 111 of the Customs Act.

I.18. As elaborated in the submissions above, the Noticee has not violated any provision of the Customs Act;

I.19. Further, in the present case, there is not intentional or deliberate wrong declaration or mis-classification on the part of the noticee to attract mischief of section 111(m) of the customs act. It is therefore respectfully submitted that the confiscation of the goods under section 111(m) of the customs act is not sustainable in law.

J. PENALTY IS NOT IMPOSABLE ON THE NOTICEE UNDER SECTION 112(A), 114A AND 114AA OF THE CUSTOMS ACT.

J.1. The SCN has sought to impose penalty on the Noticee under Section 112(a) and / or 114A and 114AA of the Customs Act.

J.2. The SCN has alleged imposition of penalty under Section 112(a) on account of alleged willful mis-declaration of the classification and alleged suppression of fact of actual origin of the impugned goods.

J.3. It is humbly submitted that the Noticee had acted in accordance with law and has not contravened any provision of the Customs Act, 1962, hence, the proposal for imposition of penalty upon the Noticee is not sustainable. Detailed submissions in this regard are being made in the following paragraphs:

Penalty cannot be imposed where duty demand is not sustainable.

J.4. In the foregoing paragraphs, it has been submitted that no duty is payable as the demand is time barred as also there no adequate evidence to establish that the impugned goods have actually originated from Pakistan or has been exported from Pakistan.

J.5. In the case of **CCE Vs. H.M.M. Limited – 1995 (76) ELT 497 (SC),** the Hon'ble Supreme Court held that the question of penalty would arise only if the department is able to sustain the demand. Similarly, in the case of **CCE Vs. Balakrishna Industries – 2006 (201) ELT 325 (SC),** the Hon'ble Supreme Court held that penalty is not imposable when differential duty is not payable.

J.6. For the sake of brevity and to avoid unnecessary repetition, the submissions made with regard to the duty portion may be considered as part and parcel of the submissions relating to the imposition of penalty. In view of the same, once duty demand is not sustainable, no penalty is imposable on the Noticee.

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

J.7. In the present case, the SCN seeks to impose a penalty under Section 112(a) of the Customs Act. For ready reference, the relevant portion of Section 112 of the Customs Act is reproduced below:

> "**SECTION 112 - Penalty for improper importation of goods, etc.** – Any person, -
>
> (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
>
> (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,
>
> shall be liable, -
>
> ...;

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

...(Emphasis Supplied)

J.8. It is submitted that imposition of penalty under Section 112(a) of the Customs Act is incorrect and bad in law on account of the following reasons:

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

J.9. As per the provisions of Section 112(a), penalty is imposable on any person who does or omits or abets any act / omission which would render the goods liable for confiscation under Section 111 of the Customs Act. Thus, the penalty under this sub-section is contingent to the liability of the goods to confiscation.

J.10. In this regard, the Noticee relies upon the submissions made in Ground G above to state that since the impugned goods are itself not liable to confiscation under Section 111 of the Customs Act, the question of imposing penalty under Section 112(a) does not arise. Further, the Noticee has neither done nor omitted to do any act which would render the impugned goods liable to confiscation. For these reasons, the proposal for penalty under Section 112(a) is not legally sustainable.

J.11. Reliance in this regard is placed on the case of **P & B Pharmaceuticals Vs. CCE – 2003 (153) ELT 14 (SC)** wherein the Hon'ble Supreme Court has held that in the absence of any liability for confiscation, penalty shall not be imposed on the assessee.

No penalty can be imposed under Section 112 of the Customs Act in absence of mens rea.

J.12. In the present case, the Noticee has sufficiently established its bona fide in the grounds above. Thus, it cannot be said that the Noticee had reason to believe that the impugned goods were liable for confiscation. For this reason, it is submitted that no penalty can be imposed under Section 112(a) of the Customs Act.

J.13. In addition to the above, the Noticee also submits that on the basis of the submissions made in the foregoing paras, no penalty, under Section 112 of the Customs Act, can be imposed when there has been no element of mens rea involved.

J.14. Reliance is placed on the following judgments wherein the Hon'ble Supreme Court has held that penalty cannot be imposed unless assessee acts deliberately against the law :

a. **Hindustan Steel Vs. State of Orissa – 1978 (2) ELT (J159);**

b. **Akbar Badruddin Jiwani Vs. CC – 1990 (47) ELT 161.**

J.15. Further reliance is placed on the case of **V. Lakshmipathy Vs. CC – 2003 (153) E.L.T. 640 (Tri. -Bang.)** wherein it has been held that imposition of penalty under section 112(a) presupposes existence of mens rea. Relevant extract of the said judgement is reproduced as follows:

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

committed prior to the importation of the goods, the provisions of Section 112(b) would be applicable in respect of acts committed post-importation. The acts committed have to be in relation to the goods which are liable for confiscation under the provisions of Section 111. In this case, the act of the appellant, in indicating "man-made fabrics" in the licence on the application made in the DGFT's office cannot be considered to be an act to constitute that it was physically connected with the importation or preparation for import of the goods with knowledge on his part and consequently the provisions of Section 112(a) cannot be invoked against the appellant in the facts of this case."

...(Emphasis Supplied)

J.16. In light of the above-mentioned judgments, it is safe to establish that the Noticee was not having any mens rea to evade the customs duty by adopting the wrong classification or claiming an incorrect exemption. Thus, the proposal to impose penalty under Section 112 (a) of the Customs Act on the Noticee is not sustainable.

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

J.17. The SCN has also proposed to impose penalty on the Noticee under Section 114A of the Customs Act. Section 114A of the Customs Act has been reproduced below for ready reference:

"114A. Penalty for short-levy or non-levy of duty in certain cases

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

...

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

...(Emphasis Supplied)

J.18. From perusal of the aforesaid provision, it is clear that penalty under Section 114A of the Customs Act can be imposed in cases when the duty has not be paid or short-paid/part-paid by the reason of collusion or any willful mis-statement or suppression of facts.

J.19. For the sake of brevity and in order to avoid repetition, the Noticee submits that the submissions made with regard to the invocation of extended period above, may be considered as part of the submissions relating to imposition of penalty as well. As mentioned in those submissions, there has been no mala fide on the part of the Noticee. For this reason alone, penalty under Section 114A is not sustainable.

J.20. In this regard, reliance is placed on the case of **CC v. Videomax Electronics, 2011 (264) ELT 0466 (Tri.-Bom.),** it was held that the legal requirements to invoke Section 114A penalty is the same as extended period of limitation under Section 28 of the Customs Act. In essence, if the extended period of limitation under Section 28 is not invokable, penalty under Section 114A of the Customs Act cannot be imposed.

J.21. Similarly, the Hon'ble Supreme Court in **UOI Vs. Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC)** in the context of section 11A and 11AC of the Central Excise Act, 1944 (pari materia with sections 28 and 114A of Customs Act) has held as under:

"**18.** ...It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

...(Emphasis Supplied)

J.22. As has been demonstrated by the Noticee in its submissions above, the extended period of limitation cannot be invoked in the present case in the absence of any willful misstatement or suppression of facts, as has been stated by the Hon'ble Supreme Court time and again. The Noticee craves leave to refer & reiterate such submissions at this juncture and submits that no penalty is imposable under Section 114A of the Customs Act.

Penalty under Section 112(a) and Section 114A cannot be imposed simultaneously.

J.23. In the present case, the SCN proposes imposition of penalty under Section 112(a) and Section 114A of the Customs Act. In this regard, it is submitted that by virtue of the fifth proviso of Section 114A of the Customs Act, penalty under Section 112(a) and Section 114A cannot be invoked simultaneously. The relevant proviso of Section 114A is reproduced below:

"SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been...

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

J.24. The above stated submission is also affirmed by the Hon'ble CESTAT, New Delhi in the case of **C Vs. Shri Ashwini Kumar Alias Amanullah – 2020 (11) TMI 441 – CESTAT New Delhi** wherein the Hon'ble CESTAT held that the Show Cause Notice invoked both Section 114A and Section 112 of the Customs Act and by virtue of the fifth proviso to Section 114A, no penalty can be imposed under Section 112 because penalty imposed under Section 112 and penalty imposed under Section 114A are mutually exclusive and therefore, penalty cannot be imposed simultaneously under both these Sections.

J.25. In view of the above settled position of law and considering the fact that there is complete absence of mens rea in the present case, the SCN is liable to be dropped forthwith.

No penalty can be imposed under Section 114AA of the Customs Act.

J.26. The SCN has also proposed penalty on the Noticee under Section 114AA of the Customs Act. The provision of Section 114AA is reproduced below:

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.

J.27. It is submitted that the SCN fails to take into consideration the intention of the Legislature behind inserting Section 114AA of the Customs Act. It is submitted that the penalty under Section 114AA is imposable only in those situations where export benefits are claimed without exporting the goods and by presenting forged documents. In support of this argument, reliance is placed on the **Twenty Seventh Report of the Standing Committee of Finance** wherein insertion of Section 114AA was discussed at Paragraph 62. For the ease of reference, the relevant part of the report is reproduced below:-

"Clause 24 (Insertion of new section 114AA)

62. Clause 24 of the Bill reads as follows:

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

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

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

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

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

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

under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under:

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

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

...(Emphasis supplied)

J.28. The aforesaid extract from the report of the Standing Committee explains the purpose for which Section 114AA has been inserted in the Customs Act. The purpose is to punish those people who avail export benefits without exporting anything, using forged and fabricated documents. Such cases involve serious criminal intent and it cannot be equated with the cases of alleged duty evasion, based on the classification of the impugned goods, as in the present case.

J.29. Thus, it is submitted that Section 114AA of the Customs Act was inserted to penalize in circumstances where export benefits are availed without exporting any goods. According to the legislature, Section 114 of the Customs Act provided penalty for improper exportation of goods and it was not covering situations where goods were not exported at all. Such serious manipulators could have escaped penal action even when no goods were actually exported. Therefore, it is submitted that penalty under Section 114AA of the Customs Act is imposable only in those circumstances where export benefits are availed without exporting any goods, using forged and fabricated documents, and has no application in the facts of the present case.

J.30. In this regard, the Noticee relies upon the case of **Commissioner of Customs, Sea Chennai Vs. Sri Krishna Sounds and Lightings - 2018 (7) TMI 867-CESTAT Chennai** wherein penalty under Section 114AA was set aside on the ground that the transaction was in relation to imports and not a situation of paper transaction. The relevant portion has been extracted below for reference:

"6. The ld. AR has submitted that the Commissioner (Appeals) has set aside the penalty under section 114AA for the reason that penalty has been imposed by the adjudicating authority under section 112(a) and therefore there is no necessity of further penalty under section 114AA. I find that this submission is incorrect for the reason that in the impugned order in para 7 and 8, the Commissioner (Appeals) has discussed in detail the provision with regard to Section 114AA. It is seen stated that as per the Taxation Laws (Amendment) Bill, 2005, introduced in Lok Sabha on 12.5.2005, the Standing Committee has examined the necessity for introducing a new Section 114AA. The said Section was proposed to be introduced consequent to the detection of several cases of

fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The said Section envisages enhanced penalty of five times of the value of the goods. The Commissioner (Appeals) has analyzed the object and the purpose of this Section and has held that in view of the rationale behind the introduction of Section 114AA of the Customs Act and the fact that penalty has already been imposed under Section 112(a), the appellate authority has found that the penalty under Section 114AA is excessive and requires to be set aside. Thus, the penalty under Section 114AA is not set aside merely for the reason that penalty under Section 112(a) is imposed. After considering the ingredients of Section 114AA and the rationale behind the introduction of Section 114AA, the Commissioner (Appeals) has set aside the penalty under Section 114AA.

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

J.31. A similar finding was also given in the case of **Bosch Chassis Esystems India Limited Vs. Gagandeep Singh - 2015 (11) TMI 549-CESTAT New Delhi.**

J.32. Further, the Noticee also places reliance on the following cases wherein it has been held that no penalty can be imposed under Section 114AA of the Customs Act in absence of any mala fide on the part of the assessee:

i. **Parag Domestic Appliances Vs. CC – 2017 (10) TMI 812-CESTAT Bangalore**

> 20. The next point is imposition of penalty under Section 114AA on both the importers as well as Director of one of the importer. We note that while there is no contest regarding the imposition of penalty under Section 112(a) except for prayer to reduce the same, the imposition of penalty under Section 114AA is strongly contested. We note that the provisions of Section 114AA will apply in cases where 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. As discussed elaborately above, we find that there is no situation of any false document submitted by the importer or by the Director of the importer. As such, we find that the application of provisions of Section 114AA is not fully justified by the impugned order and accordingly, we set aside the penalties imposed under Section 114AA.

ii. **Premax Logistics Vs. CC – 2017 (4) TMI 483-CESTAT Chennai**

> 5.4 Nonetheless, nowhere in the notice or even in the impugned order has there been any attempt made to demolish the depositions of said Shri Nagasundaram or Shri Suresh. Even more interestingly, in the entire impugned order spanning 16 pages in 31 paragraphs, there is just one (para-30), which even refers to the role of the appellant. Even this para which has been relied by Ld. A.R comes to an abrupt conclusion without any discussions or findings, that the appellant has committed acts of omission and commission and actively aided and abetted the main player.

> Having done this, adjudicating authority goes ahead to confirm the proposals made in the notice and inter alia **impose** the penalties appealed against. There is no reasoned analysis as to what was the part played by appellant and how that has resulted in acts of 'omission and commission'. I do not find any basis for imposition of the penalty for the raison d'etre for the high quantum of the penalty imposed has also not been brought out. Viewed in this context, it is but obvious that the adjudicating authority has been unjudicious and peremptory in imposition of the impugned penalty under section 114AA, since, unless it is proved that the person to be penalized, has knowingly or intentionally implicated himself in use of false and incorrect materials, there can be no justification for penalty under that section. This requirement has not been satisfactorily met either in the notice or in the impugned order and hence I do not have any hesitation in setting aside the same.

J.33. In view of the above, it is submitted that since the present case neither involves fraudulent exports nor has there been any mala fide on the part of the Noticee, penalty cannot be imposed on the Noticee under Section 114AA of the Customs Act.

J.34. In this regard it is submitted that the Noticee has not made or signed any documents which is false. Neither has it used such false documents to import the impugned goods. Assuming without admitting, even if any document is found to be incorrect, for Section 114AA to be applicable in that context, it is required that the act of such falsification of documents has to be done knowingly or intentionally by the Noticee. The Noticee in the submissions made above has sufficiently established its bona fide and hence the ingredient of this Section is not met in the Noticee's case. Therefore, Section 114AA cannot apply to the case at hand.

J.35. Further, the wording of section 114AA suggests that penalty under this section is imposable only on individuals and not on the company. Such an inference comes out from the use of the expression 'if a person knowingly or intentionally makes, signs or uses'. Only an individual can make or sign any declaration or statement. A company cannot do such an act on its own. In support of this argument, reliance is placed on the judgment of **ITC Ltd. Vs. CCE – 1998 (104) ELT 151 (Tri.)**. In this case, the Hon'ble Tribunal was dealing with Rule 52A(5)(c) of the Central Excise rules which read as follows:-

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

J.36. In the light of the aforesaid provision, the question before the Hon'ble Tribunal was whether the term "person" included ITC or not. The Hon'ble Tribunal holding that the penalty was not imposable on ITC observed as follows:-

> "Thus we find the Board circular and trade notices do not help Revenue to establish that ITC was required to show the correct PP in G.P.1, delivery invoice

etc. and had shown false PP in the said document. Hence Rule 52A(5)(c) of the Rules could not have been invoked against ITC. Further, penalty under Rule 52A(5)(c) is on any person who enters false particulars in the gate pass. It appears that the sub-rule (5)(c) seeks to rope in individuals who are responsible for gate passes with false particulars and not the manufacturer as such, unless the manufacturer is an individual and has personally entered such false particulars in the gate pass. For these reasons, we hold that the penalties imposed on ITC under Rule 52A(5)(c) of the Rules are unsustainable."

J.37. In the light of the aforesaid decision, it is submitted that penalty under section 114AA is imposable only on individuals who actually makes or signs such forged documents and not on the company. Therefore, it is submitted that under section 114AA penalty cannot be imposed on the Noticee.

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

J.38. Without prejudice to the above decision, it is submitted that in terms of various decisions of the Hon'ble Supreme Court and various other High Courts and Tribunals, penalty cannot be imposed on the assessee in absence of mens rea on part of the assessee.

J.39. The Hon'ble Supreme Court in the landmark case of **Hindustan Steel Ltd. Vs. State of Orissa - 1978 (2) ELT (J159)** has held that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Relevant portions of the judgment are reproduced below:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

...(Emphasis Supplied)

J.40. The Noticee submits that the element of mens rea is absent from the case in point. Therefore, penalty under Section 112, 114A and 114AA of the Customs Act cannot be imposed on the Noticee. It is submitted that the decision of the Hon'ble Supreme Court in **Hindustan Steel Ltd. (supra)**, is apposite. The Hon'ble Court has held that penalty will not ordinarily be imposed unless the assessee either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of his obligations.

J.41. This decision was followed by the Hon'ble Supreme Court under the Customs law in the case of **Akbar Badruddin Jiwani Vs. CC – 1990 (47) ELT 161** wherein the Hon'ble Supreme Court specifically held that penalty is not imposable in the absence of mens rea. Relevant portion has been extracted below for reference:

"58. In the present case, the Tribunal has itself specifically stated that the Appellant has acted on the basis of bona fide belief that the goods were

importable under OGL and that, therefore, the Appellant deserves lenient treatment. It is, therefore, to be considered whether in the light of this specific finding of the Customs, Excise & Gold (Control) Appellate Tribunal, the penalty and fine in lieu of confiscation required to be set aside and quashed. Moreover, the quantum of penalty and fine in lieu of confiscation are extremely harsh, excessive and unreasonable bearing in mind the bona fides of the Appellant, as specifically found by the Appellate Tribunal.

59. We refer in this connection the decision in Merck Spares v. Collector of Central Excise & Customs, New Delhi - 1983 E.L.T. 1261, Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay - 1984(18)ELT E.L.T.533 and Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay - 1987 (29)ELT E.L.T.904 wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in Hindustan Steel Ltd. v. State of Orissa - 1978 (2) E.L.T. (J 159) (S.C.) = 1970 (1) SCR 753 - by this Court that :-

> "The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."
>
> 60. In the instant case, even if it is assumed for arguments sake that the stone slabs imported for home consumption are marble still in view of the finding arrived at by the Appellate Tribunal that the said product was imported on a bona fide belief that it was not marble, the imposition of such a heavy fine is not at all warranted and justifiable."
> ...(Emphasis Supplied)

J.42. Similarly, the Hon'ble Tribunal in the case of **K. K. Arora Vs. CC – 2007 (212) ELT 33 (Tri-Mum.)** has held as under:

> "4. On adjudication of the matter, the benefit of duty free clearance of 1050 kgs. of pivaloyl chloride imported against advance license was denied, customs duty of Rs. 48,716/- along with interest @ 24% under Section 28AB was confirmed, the penalties were imposed on the two Directors namely, Shri Sandeep Aurora and Shri K.K. Arora to the tune of Rs. 50,000/- each of them and a penalty of Rs. 25,000/- each on two firms. The facts reveal that the imports have taken place from different Ports i.e. Chennai and Mumbai on the same advance license. Therefore, proceedings have been initiated separately at both the places. The South Zonal Bench at Bangalore heard the appeals filed by both the Directors, namely, Shri Sundeep Aurora and Shri K.K. Arora aggrieved by the Order-in-Original No. 3133/2004, dated 30-9-2004 and set aside the penalties imposed on them vide its Final Order Nos. 1176-1177/2005 and the same has been reported at 2005 (190) E.L.T. 53 (T-Bang.). It is observed in the aforesaid decision that there were several extenuating circumstances which prevented the Appellant from fulfilling the export obligation. As chemical was likely to lose shelf-life, therefore in view of the same they were left with no alternative but to sell the same in the local market. The orders itself clearly brings out that Appellant had no mens rea in not fulfilling export obligations. The penalty is not imposable on the Appellant consequently set aside the same."

...(Emphasis Supplied)

J.43. In view of the above settled position of law and considering the fact that there is complete absence of mens rea in the present case, it is submitted that no penalty can be imposed and the SCN is liable dropped forthwith.

PRAYER

In view of the above submissions, it is respectfully prayed that the Hon'ble Commissioner of Customs may be pleased to:

a. drop the proceedings initiated vide Show Cause Notice F. No. GEN/ADJ/COMM/37/2024-Adjn. -O/o Pr.Commr-Cus-Mundra dated 17.01.24;

b. grant an opportunity of personal hearing to the Noticee; and

c. pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

10.2. Further, M/s Rubamin also submitted compilation of provisions of relevant act and case laws in the matter, which are relied upon by them in their defence. The same was received in the office of the adjudicating authority on 20.11.2024. The gist of the contents of compilation of provisions and case laws are reproduced below for the sake of brevity -

S. No.	Particulars	Page No
1.	Relevant provisions of the Customs Act, 1962 from the Customs Manual, 63rd Ed., 2020-21 : • Sections 28 • Section 111 • Section 112 • Section 114A • Section 114AA • Section 138B	
2.	Sr. No. 137 of Notification No. 50/2017-Cus., dated 30.6.2017 from Customs Tariff, 71st Ed., 2020-21	
3.	Notification No. 5/2019-Cus., dated 16.2.2019	
SCN alleges that the imported goods are of Pakistan origin, however, it has failed to adduce any sort of evidence in support of this allegation. Even otherwise, origin of goods cannot be determined basis the transportation or movement of goods. In any case, customs department has failed to verify the veracity of the PSIC certificate, and the declaration given by the supplier that the imported goods are of UAE Origin. In fact, the SCN has made allegations basis opinion sought from a private party which is incorrect. All documents provided by the supplier declare COO as UAE.		
4.	Amglo Resources Vs. CC, 2024 (3) TMI 360 - CESTAT AHMEDABAD	
5.	Omega Packwell Vs. Pr. CC 2024 (6) TMI 455	
Without undertaking any further investigation to determine veracity of a statement, merely the statement cannot be relied upon to level allegations against the Noticee.		
6.	I.S. Corporation Vs. CC 2016 (339) ELT A125 (Tri. – Mum.)	
7.	Vikram Cement Vs. CCE 2012 (286) ELT 615 (Tri. - Del)	

Documents which are not authenticated and have conspicuous discrepancies cannot be relied upon as evidence.		
8.	Martwin Electronics Vs. Commr. Of C. Ex. & S.T. 2016 (331) ELT 85 (Tri. - Ahmd.)	
9.	CC Vs. East Punjab Traders 1997 (89) ELT 11 (SC)	
10.	Kemtech International Vs. CC 2013 (292) ELT 336 (Tri. - Del.)	
Photocopies of documents unless authenticated by originals cannot be used as evidence.		
11.	CC Vs. Ganpati Overseas 2023 (386) ELT 802 (SC)	
12.	Truwoods Vs. CC 2005 (186) ELT 135 (Tri. - Del.) Affirmed By Hon'ble Supreme Court in 2016 (331) ELT 15	
13.	Sai Steel Traders Vs. CCE (2023) 4 Centax 252 (Tri.- Chan)	
14.	Shree Nakoda Ispat Vs. CC 2017 (348) ELT 313 (Tri. - Del.)	
Secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved.		
15.	Tukaram Vs. Dighole Vs. Manik Rao Shivaji (2010) 4 SCC 329 (336)	
Genuineness of a document is fundamental question the photostat copies thereof should be accepted after examining the original record.		
16.	Govt. of A.P. Vs. Karrichinna Venkate Reddy AIR 1994 SC 591, 592	
To impute 'misdeclaration' on the Notice, it has to be shown that the declaration made was deliberate or intentional to evade the duty payment.		
17.	Shahnaz Ayurveda's Vs. CC 2004 (173) ELT 337 (All.)	
18.	CCE Vs. Shahnaz Ayurvedics 2004 (174) ELT A34 (SC)	
Innocent purchaser cannot be held accountable for fraud.		
19.	Taparia Overseas Vs. UOI , 2003 (161) ELT 47 (BOM) Maintained in 2017 (349) ELT A93 (SC)	
20.	Sumit Woolen Processors Vs. CC 2014 (312) ELT 401 (Tri.-Mum.)	
Onus of establishing that goods are classifiable under a particular Tariff Entry lay upon the Revenue which has not been discharged.		
21.	Hindustan Ferodo Vs. CCE 1997 (89) ELT 16 (SC)	
Section 114AA was introduced to penalise fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. Therefore, invocation of Section 114AA in the present case is completely unwarranted.		
22.	CC Vs. Sri Krishna Sounds and Lightings 2018 (7) TMI 867- CESTAT Chennai	
Penalty cannot be imposed in the absence of mens rea.		
23.	Akbar Badruddin Jiwani Vs. CC 1990 (47) ELT 161	
24.	CCE Vs. H.M.M. Limited 1995 (76) ELT 497 (SC)	

10.3 M/s Rubamin further submitted a gist of submission dated 25.11.2024 alongwith copy of advance authorisation, which is reproduced as under –

GIST OF SUBMISSIONS

1. The present SCN allege that the goods imported vide bill of entry no.9570097 dated 14.11.2020 by the Noticees are of Pakistan Origin as evident from paragraph 2, 4.3 and 8.3 of the SCN. Accordingly, SCN proposes reclassification under Tariff Item 9806 00 00 as against Tariff Item 2620 19 10. and consequently, basic customs Duty @200% is proposed to be demanded. Total duty demand proposed is Rs.1,05,78,217/- along with applicable interest, and further, proposal is to penalty under Section 112(a) and/or Section 114A and 114AA of the Customs Act, 1962.

Submissions:

2. SCN has failed to adduce any sort of evidence to conclude that the imported goods are of Pakistan Origin. The Bill of Lading and report from Pakistan Container Tracking website as referred in the SCN do not conclude origin as 'Pakistan'. It only inconclusively / remotely allege that the goods may have been transported from Karachi, Pakistan to UAE and then to India. It is settled law that origin of goods cannot be determined based on the transportation or movement of goods. Hence, on this ground itself, the present SCN is liable to be dropped. In similar set of facts, the Hon'ble CESTAT, Ahmedabad has allowed the assessee. Refer to the decisions at Sr. Nos. 4-5 of the Compilation.

3. It is submitted that lower authorities are duty bound by the decision/judgment of higher forums (including Tribunal and Supreme Court). Therefore, in light of judicial discipline the above decisions are binding on the lower authority. Refer to the judgment of the Hon'ble Supreme Court in Union of India Vs. Kamlakshi Finance Corporation - 1991 (55) ELT 433 (SC) [Annexure-1].

4. Even otherwise, the Bill of lading and Pakistan Container Tracking Report are photocopy, don't bear any seal of the respective officials and are not even attested by government officials of respective countries, hence, they cannot be relied upon. It is settled law that documents which are not authenticated and have conspicuous discrepancies cannot be relied upon as evidence; and photocopies of documents unless authenticated by originals cannot be used as evidence. Refer to the decisions at Sr. No. 8-10 and 11-16 of the Compilation.

5.In any case, the customs department has failed to verify the veracity of the PSIC certificate, and the declaration given by the supplier that the imported goods are of UAE Origin. No investigation has been done on the said aspect despite specially pointed out by the Noticees during the investigation. In fact, the SCN has made allegations basis opinion sought from a private party which is incorrect. All documents provided by the supplier declare COO as UAE. It is settled law that Without undertaking any further investigation to determine veracity of a statement, merely the statement cannot be relied upon to level allegations against the Noticee. Refer to the decisions at Sr. Nos 6-7 of the Compilation. Copy of the PSIC Certificate is enclosed as Annexure-2.

6. In any case, the imported goods, 1.e., Zinc Dross are eligible to concessional duty benefit in terms of Sl. No. 137 of Notification No. 50/2017-Cus., dated 30.06.17, irrespective of the origin of the goods.

7. The Noticees further submit that they import the very same goods under Advance Authorization as well. Under Advance Authorization, import of specified items is allowed duty free, irrespective of its origin. Therefore, the purported import of Pakistan origin (Bill of Entry 9570097 dated 14.11.20) in question can be swapped with other imports of zinc dross covered / debited against the said

Advance Authorizations and there will be no differential duty at all. Accordingly, the Noticee submits that Bill of Entry 9570097 dated 14.11.20 may be considered against Advance Authorization No. 3410046446 dated 05.10.20 issued for import of Zinc Dross.

8. The Noticees submit that they are innocent purchaser who were not aware of the alleged mis-declaration. All declarations were made based on the supplier documents. Further, no statement of any person even remotely suggests information about the alleged mis-declaration from the supplier's end to the Noticees. In light of the same, no penalty is imposable on the Noticees. Refer to the decisions at Sr. Nos. 23-24 of the Compilation.

9. In any case, Section 114AA was introduced to penalize fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. Therefore, invocation of Section 114AA in the present case is completely unwarranted. Refer to decision at Sr. No. 22 of the Compilation.

10. All submissions in the reply are reiterated.

11. M/s MSA Shipping, delivery agent of M/s. Clear Freight International, Mundra, vide letter dated 27.12.2024 filed their response to Show Cause Notice. The same is reproduced as under :

We refer to the Show Cause Notice F.NO/GEN/ADJ/COMM/37/2024 dated 17.01.2024 and the letter scheduling a personal hearing in relation to the said matter.

Upon review of the records, we confirm that the details submitted by MSA Shipping Pvt. Ltd. in relation to the shipment do not involve our company in the declaration of the port of loading or any associated details. The Import General Manifest (IGM) was filed in accordance with the Port of Loading (POL) Bill of Lading (BL) No: EXPMUNCWL0001 from Jebel Ali, based on the information provided by our principal office, DXB SK Shipping LLC/Clear Freight International. The manifest was duly processed in accordance with the details provided by the loading port

As the agent at Mundra, our responsibilities are limited to filing the IGM based on the details received from our Dubai office. We do not have any direct involvement in the cargo's loading, the declaration of the port of origin, or the control of the shipment. Furthermore, we do not possess, nor are we in a position to possess of port of origin, the Bill of Lading (BL) No: EXPMUNCWL0001.

We respectfully submit that, as agents, we do not have knowledge of or any liability for any penalty implications, if any, in this matter. We have no control over the cargo, its loading, or its originating port. Moreover, we do not have any information regarding the first port of loading or the port of origin of the consignment.

In our capacity as an agent, we respectfully submit that we are not liable for any penalties arising from this matter, as we do not control the cargo or the details related to its loading or port of origin. We are only responsible for submitting the manifest based on the information provided by our principal office.

11.1 Further, M/s MSA shipping vide email dated 03.01.2025, forwarded a letter, wherein, they requested as under –

'In continuation of our letter dated 27-12-2024, which provided a response to the Show Cause Notice, we hereby submit that the letter sent on the aforementioned date should be considered as our formal response to the notice. We kindly request that no further personal hearing be scheduled in relation to this

case.'

12. M/s M/s Tubby Impex Pvt. Ltd. C-54, 3rd Floor, South Extension Part-2, New Delhi-110048 (the Pre-shipment Inspection Agency), vide letter dated 10.02.2024, have filed their reply to Show Cause Notice. The same is reproduced as under:

12.1 1. That we are a notified PSIA vide Public Notice No: 48/2015- 2020- Dated. 05.01.2023.

2. That the present show cause notice has been issued to us in relation to container imported by M/s Rubamin Private Limited vide bill of entry No. 9570097 dated 14.11.2020 alleged to be originated/imported from Pakistan but Mis-declared (country of origin and port of shipment) from UAE into the territory of India.

3. That qua the above mentioned allegation that we were hand in glove with the importer while issuing the Pre Shipment Inspection Certificate of the container in question is false, vexatious as mentioned in the show cause notice itself while recording the statement of one manager of importer on 17.03.2022 wherein it was specifically denied that they have not appointed us for the inspection of container in question.

The relevant extract of statement is produced herein-

(i) That they had imported 24.020 MTS Zinc Dross from UAE base company M/s Jamaluddin Trading LLC vide invoice No. 072/786/11/20 dated 09.11.2020.

(ii) That they have not appointed M/s Tubby Impex Pvt. Ltd. for any inspection and also not made any payment for inspection of the goods imported vide BE No. 9570097 dated 11.11.2020.

(ii) That the origin of the impugned goods under the said BE is UAE.

(iv) That he does not have any information whether the said goods are of Pakistan Origin or otherwise and General Manager of the Company can comment about the Country of Origin of the said imported goods.

(v) That the Pre-Shipment Inspection Certificate issued by M/s Tubby Impex Pvt. Ltd. was sent to them by their supplier M/s Jamaluddin Trading LLC and accordingly they had e-sanchit the said document in the said BE.

(vi) That he has no idea about the container tracking system on the website https://pict.com.pk/en.

4. That we haven't issued any PSIC in respect of the aforesaid containers nor we were contacted by importer namely Rubamin Pvt. Ltd. and exporter namely Jamaluddin Trading LLC.

5. That in so far as allegations mentioned in Para 3.7 of the present show cause notice wherein summon dated 08.02.2022 was issued to us at C-54, 3rd Floor, South Extension Part-II, New Delhi for production of documents pertaining to Pre-Shipment Inspections Certificate (Certificate No. TUBY/2020/1500118/TM) to tender statement and we failed to comply with the same is unjust and untrue because of the fact that we have changed our office address from the aforesaid address to M-21, Ground Floor, Saket, New Delhi-110017 since year 2021 itself and the same can also be verified from the public notice mentioned on the website of Director General of Foreign Trade.

6. That further allegations mentioned in Para 4.6 of the notice is again falsified

from the facts mentioned above and it is again reiterated that we haven't issued any PSIC in respect of the aforesaid containers nor we were contacted by importer namely Rubamin Pvt. Ltd. and exporter namely Jamaluddin Trading LLC and neither we received any summon dated 08.02.2022 due to the reasons mentioned above

7. That also after going through the detailed scrutinisation of the present show cause notice ..... and the same has also been confirmed on behalf of M/s Rubamin Pvt. Ltd. that we haven't issued any PSIC to them.

That it appears from the circumstances mentioned above that M/s Jamaluddin Trading LLC had forged the documents in question in order to obtain undue benefits by Mis- declaring the origin and port of shipment in order to evade stamp duty and we have no role in the same.

That further we would like to inform you the addressee that somewhere in the ending year of 2020 and starting of 2021 we had come to know about the bogus/fake PSICs being issued in our Company's name by one namely M/s Global Marine Inspections for which detailed complaint dated 07.02.2021 was filed against them for the offences under section 419/420/465/467/468/47/472/473/474/ 475/476/488/120B IPC vide DD No. 10 A, ICMS No. 81760042100298/2021 and simultaneously we had also informed DGFT about the same vide email dated 25.03.2021.

Copy of police complaint dated 07.02.2021 and email sent to DGFT on 25.03.2021 are attached herewith as Annexure-A Colly.

Thus In the light of the facts mentioned above no cause of action arise against us as no- 'Mis-declaration of the description of consignment' has deemed to have been made by our PSIA as we have not issued any PSIC/Inspected the containers in question as mentioned above.

Hence, we have not violated any provision under section 114(a) of the Customs Act 1962.

Prayer

1. It is prayed that no action be taken under section 114(a) of the Customs Act 1962, taking into consideration the facts stated above, and

2. That present Show Cause Notice may kindly be withdrawn at the earliest.

PERSONAL HEARINGS

13. Opportunity of personal hearing in the case was given to the Noticees on 25.11.2024, and 09.12.2024 under the provisions laid down in Customs Act, 1962 and following the principles of natural justice.

13.1. 1st PH on 25.11.2024:

Mr. Akhilesh Kangsia, Advocate & Ms. Apoorva Parihar, Advocate and authorized representative of Noticee no. 1- M/s Rubamin Pvt. Ltd., appeared before adjudicating authority for scheduled Personal hearing on 25.11.2024 at 12.00 PM, through virtual mode. During the hearing, they relied upon and reiterated their reply to SCN received in this office on 28.05.24. They mainly emphasized following points-

- that the SCN has failed to adduce any sort of evidence to conclude that the imported goods are of Pakistan Origin. The Bill of Lading and report from Pakistan Container Tracking website as referred in the SCN do not conclude

origin as 'Pakistan'. It only inconclusively / remotely allege that the goods may have been transported from Karachi, Pakistan to UAE and then to India. It is settled law that origin of goods cannot be determined based on the transportation or movement of goods. Hence, on this ground itself, the present SCN is liable to be dropped;

- that even otherwise, the Bill of lading and Pakistan Container Tracking Report are photocopy; don't bear any seal of the respective officials and are not even attested by government officials of respective countries, hence, they cannot be relied upon as per case laws supplied;
- that the customs department has failed to verify the veracity of the PSIC certificate, and the declaration given by the supplier that the imported goods are of UAE Origin. No investigation has been done on the said aspect despite specially pointed out by the Noticees during the investigation. In fact, the SCN has made allegations basis opinion sought from a private party which is incorrect. All documents provided by the supplier declare COO as UAE. It is settled law that Without undertaking any further investigation to determine veracity of a statement, merely the statement cannot be relied upon to level allegations against the Noticee. She referred to the PSIC Certificate attached with their defense reply;
- that in any case, the imported goods, i.e., Zinc Dross are eligible to concessional duty benefit in terms of Sl. No. 137 of Notification No. 50/2017-Cus., dated 30.06.17, irrespective of the origin of the goods;
- that they import the very same goods under Advance Authorization as well. Under Advance Authorization, import of specified items is allowed duty free, irrespective of its origin. Therefore, the purported import of Pakistan origin (Bill of Entry 9570097 dated 14.11.20) in question can be swapped with other imports of zinc dross covered / debited against the said Advance Authorizations and there will be no differential duty at all. Accordingly, the Noticee submits that Bill of Entry 9570097 dated 14.11.20 may be considered against Advance Authorization No. 3410046446 dated 05.10.20 issued for import of Zinc Dross;
- that they are innocent purchaser who were not aware of the alleged mis-declaration. All declarations were made based on the supplier documents. Further, no statement of any person even remotely suggests information about the alleged mis-declaration from the supplier's end to the Noticees. In light of the same, no penalty is imposable on the Noticees;
- that Section 114AA was introduced to penalize fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. Therefore, invocation of Section 114AA in the present case is completely unwarranted.

They also referred to the compilation of various decisions, received in this office on 20.11.2024 and gist of submissions received in this office on 25.11.24, in support of above points.

13.1.1 Nobody appeared on behalf of **M/s MSA Shipping** and **M/s Tubby Impex Pvt. Ltd.** on the PH date on 25.11.2024, now any adjournment sought by them.

13.2. 2nd PH on 09.12.2024

In the interests of justice another Personal Hearing letter was issued to M/s MSA Shipping and M/s Tubby Impex Pvt. Ltd. to appear through virtual mode on personal hearing date of 09.12.2024. However, nobody appeared on behalf of M/s Tubby Impex Pvt. Ltd., nor any adjournment sought.

Further, nobody appeared on behalf of M/s MSA Shipping also, nor sought any adjournment. However, a letter dated 03.01.2025 was received from M/s MSA shipping on 03.01.2025, wherein they requested that 'the letter sent (as reply to SCN) should be considered as our formal response to the notice. We kindly request that no further personal hearing be scheduled in relation to this case.'

As defence replies were already received from all Noticees, and no further adjournment was sought by any, thus no further personal hearings were given.

DISCUSSION AND FINDINGS

14 After having carefully gone through the Show Cause Notice, relied upon documents, submissions made by the Noticees and the records available before me, I now proceed to decide the case. The main issues involved in the case which are required to be decided in the present adjudication are as below:

(i) 24020 Kgs of "Zinc Dross" imported in Container No. FCBU8502289 covered under Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020 pertaining to BE No. 9570097 dated 14.11.2020 valued at **Rs.38,10,597/- *(Rupees Thirty Eight Lakhs Ten Thousand Five Hundred and Ninety Seven Only)*** is liable for confiscation under Section 111 (m) of the Customs Act, 1962;

(ii) Whether classification of 24020 Kgs of "Zinc Dross" declared by importer under Chapter Tariff Heading No. 26201910, is liable to be rejected and the same to be re-classified under Chapter Tariff Heading No. 98060000 of the Customs Tariff Act, 1975;

(iii) Whether the said Customs duty of **Rs.1,05,78,217/-** (BCD@200%; SWS@10% & IGST@18%) ***(Rupees One Crore Five Lakh Seventy Eight Thousand Two Hundred and Seventeen only)***, is liable to be demanded and recovered from them under the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962;

(iv) Whether the said Customs Duty amounting to **Rs. 9,33,215/-** (***Rupees Nine Lakhs Thirty Three Thousand Two Hundred and Fifteen only)*** paid by the Importer at the time of clearance of goods, is liable to be appropriated against the duty mentioned in para (iii) above;

(v) Whether the said Importer is liable to penalty under the provisions of Section112 and/or 114A, 114AA of the Customs Act, 1962;

(vi) Whether **M/s. MSA Shipping Pvt. Ltd.**, Office No.10, 11 & 12, 2nd Floor, Kesar Arcade, Plot No. 51, Sector-8, Gandhidham- 370201, is liable to penalty under the provisions of Section 117 of the Customs Act, 1962; and

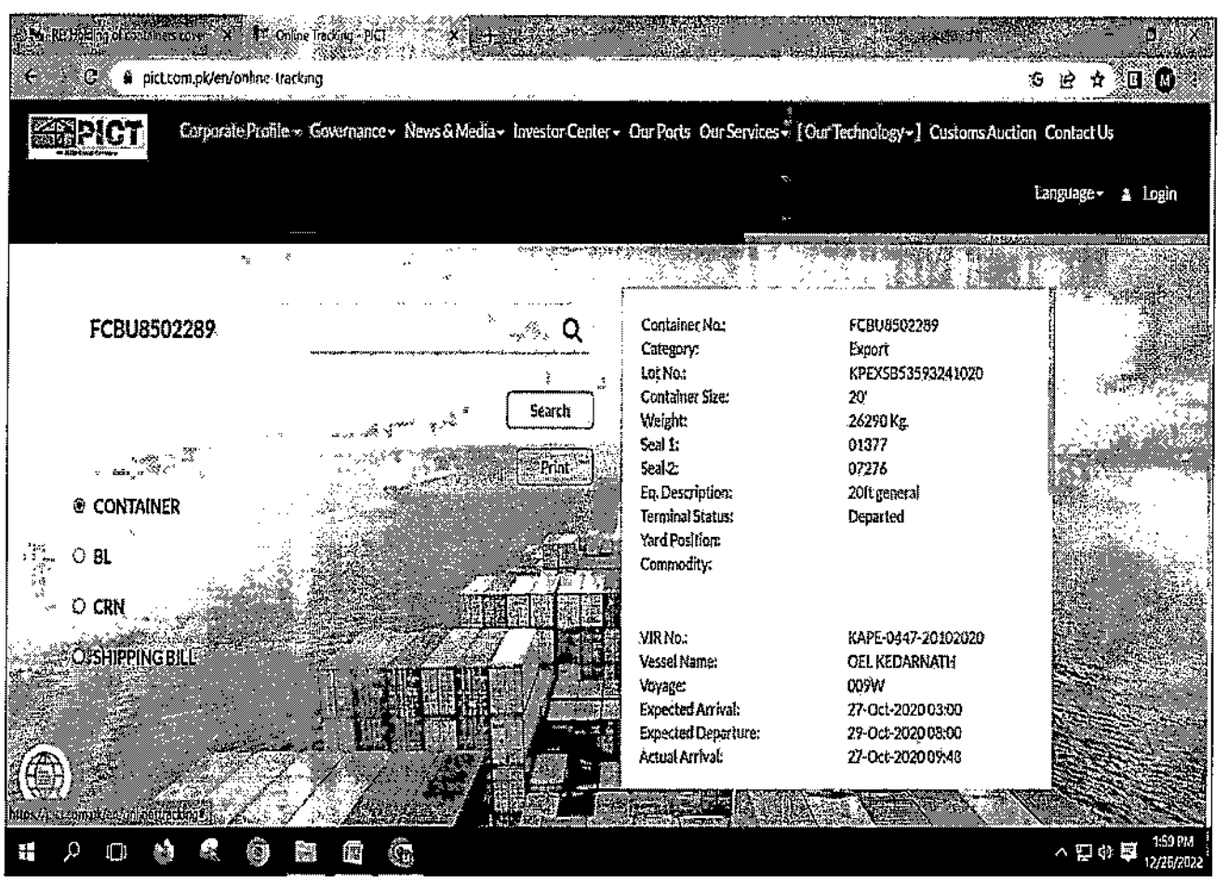
(vii) Whether **M/s Tubby Impex Pvt. Ltd.** C-54, 3rd Floor, South Extension Part-2, New Delhi-110048 (the Pre-shipment Inspection Agency) is liable to penalty

under the provisions of Section 114AA of the Customs Act, 1962.

15. After having framed the main issues to be decided, now I proceed to deal with each of the issues herein below. The foremost issue before me to decide in this case is as to whether the goods imported by M/s. Rubamin Pvt. Ltd. are mis-classified under customs Tariff Item 26201910 and the same is to be re-classified under Customs Tariff Item 98060000.

15.1. I find that in the present case the dispute of classification has arisen solely on the basis of origin of goods. The Government of India vide Notification No. 05/2019-Customs dated 16.02.2019 has inserted a specific entry "9806 00 00" in Customs Tariff Act, 1975 which stipulates that the all goods originating in or exported from the Islamic Republic of Pakistan shall be classifiable under Custom Tariff Item "9806 00 00" in Chapter 98 of Section XXI, in the First Schedule to the Customs Tariff Act,1975. The show cause notice alleges that the goods originated in Pakistan, therefore, it is correctly classifiable under Customs Tariff Item-98060000.

15.2. I find that information was received from NCTC dated 18.01.2022 stating that the container tracking on PICT (Pakistan International Container Terminal Limited) divulged that the container had originated from Pakistan; that though the declared Country of Origin and Port of Shipment is UAE, the goods imported into India originated from Pakistan and hence the Country of Origin declared by the Importer seems incorrect; that the screen-shot of tracking of container at PICT website was also forwarded, which is reproduced below for reference : -



15.3 I find that the Branch In-charge of M/s MSA Shipping Pvt. Ltd., in his statement dated 25.02.2022 stated as under –

- that the container no. FCBU8502289 was loaded from Port of Karachi to Jebel Ali in the Vessel OEL KEDARNATH vide Bill of Lading No. EXP-0002-

CWL dated 29.10.2020 and thereafter the said container was transshipped from Jebel Ali to Mundra in Vessel BSL LIMASSOL vide Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020;

- that he is producing copies of both Bill of Lading No.EXP-0002-CWL dated 29.10.2020 and Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020;
- that the container was not opened at Jebel Ali for any purpose and it was transshipped from Jebel Ali to Mundra as it was received from Karachi to Jebel Ali..

15.3.1 The details of the Bill of Lading No. EXP-0002-CWL dated 29.10.2020 and Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020, provided by the delivery agent i.e. M/s. MSA Shipping Pvt. Ltd., Gandhidham are as under:

Details mentioned in Bill of Lading	Bill of Lading No. EXP-0002-CWL dated 29.10.2020	Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020
Vessel/Voyage	OEL KEDARNATH	BSL LIMASSOL
Port of Loading	*Karachi, Pakistan*	*Jebel Ali, UAE*
Port of Discharge	*Jebel Ali, UAE*	*Mundra, India*
Name and Address of Shipper	M/s. International Industries Ltd. 101 Beaumont Plaza, 10-Beaumont Road, PO Box 4775, Karachi 75530, Pakistan.	M/s. Jamaluddin Trading LLC. PO Box 347, Ajman, UAE.
Name and Address of Consignee	M/s. Jamaluddin Trading LLC. PO Box 347, Ajman, UAE	M/s. Rubamin Private Limited. R.S.No. 115, Village-Pratappura, Halol, Dist PMS Halol, Panchmahals. Gujarat-389350.
Container No(s).	FCBU8502289	FCBU8502289
Seal No(s).	01377	01377
Package	Zinc Dross	Zinc Dross
Weight	24020 Kgs	24020 Kgs

15.3.2 The importer has also filed bill of Entry with Department wherein the same seal number was mentioned and total duty was paid at concessional rate of 5% in terms of benefit availed by them on Zinc Dross vide Notification no. 50/2017-Cus dated 30.06.2017, sr. no. 137, amounting to Rs. 9,33,215/-.

15.4 From the above documentary evidence, I find that the container no. FCBU8502289 was loaded from Pakistan's Karachi Port and seal no. 01377 was affixed on the container. The same container reached Mundra Port via Jebel Ali with the same seal no. intact, which shows that it was not opened at Jebel Ali port, and the goods loaded from Karachi were unloaded directly at Mundra Port. ***Thus, I find that the goods were originated/exported and loaded from Pakistan's Karachi port and reached Mundra Port via Jebel Ali.*** In terms of Notification no. 05/2019-customs dated 16.02.2019, All goods originating in or exported from the Islamic Republic of Pakistan shall be classified under 9806 0000 and duty shall be paid on the same @200%. Further, I find that 2 Bills of Lading were prepared to give an impression that the goods are imported into India from Jebel Ali Port and not from Pakistan. Clearly, the same was done to avoid payment of duty @200%

which is leviable on goods originated/exported from Islamic republic of Pakistan, vide Notification no. 05/2019-customs dated 16.02.2019. In the case **Collector of Customs, Madras and Ors vs D. Bhoormull- 1983 (13)ELT 1546(S.C.)** the Hon'ble Supreme Court has held that Department was not required to prove its case with mathematical precision. The whole circumstances of the case appearing in the case records as well as other documents are to be evaluated and necessary inferences are to be drawn from these facts as otherwise it would be impossible to prove everything in a direct way.

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

I find that in the instant case there remains no scope of ambiguity for a man of prudence.

15.5 Further, the Importer filed Bill of Entry where COO is mentioned as United Arab Emirates, and filed supporting documents such as PSIC, Invoice etc. The supposed PSIC issuing agency, M/s Tubby Impex couldn't appear during the investigation, however, in their reply to SCN they have mentioned that the said PSIC was not issued by them and the manager of the importer firm also in statement dated 17.03.2022, accepted that they have not appointed M/s Tubby Impex Pvt. Ltd. for issuance of PSIC in the matter. ***Thus, it is clear to me that the PSIC submitted by the importer along with the Bill of Entry, as a supporting document was forged.*** The same PSIC was used as a supporting document by the Importer, in clearance of their imported goods which were originated / exported from Pakistan. I find that submitting PSIC as a supporting document is a mandatory condition in import of items, such as "Zinc Dross". As per Srl.No. 3 of the Schedule-VIII of Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016 (Srl. 3 contains the Zinc-containing Drosses under Column (3) heading "Description of other Waste") certain documents are required to be verified by Customs viz. Import Licence from DGFT, PSIC issued by Inspection Agency, chemical analysis report of the waste being imported, an acknowledged copy of the annual return filed with concerned SPCB for import in the last financial year, etc. Thus, I find that the importer has made misdeclaration in their Bill of Entry as to COO and submitted forged documents to effect clearance of their goods.

15.5.1 I find that Section 46(4) of the Customs Act, 1962, stipulates that the importer, while presenting a BE shall make and subscribe to a declaration as to the truth of the contents of such BE. Further, Section 46(4A) stipulates that the importer who presents a BE shall ensure the accuracy and completeness of the information given therein, the authenticity and validity of any document supporting it and compliance with restriction or prohibition, if any, relating to the goods under this act or under any other law for the time being in force. The said BE has been self-assessed by the Importer in terms of Section 17(1) of the Customs Act, 1962, taking the benefit of Notification No. 50/2017 dated 30.06.2017, where BCD is 5% only. Thus, I find that the importer has filed Bill of Entry with incorrect details, viz, wrong COO mentioned, and with false/forged/ fabricated documents, viz. Forged PSIC. Under self-assessment regime, the importer is laden with the

responsibility to ensure that all declarations made by them shall be correct. In terms of Section 46 (4A), the importer shall ensure the accuracy and completeness of the information given and documents submitted, which in the present case the importer has failed to do so. This has resulted into considerable loss to Govt. exchequer., for which the importer is liable to be penalised under Section 114A and Section 114AA of the Customs Act, 1962

15.5.2 I find that the facts of actual country of origin/export, the Bill of Lading EXP-002-CWL dtd. 29.10.2020 (showing container exported from Pakistan with same seal no.), wrong/false PSIC were brought to the notice of the importer during recording of the statements of Managers of the Importer firm, twice on 17.03.2022 and 05.04.2022, however, vide letter dated 19.04.2022, the importer failed to accept their mistake and made following false submissions –

> The import in question is not of Pakistan origin;

> PSIC issued by an agency in UAE which is approved by Govt. of India (without verification of PSIC/PSIA);

> Zinc Dross is completely exempted from payment of basic custom duty in terms of sr. no. 137 of Notification no. 50/2017-Cus. dated 30.06.2017 (duty @5% plus other duties paid by the importer at relevant time).

I find that the above unjustified and false submissions of the importer were made with a to avoid payment of enhanced rate of duty @200% applicable on goods originated / exported from Pakistan in terms of Notification no. 05/2019-Customs dated 16.02.2019. In view of above, I have to construe that the importer knowingly and intentionally made incorrect declaration for the COO in their Bill of Entry filed for clearance of their goods and made mis-declaration of the goods in terms of classification and applicable duties with a willful intention to evade payment of appropriate customs duty leviable on the imported goods at enhanced rate of 200% under Notification no. 05/2019-customs and also submitted false/fabricated documents, viz PSIC, invoice etc, without proper verification to effect clearance of their goods with malafide intention. They also failed to submit the required documents as stipulated under Schedule-VIII of the Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016.

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

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

15.6 Further, I find that the noticee has referred to a number of case laws in his reply to Show Cause Notice. I observe that decisions from Higher Courts cannot straight away be used as precedents for other cases, and must be decided based after comparison of facts. Further, cases with different facts and

circumstances cannot be relied upon. This is because the facts and circumstances of each case are unique, and the principles of natural justice must be applied to the specific context of the case. A single additional or different fact can make a significant difference in the conclusions of two cases. Hence, I find that it is not proper to blindly rely on a decision when disposing of cases. In ***Bharat Petroleum Corporation Ltd. And ... vs N.R. Vairamani And Anr on 1 October, 2004***, the Supreme Court of India observed that "*Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.*" Further, I observe that the following words of Lord Denning in the matter of applying precedents have become locus classicus:

"*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*"

15.7 The noticee has contended that they import the very same goods in dispute i.e., 'Zinc Dross' on payment of duty and under export incentive schemes particularly under Advance Authorization which are value-based schemes. Under Advance Authorization, import of specified items is allowed duty free, irrespective of its origin. The contention of the noticee is clearly an afterthought. To avail the incentive of Advance Authorisations in an import consignment, there are a set of rules, which need to be followed, including mentioning the same during the process of import of goods, which the noticee has failed to do so. The benefit of advance authorisation cannot be provided to them, now when a case of misdeclaration has already been made-out against them.

15.8 I find that the notification no. 05/2019 dated 16.02.2019, points out two conditions to make the goods fall under CTH 9806 0000, which are that the goods should be originated in or exported from the Islamic Republic of Pakistan. Here, I find that the sequence of events have clearly established that the goods were loaded in Container no. FCBU8502289 sealed with Seal No. 01377 in the Port of Karachi, Pakistan. The container tracking details available in public domain, the first and second leg bill of lading duly submitted by Importer's delivery agent - M/s. MSA Shipping Pvt. Ltd., Gandhidham, as well as statement dated 25.02.2022 of Shri Keshavkant Chaturvedi, Branch Incharge of M/s. MSA Shipping Pvt. Ltd. recorded under Section, 108 of the Customs Act, 1962, leave no room for doubt in this matter. The noticee contends that the investigation team failed to establish that the goods were produced in Pakistan, hence they could not have been originated from Pakistan. This is an incorrect argument. To assume that an Indian investigation agency can establish that the subject goods loaded in a container from Pakistan were also produced in Pakistan (with documentary evidence), so that the subject goods can fall within the purview of Notification no. 05/2019-Customs dated 16.02.2019, cannot be the intention of the Notification issuing authority. I observe that if it is established that the subject goods were loaded in a container originating in a port in Pakistan and reached a port in India with its seal intact, it is enough and reasonable to assume that the subject goods were originated in Pakistan and also exported from Pakistan. Hence, I find that both the conditions of the Notification no. 05/2019 are being satisfied in the present case. I hold so.

15.9 I find that the burden of proof in this case has been sufficiently discharged by the Investigation team, when it is established that the goods were Loaded in a container in Pakistan with a seal which was only opened after it reached the Indian Port. It has also been proved that the PSIC submitted by the Importer was fabricated/forged. As soon as the above burden was discharged by Investigation team, the burden of proof fell on the noticee to clarify the situation on their end, which the noticee has clearly failed to do so. On the other hand, these facts, when brought to the notice of the Noticee, the noticee could not give a suitable explanation on the first leg bill of Entry as per Bill of Lading, the Loading of Container from Pakistan, the forged PSIC and misdeclaration made in Bill of Entry. I find the same to be contrary to the provisions of Section 46(4) and (4A) of the Customs Act, 1962.

15.10 Further, from the records available before me I find that none the aforementioned persons have retracted their respective statement. Further, the instant case is related to mis-declaration of COO, resulting in misclassification by **M/s. Rubamin,** they have also submitted fake PSIC without verification, which is based on documentary evidences and corroborated by voluntary statements recorded under Section 108 of the Customs Act, 1962. I find that the statements recorded under Section 108 of the Customs Act, 1962, also make for substantive evidences.

15.10.1 The Hon'ble Apex Court in the case of Naresh Kumar Sukhwani vs Union of India 1996(83) ELT 285(SC) has held that statement made under Section 108 of the Customs Act, 1962 is a material piece of evidence collected by the Customs Officials. That material incriminates the Petitioner inculpating him in the contravention of provisions of the Customs Act. Therefore, the statements under Section 108 of the Customs Act, 1962 can be used as substantive evidence in connecting the applicant with the act of contravention.

15.10.2 In the case Collector of Customs, Madras and Ors vs D. Bhoormull-1983(13)ELT 1546(S.C.) the Hon'ble Supreme Court has held that Department was not required to prove its case with mathematical precision. The whole circumstances of the case appearing in the case records as well as other documents are to be evaluated and necessary inferences are to be drawn from these facts as otherwise it would be impossible to prove everything in a direct way. I further rely on the case of Kanwarjeet Singh & Ors vs Collector of Central Excise, Chandigarh 1990 (47) ELT 695 (Tri) wherein it was held that strict principles of evidence do not apply to a quasi-judicial proceedings and evidence on record in the shape of various statements is enough to punish the guilty.

15.11 I observe that as the noticee did not ask for Cross examination of any person during the personal hearing granted to them, thus, the plea of absence of an opportunity of cross-examination cannot be taken by them now.

15.12 As to the contention of the noticee, that the B/L of the first leg has been obtained from an authentic source or not, I find that the said Bill of Lading was supplied by the representative of the Delivery agent during recording of his statement dated 25.02.2022. There is no reason that a delivery agent who was engaged by the importer in relation to import of their goods, would submit fabricated document. No such motive has been brought forth by the noticee in their defence submission. Further, the Bill of Lading is also corroborated by container tracking details which were available in public domain. I find that the same

container can still be tracked on the website of https://kgtl.com.pk/en/online-tracking, in which on entering the keywords, viz. container no., the following details emerge –

Container No.:	FCBU8502289
Category:	Export
Lot No.:	KPEXSB53593241020
Container Size:	20'
Weight:	26290 Kg.
Seal 1:	1377
Seal 2:	7276
Eq. Description:	20ft general
Terminal Status:	Departed
Yard Position:	-
Commodity:	-
-	-
VIR No.:	KAPE-0447-20102020
Vessel Name:	OEL KEDARNATH
Voyage:	009W
Expected Arrival:	27-10-20 3:00
Expected Departure:	29-10-20 8:00
Actual Arrival:	27-10-20 9:48
Actual Departure:	29-10-20 8:36
Port of Loading:	PKKHI
Port of Discharge:	AEJEA
Destination:	AEJEA

I find that the above details prove beyond doubt the authenticity of the first leg Bill of Lading submitted by the delivery agent as well the fact that the same container with same seal number was loaded from Pakistan's Karachi Port and arrived at India's Mundra Port without being opened once. In these circumstances, issuance of PSIC at UAE is also impossible, as container was not opened at UAE for any verification. I observe that over a period of time, the website addresses may change, and the same information available in public domain in an old website may be shifted to a new and improved website for the sake of convenience or change in circumstances or for some other reason.

REJECTION OF CLASSIFICATION AND RE-CLASSIFICATION OF GOODS

16. In the aforesaid paras, I have held based on available documents and evidences that the impugned goods imported under the Bills of Entry bearing no. BE No. 9570097 dated 14.11.2020 were of Pakistan origin, now I proceed to classify the said goods.

16.1 I find that Government of India vide Notification No. 05/2019-Customs dated 16.02.2019 has inserted tariff item 98060000 in Ch. 98 of the First Schedule to Customs Tariff Act, 1975. The relevant portion of the Notification 05/2019-Customs dated 16.02.2019 is produced hereunder for sake of clarity: -

"In the First Schedule to the Customs Tariff Act, in Section XXI, in Chapter 98, after tariff item 9805 90 00 and the entries relating thereto, the following tariff item and entries shall be inserted, namely: -

1	*2*	*3*	*4*	*5*
"9806 00 00	*All goods originating in or exported from the Islamic Republic of Pakistan*	*-*	*200 %*	*-"*

From the above notification, it is clear that all goods originating in or exported from the Islamic Republic of Pakistan will fall under Customs Tariff item irrespective of their other entries in Customs Tariff Act, 1975.

16.2 I find that the classification adopted by the importer of the impugned goods under Customs Tariff Item 26201910 is not correct and is correctly classifiable under Customs Tariff Item 98060000 of Customs Tariff Act, 1975 in terms of Notification No. 05/2019-Customs dated 16.02.2019 as the goods imported by the them has originated from Islamic Republic of Pakistan. I find further that exemption availed by the importer under Notification No.50/2017 - Cus dated 30.06.2017 (Sr.No. 137) on subject goods is also liable to be denied as the exemption under the said Notification is not available on the goods falling under CTH 98060000 of Customs Tariff Act, 1975 and importer is liable to pay differential duty of Rs.1,05,78,217/- as calculated in Table-A of the Show Cause Notice under Section 28(4) of Customs Act, 1962. I hold so.

Applicability of extended period under section 28(4) of the Customs Act, 1962

17. The present Show Cause Notice has been issued under the provisions of Section 28(4), therefore it is imperative to examine whether the section 28(4) of Customs Act, 1962, has been rightly invoked or not. The relevant legal provisions of Section 28(4) of the Customs Act, 1962 are reproduced below: -

> *"28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—*
>
> *(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—*
>
> *(a) collusion; or*
>
> *(b) any willful mis-statement; or*
>
> *(c) suppression of facts."*
>
> *by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.*

The term "relevant date" For the purpose of Section 28 ibid, has been defined in Explanation 1, as under:

> ***Explanation 1*** *. - For the purposes of this section, "relevant date" means,-*
>
> *(a) in a case where duty is 21[not levied or not paid or short-levied or short-paid], or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;*
>
> *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;*
>
> *(c) in a case where duty or interest has been erroneously refunded, the date of refund;*

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

17.1 The importer has contended that Section 28(4) of Customs Act, 1962 cannot be invoked in the present case as there is no "wilful mis-declaration of Country of Origin". They have contended that the sole ground on which an extended period has been invoked is mis-declaration of the country of origin of the goods, which is not a material particular.

17.1.1 I find that above contention of importer is not sustainable. The importer not only misdeclared the Country of origin but also submitted forged PSIC as a supporting documents, to effect clearance of their goods. They never approached the PSIC agency before submitting Bill of Entry or even during the course of investigation, when the fact of misdeclaration was brought to their knowledge along with doubtful PSIC and the first leg Bill of lading, which shows the origin of the containers containing the goods. Further, the after introduction of self-assessment and consequent upon amendments to Section 17 of the Customs Act, 1962 w.e.f. 08.04.2011, it is the obligatory on the part of the importer to declare the correct country of country of origin of impugned goods and correct classification of the goods imported by them and pay the duty applicable in respect of the said goods. It is unreasonable to expect that an officer assessing the Bill of Entry will presume that the Imported goods would have originated from any other country than declared and will start tracking of the containers on website of Ports of suspected country. The importer, therefore, by not disclosing the true and correct facts to the proper officer at the time of clearance of imported goods, have indulged in mis-declaration and mis-classification by way of suppression of facts and wilfully mis-declared and mis-classified the imported goods with intent to evade the payment of applicable Custom duties. Sub-section(4A) to Section 46 of the Customs Act, 1962, requires him to ensure completeness, correctness and authenticity of the information. Thus, the importer has contravened the provisions of Section 46(4) & 46(4A) of the Customs Act, 1962, in as much as they have mis-classified and mis-declared the goods imported by them, by suppressing the true and actual description of the goods, while filing the declaration seeking clearance at the time of importation of impugned goods. **Section 17 (1) & Section 2 (2) of the Customs Act, 1962 read with CBIC Circular No. 17/2011- Customs dated 08.04.2011,** cast a heightened responsibility and onus on the importer to determine duty, classification etc. by way of self-assessment. The importer, at the time of self assessment, is required to ensure that he declared the correct classification, country of origin, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry. In **EVERSHINE CUSTOMS (C & F) PVT LTD., New Delhi Vs. COMMISSIONER OF CUSTOMS, New Delhi, the CESTAT**, Principal Bench observed as under -

"19. The responsibility therefore, rests entirely on the importer and without such a provision, the Customs law cannot function. Sub-section (1) of section 46 requires the importer to make an entry of the goods imported. Sub-section (4) requires him to make a declaration confirming the truth of the contents of the Bill of Entry."

By the self assessment scheme, a trust is placed in the hands of Trade, for speedy clearance by way of facilitation. Therefore, in light of doctrine "*No man can take advantage of his own wrong*", trade is not liberally allowed to advance their plea, justifying every act or omission as bonafide error in order to escape from the

clutches of penal liabilities. The customs officers are also enjoin to be very cautious and unbiased during self assessment so that there is correct application of law. While construing the word bonafide error, extended meaning should not be given to it in order to include deliberate act or omission of the importer/exporter.

17.2 The facts and evidences placed before me clearly states that the Importer has wilfully indulged in mis-stating and suppressing the fact that the goods were of Pakistan Origin. The importer had mis-declared the Country of Origin of such goods covered under the said Bills of Entry, as UAE. The importer had submitted all the documents viz. Pre-shipment Inspection Certificate, country of origin certificate etc. which were fake and created only with the intention to hide the fact about country of origin and to evade payment of appropriate duty. Their act of suppression of facts was unearthed only after intelligence was received and investigation conducted by SIIB. The importer knowingly and deliberately has suppressed the material facts of Country of Origin from the Department and mis-declared the same in the Bills of Entry with a clear intention to evade the differential Customs Duty. Had the SIIB not initiated investigation into the matter, the importer would have succeeded in his manipulations and the evasion of duty could not have been unearthed. The Importer cannot take a stand that he had no idea of the fraud perpetrated by his supplier and seek relief from the charges made in the notice, in the face of the evidence available in the instant case, including especially submission of false COO and PSIC certificate. If such leniency is extended in financial crimes, no case can be booked against erring Importers. The preponderance of probability in the instant case clearly points to culpability on the part of the Importer.

17.3 In view of above, I hold that there is no flaw in invoking Section 28(4) of Customs Act, 1962, to demand duty in the present case.

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

18. As far as confiscation of goods are concerned, I find that Section 111 of the Customs Act, 1962, defines the Confiscation of improperly imported goods. The relevant legal provisions of Section 111(m) of the Customs Act, 1962 are reproduced below: -

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

18.1 The importer in their submission have contended that the goods were examined by Custom officers at the port of import and permitted for clearance for home consumption only after the same were found tallying with the declarations made in the bill of entry and documents presented by the importer that were received from the overseas supplier. As such, there was no mis-declaration, leave alone willful, at the time of import and clearance. Hence, provisions of Section 111 (m) of Customs Act,1962 for confiscation of goods on the ground of mis-declaration are not applicable.

18.1.1 The above submission of importer is not tenable as section 111(m) of Customs Act, 1962 provides that any goods which do not correspond in respect of

value or in any other particular with the entry made under this Act are liable for confiscation. From the above provisions, it is clear that goods which are imported by way of any type of mis-declaration, will be liable to confiscation. The above provisions are not confined to Quantity of the Goods only. In the present case it has already been held in paras supra that the Importer had mis-declared origin of the goods as UAE and has classified the same the under Customs Tariff Item 74040022 instead of correct classification under 98060000 of the Customs Tariff Act, 1975. Further, the case law of **Shahnaz Ayurveda's Vs. CCE - 2004 (173) ELT 337 (All.) and CCE Vs. Shahnaz Ayurvedics - 2004 (174) ELT A34 (SC)** referred to by the noticee and other Case laws referred thereafter, are not squarely applicable in the present case, due to different facts and circumstances in those cases. Further, as per the ratio laid down in **Evershine Case**, referred above, I find that the importer has failed to impart due diligence, as both the COO and the PSIC certificate submitted by them are found to be fraudulent/forged. As per Section 46(4A) of the Customs Act, 1962, the Importer is duty bound to check the accuracy of the imformation given by them in the Bill of Entry and to ensure the authenticity and validity of any supporting documents, which the importer has failed to do so in the present case. Accordingly, I hold that the impugned goods are liable for confiscation under Section 111(m) of Custom Act, 1962.

18.2 As the impugned goods are found to be liable for confiscation under Section and 111(m) of the Customs Act, 1962, I find that it necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the goods imported under Bill of Entry No. 9570097 dated 14.11.2020. The Section 125 ibid reads as under:-

> *"Section 125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods 1[or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit."*

A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine.

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

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

Further in case of ***VISTEON AUTOMOTIVE SYSTEMS INDIA LIMITED Versus***

CESTAT, CHENNAI, 2018 (9) G.S.T.L. 142 (Mad.) Hon'ble High Court of Madras has passed the landmark judgement contrary to the judgement of tribunal passed earlier. In the said judgement it has been held that:

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

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

Imposition of Penalty on M/s. Rubamin Pvt. Ltd., Panchmahal, under Section114A, 112(a)(ii) and 114AA of the Customs Act, 1962

19. I find that section 114A stipulates that the person, who is liable to pay duty by reason of collusion or any willful mis-statement or suppression of facts as determined under section 28(8) ibid, is also be liable to pay penalty under section 114A.

19.1 In above paras, I have held that the Importer mislead the department at the time of filing of Bills of Entry of imported goods by mentioning wrong Customs Tariff Items thereby evading the Customs duty. They have deliberately misled the Department, by submitting Fake COO, forged PSIC and other documents fraudulently to evade payment of higher rate of duty imposed on Pakistan Origin goods. Had the investigating agency i.e. SIIB Section, Mundra Customs, not initiated investigation against the Importer, the evasion of Customs Duty would not have come to the knowledge of the department. In the present case, the importer have been found liable to pay duty determined under section 28 of the customs act, 1962, therefore, for these acts and omissions, the Importer is liable for penal action under Section 114A of the Customs Act, 1962. I hold so. The ratio laid down in ***M/S. SCANIA COMMERCIAL VEHICLES INDIA P LTD. VERSUS COMMISSIONER OF CUSTOMS (IMPORT) – MUMBAI 2022 (6) TMI 1140 - CESTAT MUMBAI,*** *referred Supra,* also supports this view.

19.2 However, I find that as per 5th proviso of section 114A, penalties under section 112 and 114A are mutually exclusive. When penalty under section 114A is imposed, penalty under section 112 is not imposable. I find that there is a mandatory provision of penalty under section 114A of customs act, 1962 where duty is determined under Section 28 of customs act, 1962. Therefore, I refrain from imposing penalty under section 112(a)/112(b) of Customs act, 1962.

19.3 As regards imposition of penalty under Section 114AA of Customs Act, 1962 on M/s. Rubamin Pvt. Ltd., the Section 114AA envisages penalty on a person who 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. Further, I observe that a company is also a legal person in the eyes of law and the intention of Section 114AA cannot be construed to be applicable only to individuals and not on any wrongdoer company or firm. I observe that M/s. Rubamin Pvt. Ltd. has mis-declared the country of origin to evade the duty by way of producing bogus or fake documents (viz. PSIC, COO Certificate, Invoice etc.) and for their act of omission and commission they have rendered themselves liable for penalty under Section 114AA of the Customs Act, 1962. I hold so.

Imposition of Penalty on delivery agent, M/s. MSA Shipping Pvt. Ltd. under Section 117 under the Customs Act, 1962.

20. Defence submission was submitted by Custom Broker, M/s MSA Shipping Pvt. Ltd. on 27.12.2024. They have contended that The Import General Manifest (IGM) was filed in accordance with the Port of Loading (POL) Bill of Lading (BL) No: EXPMUNCWL0001 from Jebel Ali, based on the information provided by their principal office, DXB SK Shipping LLC/Clear Freight International and they have no knowledge and responsibility for it. I find that M/s MSA Shipping, Gandhidham did not carry out due diligence to find the correct fact that the goods were loaded at Karachi Port and filed Bill of lading provided by the Load Port Shipping line which shows goods loaded at Jebel Ali. As agents of their Principal, they cannot fully wash away the deliberate actions undertaken by their Principal which have played an important role in perpetrating the fraud of sizeable evasion of duty. They remain culpable to a certain extent to face penal action for the omissions and commissions committed by their Principal. I find that M/s MSA Shipping, Gandhidham had not securitized the papers/documents available with them and have failed to exercise the due diligence required from them, hence they are liable to penalty under Section 117 of the Customs Act, 1962. I hold so.

Imposition of Penalty on PSIA (i.e. Pre-shipment Inspection Agent/Agency) M/s. Tubby Impex Pvt. Ltd., New Delhi, under Section 114AA of the Customs Act, 1962.

21. I have carefully examined the proposals for imposition of penalty on PSIA (i.e. Pre-shipment Inspection Agent/Agency) M/s. Tubby Impex Pvt. Ltd., New Delhi under Section 114AA of Customs Act, 1962. M/s. Tubby Impex Pvt. Ltd. in their reply to SCN has contended as under –

> The Show Cause notice makes allegation that we were hand in glove with the importer while issuing the Pre Shipment Inspection Certificate of the container in question is false, vexatious as mentioned in the show cause notice.

> That during recording the statement of one manager of importer on 17.03.2022 wherein it was specifically denied that they have not appointed us for the inspection of container in question.

> That we haven't issued any PSIC in respect of the aforesaid containers nor we were contacted by importer namely Rubamin Pvt. Ltd. and exporter namely

Jamaluddin Trading LLC.

> That somewhere in the ending year of 2020 and starting of 2021 we had come to know about the bogus/fake PSICs being issued in our Company's name by one namely M/s Global Marine Inspections for which detailed complaint dated 07.02.2021 was filed against them for the offences under section 419/420/465/467/468/47/472/473/474/ 475/476/488/120B IPC vide DD No. 10 A, ICMS No. 81760042100298/2021 and simultaneously we had also informed DGFT about the same vide email dated 25.03.2021 (Copy of police complaint dated 07.02.2021 and email sent to DGFT on 25.03.2021 are attached).

I find merit in contention of the PSIA - M/s Tubby Impex, New Delhi. I find that the investigation team failed to provide any documentary evidence that the said PSIC was issued by the PSIA-M/s Tubby Impex in the matter. The importer is also denying having engaged the said PSIA for issuing any such PSIC. Further, a police complaint was also filed by the PSIA-M/s Tubby Impex in the year 2021 itself, it was complained that bogus/fake PSICs were being issued in their Company's name. In these circumstances, no penalty under 114A can be levied on the PSIA-M/s Tubby Impex. I hold so.

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

ORDER

(i) I order to confiscate total quantity of 24020 Kgs of "Zinc Dross" imported in Container No. FCBU8502289 covered under Bill of Lading No. EXPMUNCWL0001 dated 10.11.2020 pertaining to BE No. 9570097 dated 14.11.2020 valued at **Rs.38,10,597/- *(Rupees Thirty Eight Lakhs Ten Thousand Five Hundred and Ninety Seven Only)*** under Section 111 (m) of the Customs Act, 1962; however, I give an option to the importer-M/s Rubamin Pvt. Ltd., Panchnahal, to redeem the said goods on payment of redemption fine amounting to **Rs. 3,00,000/- (Rs. Three Lakhs only)** in lieu of confiscation, for the reasons discussed above;

(ii) I reject the Classification of 24020 Kgs of "Zinc Dross" declared by them under Chapter Tariff Heading No. 26201910 and order to re-classify the same under Chapter Tariff Heading No. 98060000 of the Customs Tariff Act, 1975;

(iii) I order to recover duty amounting to **Rs.1,05,78,217/-** (BCD@200%; SWS@10% & IGST@18%) ***(Rupees One Crore Five Lakh Seventy Eight Thousand Two Hundred and Seventeen only)*** on 24020 Kgs of "Zinc Dross" originated and exported from Pakistan under the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962;

(iv) I order to appropriate Customs Duty amounting to **Rs. 9,33,215/- (*Rupees Nine Lakh Thirty Three Thousand Two Hundred and Fifteen only)***

already paid by the Importer at the time of clearance of goods against the duty confirmed at (iii) above;

(v) I impose a penalty of **Rs.1,05,78,217/-** (BCD@200%; SWS@10% & IGST@18%) ***(Rupees One Crore Five Lakh Seventy Eight Thousand Two Hundred and Seventeen only)*** payable on the Duty demanded and confirmed at (iii) on M/s. Rubamin Pvt. Ltd. under the provisions of Section 114A of the Customs Act, 1962;

(vi) I refrain from imposing penalty on M/s Rubamin Pvt. Ltd. under the provisions of Section 112 of the Customs Act, 1962, for the reasons discussed above;

(vii)I impose a penalty of **Rs. 5,00,000 (Rs. Five Lakh only)** on M/s. Rubamin Pvt. Ltd. under the provisions of Section 114AA of the Customs Act, 1962;

(viii) I impose a penalty of **Rs. 3,00,000/- (Rs. Three Lakhs only)** on **M/s. MSA Shipping Pvt. Ltd.**, Gandhidham, under the provisions of Section 117 of the Customs Act, 1962;

(ix) I refrain from imposing penalty on **M/s Tubby Impex Pvt. Ltd.,** New Delhi, under the provisions of Section 114AA of the Customs Act, 1962, for the reasons discussed above.

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

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

F.NO. GEN/ADJ/COMM/37/2024-Adjn Date:- 15.01.2025

By RPAD/Email/Speed Post

To (Noticees):

1. **M/s. Rubamin Pvt. Ltd.,**
   R. S. No. 115, Village- Pratappura, Halol, Panchmahal,
   Gujarat – 389350.
2. **M/s. MSA Shipping Pvt. Ltd.,**
   Office No.10, 11 & 12, 2nd Floor, Kesar Arcade,
   Plot No. 51, Sector-8, Gandhidham- 370201.
3. **M/s Tubby Impex Pvt. Ltd.**
   C-54, 3rd Floor, South Extension Part-2, New Delhi-110048

Copy for information and further necessary action / information/ record to:

a. The Chief Commissioner of Customs, CCO, Ahmedabad.

b. The Additional Commissioner (SIIB), C.H., Mundra

c. The Deputy/Assistant Commissioner (Recovery/TRC), Customs House, Mundra.

d. The Deputy/Assistant Commissioner (EDI), Customs House, Mundra.

e. Notice Board/Guard File.