



भारत सरकार

वित्त मंत्रालय/ राजस्व विभाग

केंद्रीय अप्रत्यक्ष कर एवं सीमाशुल्क बोर्ड - मुंबई अंचल-1, भारतीय सीमाशुल्क

आयुक्त सीमाशुल्क (आयात-1) का कार्यालय

द्वितीय मंजिल, नवीन सीमाशुल्क भवन, शूरजी वल्लभदास मार्ग, बेलार्ड एस्टेट,
मुंबई-400001.

दूरध्वनि-22757401 फ़ैक्स-22757402

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फा.सं. : Gen/Adj/Comm/269/2022-Adjn

के द्वारा जारी किया गया : विवेक पाण्डेय
आयुक्त सीमाशुल्क (आयात-1)

आदेश दिनांक: 30.04.2023
जारी दिनांक: 02.05.2023

सी.ए.ओ. क्रमांक : 06/2023-24/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)
DIN No. 202305770000000073E8

मूल आदेश

- 1- यह प्रति उस व्यक्ति के प्रयोग के लिए निः शुल्क है, जिसके लिए यह पारित किया है।
- 2- इस आदेश के विरुद्ध क्षेत्रीय पीठ, सीमाशुल्क, उत्पाद एवं सेवाकर अपीलीय अधिकरण, जय सेन्टर, चौथा एवं पांचवा तल, 34 पी. डी. मेलो रोड, पूना स्ट्रीट, मस्जिद बन्दर (पूर्व) मुंबई 400 009 को अपील की जा सकती है।
- 3- सीमाशुल्क (अपील) नियमों 1982 के नियम 6 के आधार पर अपील फॉर्म सी ए-3 में जैसा कि उक्त नियम में संलग्न है के आधार पर की जानी चाहिए। अपील चार प्रतियों में की जानी चाहिए एवं 90 दिनों के अन्दर दायर की जानी चाहिए एवं उसके साथ उस आदेश की चार प्रतियां संलग्न होनी चाहिए जिसके विरुद्ध अपील की गई हो (इन प्रतियों में कम से कम एक प्रति अभिप्रमाणित प्रति होनी चाहिए)। अपील के साथ सीमाशुल्क अधिनियम 1962 की धारा 129A की उपधारा (6) के अन्तर्गत लागू रु.1,000/-, रु.5,000/- अथवा रु.10,000/- का, क्रास किया हुआ बैंक ड्रॉफ्ट अधिकरण की पीठ के सहायक रजिस्ट्रार के नाम जारी किया होना चाहिए। यह बैंक ड्रॉफ्ट ऐसे राष्ट्रीय बैंक का होना चाहिए जिसकी शाखा उस जगह स्थित हो जहां अधिकरण पीठ स्थित है।
- 4- अपील अधिकरण पीठ के सहायक रजिस्ट्रार अथवा इस संबंध में उनके द्वारा अधिकृत किसी भी अधिकारी के कार्यालय में प्रस्तुत की जानी चाहिए अथवा सहायक रजिस्ट्रार या ऐसे अधिकारी के नाम पंजीकृत डाक द्वारा भेजी जानी चाहिए।
- 5- जो व्यक्ति इस आदेश के विरुद्ध अपील करना चाहता है वह इस अपील के लंबित रहने तक दंडराशि या अपेक्षित शुल्क की साढ़े सात प्रतिशत धनराशि को जमा करे और ऐसे भुगतान का साक्ष्य प्रस्तुत करे। ऐसा न करने पर यह अपील सीमाशुल्क अधिनियम, 1962 की धारा 129E के प्रावधानों के अनुपालन न करने के आधार पर निरस्त मानी जाएगी।



GOVERNMENT OF INDIA
MINISTRY OF FINANCE/ DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS, INDIAN CUSTOMS - MUMBAI ZONE-1
OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I)
2nd FLOOR, NEW CUSTOM HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE,
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F.No. Gen/Adj/Comm/269/2022-Adjn

Passed by: VIVEK PANDEY
COMMISSIONER OF CUSTOMS (IMPORT-I)

Date of Order: 30.04.2023
Date of Issue: 02.05.2023

C.A.O. No.: 06/2023-24/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)
DIN No. 202305770000000073E8

ORDER-IN-ORIGINAL

1. This copy is granted free of charge for the use of the person to whom it is issued.
2. An appeal against this order lies to the Regional Bench, Customs, Excise and Service Tax Appellate Tribunal, Jai Centre, 4th & 5th Floor, 34 P. D'Mello Road, Poona Street Masjid Bunder (East), Mumbai 400 009.
3. The appeal is required to be filed as provided in Rule 6 of the Customs (Appeals) Rules, 1982 in form C.A.3 appended to said rules. The appeal should be in quadruplicate and needs to be filed within 90 days and shall be accompanied by Four copies of the order appealed against (at least one of which should be certified copy). A crossed bank draft drawn in favour of the Asstt. Registrar of the Bench of the Tribunal on a branch of any nationalized bank located at a place where the bench is situated for Rs. 1,000/-, Rs. 5,000/- or Rs. 10,000/- as applicable under Sub Section (6) of the Section 129A of the Customs Act, 1962.
4. The appeal shall be presented in person to the Asstt. Registrar of the bench or an Officer authorized in this behalf by him or sent by registered post addressed to the Asstt. Registrar or such Officer.
5. Any person desirous of appealing against this decision or order shall pending the appeal deposit seven and a half per cent of the duty demanded or the penalty levied therein and produce proof of such payment along with the appeal failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 129E of the Customs Act, 1962.

Subject: Adjudication of Show Cause Notice F.No. Gen/Adj/Comm/ 269/2022-Adjn dated 01.07.22 of M/s. Ultratech Cements Limited (IEC No.0304009547) related to evasion of Customs duty amounting to Rs. 91,13,732/- by way of mis-classification of Wheel Loaders imported from Japan under CTH 84295900 and wrongly availing lower rate of Basic Customs Duty under Sr. No. 577 of Notification 69/2011-Cus dated 29.07.2011(as amended).

BRIEF FACTS OF THE CASE

M/s Ultratech Cements Limited¹, situated at A Wing, Ahura Centre, 1st Floor, Mahakali Caves Road, Andheri(East), Mumbai 400093 having IEC No. 0304009547 appears to have contravened the provisions of Section 17 read with Section 46 of the Customs Act, 1962, in as much as, they have evaded the Customs duty of Rs. 91,13,731/- by way of mis-classification of Wheel Loaders² imported from Japan under CTH 84295900 of the First Schedule of the Customs Tariff Act,1975 (which attracts concessional rate of BCD by claiming exemption under Serial No.577 of Notification No.69/2011 dated 29.07.2011 as amended³), whereas the same is liable to be classified under CTH 84295100 which attracts BCD @ 7.5% ad valorem. The differential duty appears recoverable from the importer under Section 28(4) of the Customs Act, 1962⁴, along with applicable interest and penalty.

2. Intelligence gathered by Directorate of Revenue Intelligence, Jaipur Regional Unit indicated that certain importers had mis-declared Wheel Loaders imported from Japan by classifying the same under the Customs Tariff Heading 8429 5900 and cleared at concessional rate of duty by claiming exemption under Serial No.577 of Notification No.69/2011 dated 29.07.2011 as amended. Based on the above intelligence, the data pertaining to such importers were scrutinized and it was found that M/s Ultratech Cements Limited had imported one Wheel Loader of Komatsu brand from Japan and had wrongly availed concessional rate of duty under Serial No.577 of Notification No.69/2011 dated 29.07.2011 as amended, by classifying the same under CTH 8429 5900.

3. Intelligence indicated that the Wheel Loader imported by the importer from Japan under the CTH 8429 5900 are basically self propelled wheeled machines with a front mounted bucket which is used to pick the material, transport and discharge it. Preliminary scrutiny of import documents and user manuals of the imported Wheel Loaders indicated that these Wheel Loaders are used for loading materials into trucks and moving materials in construction, agriculture, or landscaping industries. Accordingly, it appeared that the imported

¹ hereinafter referred to as the 'Importer or Noticee

² Also referred to as the imported goods

³ Also referred to as said Notification or exemption Notification

⁴ Also referred to as the Act

Virek
30.04.23

Wheel Loader was liable to be rightly classified under CTH 8429 5100 i.e. "Front End Shovel Loader", which are capable of doing the exact functions of impugned Wheel Loader, which is evident from the Explanatory notes to the Heading 8429 issued by the World Customs Organization as well. As such the importer has availed the ineligible benefit of Notification No. 69/2011 dated 29.07.2011 as amended, which extend Tariff concessions to imports of specified goods from Japan into India, which do not cover the CTH 8429 5100.

4. Acting on the said intelligence, Directorate of Revenue Intelligence, Regional Unit, Jaipur initiated investigation into the import of Wheel Loader by M/s Ultratech Cements Limited and the importer was summoned vide Summons dated 11.11.2021. Shri Kumar Purushotam, Dy. General manager, Customs & Logistic, M/s. Ultratech Cements Limited vide letter dated 23.11.2021 requested to grant time for submission of requisite documents.

5. Another Summons dated 27.11.2021 was issued to the importer. In response, Shri Kumar Purushotam appeared on 08.12.2021 and his voluntary statement was recorded under Section 108 of the Customs Act, 1962; Shri Kumar Purushotam stated inter-alia that as Dy. General Manager, Customs & Logistic, M/s. Ultratech Cements Limited, he is responsible for Custom and Logistic function of M/s. UltraTech Cements Ltd.

5.1 He further submitted that from 01.04.2017 to till date, M/s. Ultratech Cements Limited have imported a total 04 numbers of Wheel Loaders of different models from Komatsu Ltd., Japan. He vide letter dated 08.12.2021 submitted import documents such as copy of Bill of Entry, Supplier's invoice, Certificate of Origin issued by the Tokyo Chamber of Commerce and Industry-Japan, Bill of lading, Duty payment receipt etc. w.r.t. the import of Wheel Loader of Komatsu Brand from Japan.

5.2 He stated that in all the Bills of Entry filed by M/s. Ultratech Cements Limited, Wheel Loaders imported from Japan are declared under CTH 84295900 which was confirmed by the supplier M/s. Komatsu, Japan and availed the benefit of concessional rate of BCD under Notification 69/2011 (Sl. No. 577) dated 29.07.2011 as amended.

5.3 When specifically asked about what is a Wheel Loader and the basic working of Wheel Loaders, he stated that Wheel Loader can basically be described as wheeled machines with a front mounted bucket which pick up material through motion of the machine and discharge into the body of the other machine. In their case, the main function of loaders is only handling and not transportation. Our Imported Wheel Loader is off-Road and not ply on Road and it is only for their mining activities used in captive mines.

5.4 When he was asked to examine the relevant pages of Chapter 8429 of the Customs Tariff Act, 1975 along with the relevant portions of explanatory notes to Customs Tariff Heading of 8429 by the World Customs Organization and asked whether the Wheel

Loaders imported by M/s. UltraTech Cements Ltd. are capable of the function as described in the explanatory notes to Chapter 8429, he examined the same and stated that he would reply to this question after consultation with his technical team and would present himself with full explanation within 10 days.

5.5 When he was asked if there is any difference between Front End Shovel Loader and Wheel Loaders imported by M/s. UltraTech Cements Ltd., he stated that Wheel Loaders imported by them are used in mines. The main function of these machines is handling and not transport. These are equipped with a front mounted bucket which picks up bulk materials and discharges them into the body of the machine. Regarding the difference between front end Shovel Loader and Wheel Loader, he would reply after consultation with his technical team.

5.6 When he was asked whether M/s. Ultratech Cements Limited has imported the Wheel Loaders other than from Japan, he stated that he would reply after checking the details within 10 days.

5.7 When asked about the decision regarding classification of Wheel Loaders imported by the importer, he inter-alia stated that they first saw the declaration of HSN/CTH made by the supplier and further examined the purpose and use of the machine and best suitable option was selected. The decision regarding selection of CTH 84295900 was taken by the import Department of M/s. Ultratech Cements limited which is headed by him.

5.8 He admitted that CTH is decided by M/s Ultratech Cements Limited and accordingly, Bills of Entry were filed by the CHA.

6. Further Shri Kumar Purushottam vide letter dated 17.12.2021 has submitted that:

(a) M/s. Ultratech Cements Ltd. has imported Komatsu Wheel Loaders from Komatsu Ltd. Japan for off-road mining activities at their captive mines adjacent to their Cement plant.

(b) They had classified the Wheel Loader basis Shipping documents viz. Invoice, Bill of Loading & CEPA Certificate etc. As per manufacturer's Certificate of Origin issued through Chamber of Commerce Japan, the subject goods are classified under HSN 842959. They have checked with Komatsu, they are supplying Wheel Loader worldwide on the same HSN.

(c) They had imported Wheel Loader & what is given in chapter is Shovel Loader and as per Supplier Wheel Loader is different than Shovel Loader.

(d) At the time of import, they have produced & submitted all Shipping documents (Invoice, CEPA COO etc.) at Custom House and accordingly their BOE has been assessed by Customs.

(e) Based on input given by Vendor, their Management is deliberating the issue with consultant & subject matter expert.

(f) Sought some more time to find some old records to draw final conclusion in the matter.

Vide the aforesaid letter, M/s. Ultratech Cements Limited has sought time till 15.01.2022 to take final call in the matter and stand on the same.

7. Vide letter dated 20.01.2022, M/s. Ultratech Cements Limited, submitted that they never had any malafide intention to evade the Customs duty. This was inadvertently classified on the basis of import documents submitted by M/s. Komatsu Ltd. Japan as per all over Industry practice. It was further informed that they had paid the differential Customs duty along with interest till 19.01.2022 amounting to Rupees 1,08,65,180/- (Duty Rs.91,13,732 + interest Rs.17,51,447/-). They have submitted copies of duty payment Challan No. 60,61, 62 & 63, & 140, 141, 142 & 143 all dated 19.01.2022 paid at Office of the Commissioner of Customs, NCH, Mumbai.

8. On scrutiny of import data of M/s. Ultratech Cements Limited, it is found that in the year 2017 & 2018, M/s. Ultratech Cements Limited has imported 03 Nos. of Wheel Loaders of Model Liebherr L 580, Caterpillar 988 K & Caterpillar 972L vide Bills of Entry No. 8179960 dated 13.01.2017, 8858178 dated 11.03.2017 & 6539487 dated 26.05.2018 through Mumbai port from US and China and declared them under the correct CTH 84295100

9. On scrutiny of the Bills of Entry filed by M/s Ultratech Cements Limited, wherein Wheel Loaders were imported from Japan, it was noticed that the CTH declared in the Bills of Entry was 8429 5900 and has availed the benefit of concessional rate of duty under the Notification 69/2011 dated 29.07.2011 as amended. The importer had imported machines of model 'Komatsu Wheel Loader Model No. WA600-6R', 'Komatsu Wheel Loader Model No. WA480-6A' & 'Komatsu Wheel Loader Model No. WA470-6A'. The image of the said Wheel Loader model is given below:

(IMAGE-I)

Komatsu Wheel Loader Model No. WA 480-6A (BE No 9172165 dated 8.12.2018)



(IMAGE-II)

Komatsu Wheel Loader Model No. WA600-6R (BE No 5597028 dated 08.11.2019 & BE No 5210050 dated 27.08.2021)



(IMAGE-III)

Komatsu Wheel Loader Model No. WA 470-6A (BE No 5209329 dated 27.08.2021)



10. As per Wikipedia, a Loader is a heavy equipment machine used in construction to move or load materials such as soil, rock, sand, demolition debris, etc. into or onto another type of machinery (such as a dump truck, conveyor belt, feed-hopper, or railroad car). A Loader is commonly used to move a stockpiled material from ground level and deposit it into an awaiting dump truck or into an open trench excavation. There are many type of Loaders depending on the design and application, like bucket Loader, front Loader, Wheel Loader, Shovel Loader etc.

11. A Wheel Loader is a type of Loader, usually a 4 wheeled, tyre mounted and that has a front-mounted wide bucket or shovel connected to the end of two booms (arms) to scoop up loose material from the ground, such as dirt, sand or gravel, and move it from one place to another without pushing the material across the ground. A wheel Loader or a Shovel Loader uses a controlled arm to put materials into a dump truck, onto a conveyor belt or a feed hopper. Possible materials are: asphalt, demolition debris, dirt, feed, gravel, logs, raw minerals, recycled material, rock, sand, wood chips, etc. It is used for loading materials into trucks and moving material in construction, agriculture, or landscaping industries. In view of the above, the Wheel Loaders can basically be described as wheeled machines with a front mounted bucket which pick up material through motion of the machine, transport and discharge it.

12. The Chapter Heading 8429 of the Customs Tariff Act, 1975 include 'Self-propelled bulldozers, angle dozers, graders, levellers, scrapers, mechanical

shovels, excavators, shovel loaders, tamping machines and road rollers'. The relevant portions of the said Chapter are reproduced below;

8429	Self-propelled bulldozers, angle dozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers
	- Bulldozers and angle dozers
	- Mechanical shovels, excavators and shovel loaders
84295100	- - Front-end shovel loaders
84295200	- - Machinery with a 360degrees Revolving Superstructure
84295900	-- Other

The explanatory notes to the Heading 8429 issued by the World Customs Organization, (Fourth Edition (2011) Volume III) to Harmonised Commodity Description and Coding System read as under;

The heading covers a number of earth digging, excavating or compacting machines which are explicitly cited in the heading and which have in common the fact that they are all self-propelled.

(A) Bulldozers and angle dozers: ----

(B) ----

(H) **Self-propelled shovel loaders: These are wheeled or crawler machines with a front mounted bucket which pick up material through motion of the machine, transport and discharge it.**

Some "shovel-loaders" are able to dig into the soil. This is achieved as the bucket, when in the horizontal position, is capable of being lowered below the level of the wheels or tracks.

(I) ---

The heading also covers self propelled Shovel Loaders having an articulated arm with a bucket mounted on the rear.'

13. It is evident that Customs Tariff Heading 84295100 specifically denotes the 'Front End Shovel Loaders, which is clear from the Explanatory notes of the Chapter as well. The explanatory note clearly defines the basic function / configuration or working of the Shovel Loaders.

14. The Notification 69/2011 dated 29.07.2011 extend tariff concessions to specified goods when imported into India from Japan, "*....exempts goods of the description as specified in column (3) of the Table appended hereto and falling under the Chapter, Heading, Sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding entry in column (2) of the said Table, when imported into India from Japan, from so much of the duty of customs leviable thereon as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the aforesaid Table.....*"

The goods covered under Notification 69/2011 dated 29.07.2011 as amended along with their respective CTH are reproduced below:

TABLE-I

Sl No.	CTH	Description	BCD Rate in percentage (unless otherwise specified) as amended vide below mentioned Notification No.		
			Notification No. 34/2018 dated 27.03.2018	Notification No. 10/2019 dated 28.03.2019	Notification No. 20/2021 dated 30.03.2021
	-	-			
576	842840 to 842940	All goods			

577	84295200 to 84331110	All goods	2.0	1.4	0
	-	-			

15. It is evident from the above that the Notification 69/2011 dated 29.07.2011 as amended does not cover the CTH 84295100 which is the specific CTH of Front End Wheel Loaders/Shovel Loaders. As per Article 17 of the Comprehensive Economic Partnership Agreement between Japan and the Republic of India, the classification of goods in trade between the Parties shall be in conformity with the Harmonised System. As per the Harmonised system equipment imported by them should had been classified under 84295100. The HSN code mentioned in Certificate of Origin issued under IJCEPA was based on the declaration made by the supplier i.e. M/s. Komatsu Ltd. and it was the responsibility of the supplier to enter all the information true and correct. In this case, it was the responsibility of M/s. Komatsu to enter the correct HSN code, which they failed to do so.

16. Reading together of the descriptions given under the headings 8429 along with the explanatory notes indicate that the CTH 84295100 denote Front End Shovel Loaders, that are wheeled or crawler machines with a bucket mounted on the front of it and uses this bucket to pick up materials through the motion of the machines, move from one placed to another and discharges the material in a truck or another machine. It is also pertinent to note that the CTH 8429 5100 is not covered under Notification 69/2011 dated 29.07.2011 as amended and as such concessional rate of duty is not applicable to the Front End Shovel Loaders covered under CTH 8429 5100, when imported from Japan. It can also be summarized from the aforesaid discussion that CTH 8429 5900 covers 'Other' machines in the category 'Mechanical Shovels, excavators and Shovel loaders', that are not specifically mentioned in the Chapter heading 8429.

17. The General Rule of Interpretation of the First Schedule of Import Tariff clearly states that the titles of Sections, Chapters and Subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. According to GRI 1, *if a provision specifically and completely describes a product, then the product would be classified in that provision rather than in general heading.* As such it appears that though the description of CTH 8429 5100 is 'Front End Shovel Loader', the heading covers all the machines with the same application and design like Wheel Loaders. It is

pertinent to mention that Customs Tariff 8429 5900 denote 'other' and that the imported Wheel Loaders cannot be classified under the residual entry of 8429 5900 since Customs Tariff Heading 8429 5100 specifically covers Front-end Shovel Loader and the Wheel Loader is the most generic term used for Front end Shovel Loaders and as the same would be inconsistent with Rule 1 of General Rules of interpretation of the First Schedule of Import Tariff. Application of the General Rules of Interpretation read with the general explanatory note to the import tariff implies that the classification of Wheel Loaders which are "Front End Shovel Loaders shall be 8429 5100.

18. Shri Kumar Purushottam vide his voluntary statement dated 08.12.2021 explained that Wheel Loader can basically be described as wheeled machines with a front mounted bucket which pick up material through motion of the machine and discharge into the body of the other machine. These are equipped with a front mounted bucket which picks up bulk materials and discharges them into the body of the machine. It is also evident from the user manuals of the imported Wheel Loaders that, these machines are equipped with a bucket mounted at its front end, which is used to pick up the material. The bucket is attached with the machine with two hydraulic arms to control the movement of the bucket. It appears from the above that these Wheel Loaders are not capable of any other functions/applications. It can be summed up that the imported Wheel Loaders are capable of doing the exact function as described in the Explanatory notes to Chapter Heading 8429 and hence warrant classification under CTH 8429 5100 as specific classification for the said goods is available in the Tariff. It is also pertinent to note that he also admitted that the CTH is decided by M/s Ultratech Cements Limited based on confirmation given by the bidder and accordingly, Bills of Entry are filed by the CHA. Hence, reading together with the fact that it is evident that the importer was well aware of the specific functions and configurations of the imported Wheel Loaders and the importer resorted to misclassification of the impugned Wheel Loaders under CTH 8429 5900 to avail concessional rate of duty under the Notification 69/2011 dated 29.07.2011 as amended.

19. During the course of investigation, the importer submitted relevant documents viz. Invoice, Bill of Lading, Packing list, Certificate of origin along with the respective Bill of Entry in respect of the Wheel Loaders. On scrutiny of import data of M/s. Ultratech Cements Limited, it is found that in the year 2017 & 2018, M/s. Ultratech Cements Limited has imported 03 Nos. of Wheel Loaders of Model Liebherr L 580, Caterpillar 988 K & Caterpillar 972L vide Bills of Entry No. 8179960 dated 13.01.2017, 8858178 dated 11.03.2017 & 6539487 dated 26.05.2018 through Mumbai port from US and China and declared them under the correct CTH 84295100, as the benefit of concessional rate of duty was not available for imports from US and China. The said Wheel Loaders of brand M/s. Liebherr and M/s. Caterpillar are having the

same specifications and are capable of performing the same functions which are performed by the Wheel Loaders of M/s. Komatsu imported from Japan by the importer. When the importer imported Wheel Loaders from Japan, the importer resorted to misclassification of the impugned Wheel Loaders under CTH 8429 5900 to avail concessional rate of duty under the Notification 69/2011 dated 29.07.2011 as amended. Hence, reading together with the fact that it is evident that the importer was well aware of the correct CTH of the imported Wheel Loaders.

20. Thus, it appears that the declared classification 8429 5900 in respect of imported Wheel Loaders is liable to be rejected and ought to be re-determined as 8429 5100. Consequently, the assessment of concessional rate of Customs duty in respect of the said imports as per serial number 577 of Notification No.69/2011 dated 29.07.2011 as amended is liable to be rejected as it is not applicable to goods falling under the Customs Tariff heading of 8429 5100 and the goods falling under the Customs tariff heading of 8429 5100 attracts basic Customs duty @ 7.5% ad valorem.

21. The differential duty liability on import of Wheel Loader wrongly classified under the CTH 8429 5900 has been quantified and is enclosed as **Annexure-A** to the SCN, in respect of imports through Mumbai Port. The differential duty arising out of the misclassification of CTH by M/s Ultratech Cements Limited amounts to Rs. 91,13,732/- (Rupees Ninety One Lakh Thirteen thousand Seven hundred Thirty Two only).

22. During the course of investigation M/s Ultratech Cements Limited has paid entire differential duty amounting to Rs. 91,13,732/- (Rupees Ninety-One Lakh Thirteen Thousand Seven Hundred Thirty-Two only) and interest Rs.17,51,447/- (Rupees Seventeen Lakh Fifty One thousand Four hundred Forty Seven only) against the import of Wheel Loaders through Mumbai Port vide Challans No. 60, 61, 62, 63, 140, 141, 142 & 143 dated 19.01.2022.

23. Legal provisions

- i). *As per section 46(1) of the Customs Act 1962, the importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting [electronically] [on the customs automated system] to the proper officer a bill of entry for home consumption or warehousing [in such form and manner as may be prescribed]:*
- ii). *As per section 46(4) of the Customs Act 1962, The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce*

to the proper officer the invoice, if any, [and such other documents relating to the imported goods as may be prescribed].

iii). As per section 111(m) of the Customs Act 1962, [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]

iv). As per section 28 of the Customs Act 1962,

(1) Where any [duty has not been levied or not paid or 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,-

(2) -----

(3) -----

(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.

As per section 28AA of the Customs Act, 1962,

1) Notwithstanding anything contained in any judgement, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable

to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

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

v) As per section 112(a) of the Customs Act, 1962, Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, 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, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

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

vi) As per section 114 A of the Customs Act, 1962, 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

vii) As per Section 114AA of the Customs Act, 1962, 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.

viii) The Finance Act, 2011 (Act No.08 of 2011) dated 08.04.2011 has introduced the concept "Self-Assessment" of Customs duty with effect from 08.04.2011. The Central Board of Excise and Customs has issued Circular No.17/ 2011- Customs dated 08.04.2011 regarding implementation of Self assessment in Customs. The relevant portions of the said circular are given below:

"The Finance Bill, 2011 stipulates 'Self-Assessment' of Customs duty in respect of imported and export goods by the importer or exporter, as the case may be. This means that while the responsibility for assessment would be shifted to the importer / exporter, the Customs officers would have the power to verify such assessments and make re-assessment, where warranted

"New Section 17 of the Customs Act, 1962 provides for self-assessment of duty on imported and export goods by the importer or exporter himself by filing a Bill of Entry or Shipping Bill, as the case may be, in the electronic form (new Section 46 or 50). The importer or exporter at the time of self-assessment will ensure that he declares the correct classification, applicable rate of duty, value, and benefit of exemption notifications claimed, if any, in respect of the imported / export goods while presenting Bill of Entry or Shipping Bill "

ix) As per Section 17 of the Customs Act, 1962, 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.

x) The Integrated Goods And Services Tax Act, 2017- Section 5(1): Subject to the provisions of sub section (2), there shall be levied a tax called the integrated goods and services tax on all inter-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the central goods and services tax act and at such rates not exceeding 40% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person...

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of Customs are levied on the said goods under Section 12 of the Customs Act, 1962.

24. M/s Ultratech Cements Limited has subscribed to a declaration as to the truthfulness of the contents of the Bills of Entry in terms of Section 46(4) of the Customs Act, 1962 in respect of their Bills of Entry. As per Section 111(m) of the Customs Act, 1962, any goods which do not correspond in respect of value or in any other particular with the entry made under Customs Act, 1962 are liable for confiscation under the said section. In this case as discussed supra, the importer has resorted to misclassification of the imported Wheel Loaders in a residual entry in the Custom Tariff Schedule rather than in the specific entry in the Schedule in order to avail benefit of paying reduced duty. Post implementation of Self assessment by suitable changes to Sections 17, 18, 46 and 50 of the Customs Act, 1962, the responsibility and onus lay with the importer to make true and correct declarations in respect of all the goods imported by them. The importer is responsible for making true and correct declarations regarding the description and nature of the import goods, its quantity, value, classification, applicable rate of duty, benefits of exemption notification claimed, if any, etc while presenting the Bill of Entry.

25. The investigations revealed that M/s Ultratech Cements Limited deliberately and intentionally misdeclared the imported Wheel Loaders under the CTH 8429 5900 for availing ineligible benefit of notification 69/2011 dated 29.07.2011 as amended which has resulted in huge loss of revenue to the Government. Though the importer had filed the Bills of Entry by self declaring to the correctness of the details mentioned therein, evidences indicated that the importer has deliberately not declared according to the actual nature of the goods. Admittedly, the importer has resorted to clear the goods by declaring the impugned Wheel Loaders in the residual entry rather than in the specific entry denoting the 'Wheel Loaders' and thereby assessed to lower rate of duties.

26. Reading together of the descriptions given under the headings 8429 5100 and 8429 5900 together with the explanatory notes indicate that the impugned Wheel Loaders fall under the category of 'Front End Shovel Loaders' under CTH 8429 5100 rather than in the residual entry of 'other' under CTH 8429 5900. In the impugned case, representative of the importer Shri Kumar Purushottam in his statements recorded under Section 108 of the Customs Act, 1962 have endorsed that the goods imported by them are Wheel Loaders which are capable of doing the exactly the same function as described in the explanatory notes of the Chapter heading 8429 5100. Hence it appears that the declared classification of 8429 5900 of the imported goods i.e the residual entry 'other' is liable to be rejected since the same is contrary to the very nature of the impugned goods and also to the General Rules for the Interpretation of the First Schedule of the Customs Tariff Act,1975 (as amended) and the General Explanatory Notes of the Chapter heading 8429 and should be re-classified under CTH

8429 5100 as it represent the exact nature and matches with the explanatory notes and descriptions given therein. Accordingly the benefit of Notification 69/2011 dated 29.07.2011 as amended availed by the importer for the concessional rate of duties is liable to be rejected and standard rate of Customs duty at 7.5 % ad valorem should be demanded in accordance with the provisions of Section 28(4) along with applicable interest under the provisions of Section 28AA of the Customs Act, 1962 from the importer in respect of the Bills of Entry as detailed in Annexure-A having a total assessable value of Rs.10,43,46,982/-(Rupees Ten Crore Forty Three Lakh Forty Six Thousand Nine Hundred Eighty Two only) .

27. In view of the aforementioned facts, it appears that the importer, M/s Ultratech Cements Limited had willfully mis-declared the imported Wheel Loaders and thereby evaded applicable Customs duty on the imported goods. The importer have admitted the true nature and tariff heading of the imported goods in his statement recorded under Section 108 of the Customs Act, 1962. It is evident from the admissions made by the importer that they were well aware of the functions/working of the imported Wheel Loaders. The importer has imported 03 Nos. of Wheel Loaders of Model Liebherr L 580, Caterpillar 988 K & Caterpillar 972L vide Bills of Entry No. 8179960 dated 13.01.2017, 8858178 dated 11.03.2017 & 6539487 dated 26.05.2018 through Mumbai port from US and China and declared them under the correct CTH 84295100, thus it is evident that they are well aware of the correct CTH i.e. 84295100. Moreover, it was the responsibility of the importer that he declares at the time of self-assessment the correct classification, applicable rate of duty, value, and benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting Bill of Entry. Hence, it appears that the importer had suppressed the true nature of the imported Wheel Loaders and thereby willfully mis-stated the CTH in order to avail the lower rate of Customs duty. Thus it appears that the impugned imports satisfy the ingredients of Section 28(4) of the Customs Act, 1962 for invoking extended period of limitation. It further appears that importer is also liable to pay duty in accordance with the provisions of Section 28 along with applicable interest under the provisions of Section 28AA of the Customs Act, 1962.

28. Hence it appears that the above acts of omission and commission on the part of the importer have rendered the Wheel Loaders imported by M/s. Ultratech Cements Limited having a total assessable value of Rs.10,43,46,982/-(Rupees Ten Crore Forty-Three Lakh Forty-Six Thousand Nine Hundred Eighty-Two only) liable for confiscation under Section 111(m) of the Customs Act, 1962 and the importer M/s Ultratech Cements Limited is liable to penalty under Section 114A of the Customs Act, 1962.

29. It is apparent that the importer was well aware of the true nature and function of the imported Wheel Loaders; but mis-declared the same in order to avail the benefit of lower rate of Customs duty. Moreover, it was the responsibility of the importer that he declares at the time of self-assessment the correct classification, applicable rate of duty, value, and benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting Bills of Entry. Thus it appears that the importer, M/s Ultratech Cements Limited had intentionally and premeditatedly signed and used various documents such as the Bills of Entry containing false or incorrect in material particular with respect to the CTH, which were filed for the purpose of clearance of the imported goods and thus liable for penalty under Section 114 AA of the Customs Act, 1962.

30. Therefore, M/s Ultratech Cements Limited, having their registered office at A Wing, Ahura Centre, 1st Floor, Mahakali Caves Road, Andheri(East), Mumbai 400093 having IEC No. 0304009547, was called upon to show cause to the Commissioner of Customs(Import-I), New Customs House, Mumbai, the adjudicating authority in this case, within thirty days from the date of receipt of the notice as to why;

- a. The declared classification of 8429 5900 of the Wheel Loaders imported vide 04 nos. of Bills of Entry (as per Annexure-A) should not be rejected and re-determined under CTH 8429 5100.
- b. The already availed benefit of lower rate of basic Customs duty as per Serial No.577 of Notification No.69/2011 dated 29.07.2011 (as amended) in respect of the Wheel Loaders imported vide the impugned Bill of Entry as listed in Annexure-A to the show cause notice should not be rejected and should be reassessed BCD @7.5%.
- c. The imported goods having a total assessable value of Rs. Rs.10,43,46,982/-(Rupees Ten Crore Forty-Three Lakh Forty-Six Thousand Nine Hundred Eighty-Two only) cleared by the importer through 04 nos. of Bills of Entry as given in Annexure-A to this show cause notice should not be reassessed in accordance with the actual classification of 8429 5100 and the differential duty of Rs.91,13,732/- should not be demanded on such reclassification under Section 28(4) of the Customs Act,1962 along with applicable interest under Section 28AA of the Customs Act,1962.

- d. The 4(four) consignment imported against Bills of Entry listed in Annexure-A to this show cause notice having a total assessable value of Rs.104346982/- (Rupees Ten Crore Forty Three Lakh Forty Six Nine Hundred Eighty Two only) should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962.
- e. Penalty should not be imposed on M/s Ultratech Cements Limited under Section 114A/112A of the Customs Act, 1962
- f. Penalty should not be imposed on M/s Ultratech Cements Limited under Section 114AA of the Customs Act, 1962
- g. The already paid amount of Rs.1,08,65,180/- (One Crore Eight Lakh Sixty-Five Thousand One Hundred and Eighty only) (Rs. 91,13,732/-duty + Rs.17,51,447 interest) vide TR6 Challan No. 60, 61, 62 63, 140, 141, 142 & 143 dated 19.01.2022 should not be appropriated against the above said liabilities.

PERSONAL HEARING AND SUBMISSIONS OF THE NOTICEE

31. A personal hearing was granted to noticee on 14.11.2022 vide letter dated 31.10.2022. Shri Kumar Puroshottam, General Manager-Central Procurement Cell, M/s.Ultratech cements Limited attended the hearing and requested for 15 days adjournment. Another opportunity of personal hearing was granted on 29.11.2022 vide letter dated 14.11.22. On this day, a written submission dated 29.11.2022 submitted by Shri Kumar Puroshottam, General Manager. Further another opportunity of personal hearing was granted on 02.02.23, in response to it, noticee submitted final written submission dated 15.02.23 and requested to decide the case on merit.

32. Written submission

- i) That the imported goods are 'Wheel Loaders' as evident from the product catalogue. Therefore, the imported goods are not covered by name and description by Tariff Item 8429 5100 as Front End Shovel Loader. Hence, the imported goods being 'Wheel Loaders' are correctly classifiable under Tariff Item 8429 5900. That 'Wheel Loader' and 'Shovel Loader' are two distinct and different equipment. The Wheel Loaders are used in mines. The main function of these machines is handling and not transport .
- ii) That SCN proposes a demand of differential BCD with respect to four bills of entry filed during the period from 08.12.18 to 27.08.21 by invoking an extended period of limitation under Section 28(4) of the Customs Act, 1962 on the ground of

mis-classification. That the extended period is not invocable since no mis-declaration wrt description and value has been alleged in the SCN. Noticee does not possess the sophisticated technical knowledge of such heavy duty capital goods, they almost always classify them as per the declarations of the Supplier. Therefore, no mala fide intention or mens rea to evade duty can be attributable to the noticee. The allegation is limited to the correct classification of the imported goods namely 'wheel Loader' which is a matter of legal interpretation and bona fide belief. The Noticee relied upon **Cosmic Dye Chemical and Gammon India Ltd, CCE, Aurangabad Vs. Bajaj Auto Limited, Orissa Bridge & Construction Corp. Vs. CCE, Bhubaneshwar, Lovely Food Industries Vs. CCE, Jalla Industries Vs. CCE, Rivaa Textile Inds. Ltd. Vs. CCE, Vaspar Concepts (P) Ltd. Vs. CCE, GV Exim Vs. CC, National Radio and Electronics Company Vs. CCE, KMS Medisurgi Vs. CC, Sirthai Superware India Ltd. Vs. CC, Natraj Stationery Products Vs. CCE, Komal Trading Co. Vs. CC, Automark Technologies Vs CCE, Singh Brothers Vs. CCE, Steelcast Ltd. Vs. CCE, P.T. Education & Training Services Ltd. Vs. CCE, K.K. Appachan Vs. CCE and Pratibha Processors Vs. UOI - 1996.** Since the demand of duty against the Noticees is not sustainable, the question of levy of any interest under Section 28 AA would not arise

iii) That the capital goods imported are highly sophisticated and technical, the noticee has limited knowledge of such heavy duty capital goods. Hence, the goods are classified on the basis of the information and documents provided by the Supplier viz., invoice. COO etc. It is submitted that there was never any malafide intention on the part of the noticee to evade payment of duty. Hence, the imported goods cannot be liable to confiscation under Section 111(m) and relied upon **Lewek Altair Vs. CC and CC Vs. Maruti Udyog, Allseas Marine Contractors S.A. Vs. CC, Sutures India Vs. CC, Kirti Sales Corpn. Vs. CC, Shree Ganesh International Vs. CCE and Bussa Overseas & Properties Vs. C.L. Mahar.**

iv) That there has been no suppression or mis- classification by the noticee as they were under bona fide belief that the goods were rightly classifiable under Tariff Item 8429 5900 of the Customs Tariff. Therefore no penalty is imposable in matters of classification and interpretation and relied upon **Cement Marketing Co. of India Vs. Assistant Commissioner of Sales Tax and Hindustan Steel Vs. State of Orissa, Sutures India Vs. CC, Sirthai Superware India Vs. CC, Raghav Industrial Vs. CC, Kohler India Vs. CC, Akbar Badruddin Jiwani Vs. Collector of Customs, CCE Vs. Balakrishna Industries, CC Vs. Videomax Electronics, Anand Nishikawa Vs. CCE, Aban Lloyd Offshore Vs. CC, Tamil Nadu Housing Board Vs. CCE, CCE Vs. Chemphar Drugs & Liniments, CC Vs. Kamal Kapoor, CC Vs. Surbhit Impex Pvt. Ltd., Bahar Agrochem & Feeds Vs. CCE and Ghanshyam Metal Udyog Vs. CC.**

v) That penalty under Section 114AA is not sustainable as the noticees have not made any declaration, statement or document which is false or incorrect in any material particular in classifying the imported goods and relied upon **Lewek Altair Shipping**.

vi) That the SCN is invalid in absence of an appeal against the Out of Charge Order of Bills of entry and relied upon **Priya Blue Industries Vs. CC(Preventive) and CCE, Kanpur Vs Flock (India), ITC Limited Vs. CCE, Kolkata, Vitesse Export Import Vs. CC (EP), Mumbai, Ashok Khetrupal Vs.CC, Jamnagar, CC, Cochin Vs. Arvind Export and Neelkanth Polymers Vs. CC, Kandla.**

DISCUSSION AND FINDINGS

33. The case involves only one noticee i.e, M/s. Ultratech Cements Limited. I have carefully gone through the case records, the noticee's reply and his written submissions made during the course of personal hearings.

34. **Issues for determination:** The noticee has made his verbal and written submission under the following headings which can be treated as the issues before me for determination:

- a. Whether the SCN is invalid in absence of an appeal against the Out of Charge Order/Assessment Order?
- b. Whether the declared classification of the subject goods under CTH 8429 5900 should be rejected and should be re-determined under CTH 8429 5100? Also whether the availed benefit of lower rate of basic customs duty as per Serial No.577 of Notification No.69/2011 dated 29.07.2011 (as amended) should be rejected?
- c. Whether the subject goods imported against subject 04 Bills of Entry having a total assessable value of Rs.10,43,46,982/- should be held liable to confiscation under Section 111(m) of the Customs Act,1962?
- d. Whether the penalty should be imposed on the importer under Section 112(a)/114A of the Customs Act, 1962?
- e. Whether penalty should be imposed on the importer under Section 114AA of the Customs Act, 1962?

35. **The SCN is invalid in absence of an appeal against the out of charge order/assessment order.**

35.1 Noticee argued that the said Bills of Entry were assessed by the proper officer; therefore before issuing the notice, the department should have challenged the out of charge order/assessment order by way of appeal and relied upon the following case laws:

- (i) Priya Blue Industries Vs. CC(Preventive)⁵
- (ii) CCE, Kanpur Vs Flock (India)⁶,
- (iii) ITC Limited Vs. CCE, Kolkata⁷,
- (iv) Vitesse Export Import Vs. CC (EP), Mumbai⁸,
- (v) Ashok Khetrapal Vs.CC, Jamnagar⁹,
- (vi) CC,Cochin Vs. Arvind Export¹⁰
- (vii) Neelkanth Polymers Vs. CC, Kandla¹¹.

35.2 I find that a notice can be issued after the assessment of the bill of entry without appeal in the 'Out of Charge Order/Assessment Order.' if something adverse is found during the investigation of the goods. In this regard, I reproduce hereinbelow section 28 and Section 124 of the Customs Act, 1962 at the relevant time:

"Section 28. Notice for payment of duties, interest, etc. - (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part 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:

For the purposes of sub-section (1), the expression 'relevant date' means,

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

⁵ Priya Blue Industries Vs. CC(Preventive) reported at 2004 (172) ELT 145 (SC)

⁶ CCE, Kanpur Vs Flock (India) reported at 2000(120) ELT 285(SC).

⁷ ITC Limited Vs. CCE, Kolkata reported at 2019-VIL-32-SC-CU

⁸ Vitesse Export Import Vs. CC (EP), Mumbai reported at 2008 (224) ELT 241 (Tri. -Mumbai)

⁹ Ashok Khetrapal Vs.CC, Jamnagar reported at 2014 (304) ELT 408 (Tri-Ahmedabad)

¹⁰ CC, Cochin Vs. Arvind Export reported at 2001 (130) ELT 54 (Tri. -LB)

¹¹ Neelkanth Polymers Vs. CC, Kandla reported at 2009 (90) RLT 188 (Tri. -Ahmd.).

(b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;

(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."

Section 124. Issue of show cause notice before confiscation of goods, etc. -

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral."

35.3 On perusal of Section 124 above, it is very much clear that a notice under Section 124 can be issued to the owner of the goods informing him in writing the grounds on which it is proposed to confiscate the goods or to impose a penalty and also I find that in Section 124, no condition has been prescribed which links the issuance of notice in any way with the assessment of the goods. Therefore, it may be presumed that a notice under Section 124 of the Act can be issued before assessment, after assessment and also when the goods are provisionally assessed. On perusal of Section 28 above, it can be said that a notice under Section 28 of the Act for payment of Customs duties not levied can be issued subsequent to the clearance under Section 47 of the Act. Also, I find that in Section 28 no condition has been prescribed that a notice can be issued only after appeal of 'assessment order' or 'Out of Charge order'. Further, in this regard, I rely upon the case laws of **Commr. of Cus. vs. S.V. Technologies**¹² and **UOI v. Jain Shudh Vanaspati**¹³

35.4 Hon'ble Tribunal in the case of **S.V. Technologies Pvt. Ltd.(supra)** has held:

"6. We have considered the arguments by Learned DR and perused the records. The short point to be decided is whether the First Appellate Authority was correct in holding that the lower authority cannot raise a demand under Section 28 of the Customs Act without first challenging the assessment done in the bill of entry relying on the judgment of Priya

¹² Commr. of Cus., C. Ex. & S.T., Hyderabad-II vs. S.V. Technologies Pvt. Ltd.-2019 (369) E.L.T. 1631 (Tri. - Hyd.)

¹³ UOI Vs. Jain Shudh Vanaspati-1996 (86) E.L.T. 460 (S.C)

Blue (supra) and Flock India (supra). We find that the judgment of *Priya Blue and Flock India* of the Hon'ble Apex Court are on the point of refund claim by the assessee without challenging the assessment order in the bill of entry. The present case is different. It is a case where after assessment and clearance of the goods is completed by issue of order under Section 47 of the Customs Act, 1962, within the normal period of limitation, the Deputy Commissioner has raised a demand under Section 28. While raising the demand he issued a show cause notice proposing re-classification of the imported goods and gave an opportunity to the respondent to present their case and considered their submissions. Thereafter, he confirmed the demand. The First Appellate Authority also agrees with the re-classification done by the Deputy Commissioner on merits. He, however, held that the Deputy Commissioner again raised the demand without first challenging or asking the Commissioner to review his own assessment of the bill of entry. This is not the ratio laid down by the Hon'ble Apex Court in the case of *Priya Blue (supra)* or *Flock India (supra)*. Cases pertaining to issue of demand under Section 28 after clearance of the case under Section are covered by the judgment of the Hon'ble Apex Court in the case of *Jain Shudh Vanaspati Ltd., (supra)* which clearly held that a demand can be raised under Section 28 even after clearance of the case under Section 47”

35.6 Hon'ble Supreme Court in the case of **Jain Shudh Vanaspati (supra)** at para 5 and 6 has held:

“5. It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the “relevant date”; “relevant date” is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130.

6. The case of the appellants in the show cause notices is that the stainless steel containers in which the said oil was imported were banned, that the stainless steel containers were deliberately camouflaged by painting them to resemble mild steel containers, and that this was done with a view to enabling their clearance. A clearance order under Section 47 obtained by fraudulent means such as this (if it, in fact, be so) cannot debar the issuance of a show-cause notice for confiscation of goods under Section 124.”

35.7 The two prominent case laws; **Priya Blue (supra)** and **Flock India (supra)** **relied upon by the noticee** already distinguished in the case of **S.V. Technologies Pvt. Ltd.(supra)** as discussed above. I find that the other 5 case laws are on similar lines and therefore not applicable to the present case and hence not being discussed in detail.

35.8 Therefore, in view of the above, I find that a demand notice under Section 28 and Section 124 of the Act can be issued without appealing the 'assessment order' and/or 'out of charge order' respectively made under Sections 17 & 47 of the Act.

36. Whether the declared classification of the subject goods under CTH 8429 5900 should be rejected and should be re-determined under CTH 8429 5100? Also whether the availed benefit of lower rate of basic customs duty as per Serial No. 577 of Notification No.69/2011 dated 29.07.2011 (as amended) should be rejected?

36.1 The noticee had imported the following 3 models of machines- Komatsu Wheel Loader Model No. WA480-6A, Komatsu Wheel Loader Model No. WA600-6R and Komatsu Wheel Loader Model No. WA470-6A-vide subject 4 Bills of Entry as shown in Annexure-A to the SCN and classified them in CTH 84295900. The noticee availed the benefit of concessional rate of BCD under Notification no. 69/2011 dated 29.07.2011, Sr. No. 577 (as amended) as goods were imported from Japan.

36.2 The noticee argued that the imported goods are Wheel Loaders and the same is evident from the product catalogue. Further added that the imported goods are not covered by name and description by Tariff Item 84295100 as Front End Shovel Loader. Hence, the imported goods being 'Wheel Loaders' are correctly classifiable under Tariff Item 84295900. They classified the subject goods on the basis of shipping documents, invoice, Bill of Lading and CEPA Certificate as given by the supplier. M/s. Komatsu Ltd Japan (Supplier) is the manufacturer and worldwide supplier of the subject goods. The Wheel Loaders are used in captive consumption in mining activities. The main function of these machines is handling and not transport. That 'Wheel Loader' and 'Shovel Loader' are two distinct and different equipments .

36.3 Let us now go through the HSN note of the Chapter Heading 8429 :

8429	<i>Self-propelled bulldozers, angle dozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers</i>
------	---

	<i>- Bulldozers and angle dozers</i>
	<i>- Mechanical shovels, excavators and shovel loaders</i>
84295100	<i>-- Front-end shovel loaders</i>
84295200	<i>-- Machinery with a 360 degrees Revolving Superstructure</i>
84295900	<i>-- Other</i>

The heading covers a number of earth digging, excavating or compacting machines which are explicitly cited in the heading and which have in common the fact that they are all self-propelled.

(A) Bulldozers and angle dozers: ----

(B) ----

(H) Self-propelled shovel loaders: These are wheeled or crawler machines with a front mounted bucket which pick up material through motion of the machine, transport and discharge it.

Some "shovel-loaders" are able to dig into the soil. This is achieved as the bucket, when in the horizontal position, is capable of being lowered below the level of the wheels or tracks.

(I,J) ----

The heading also covers self propelled shovel loaders having an articulated arm with a bucket mounted on the rear.'

36.4 From the HSN note, I find that the CTH 84295100 denotes the "Front end Shovel Loaders" and CTH 84295900 denotes "Other". The explanatory note clearly

defines the basic function and working of the Self propelled Shovel Loaders that these are wheeled or crawler machines with a front mounted bucket which pick up material through the motion of the machines, transport and discharge it. Further CTH 8429 5900 covers 'Other' machines in the category of 'Mechanical Shovels, excavators and Shovel Loaders'.

36.5 I reproduce below the image of the said Wheel Loader model:

(IMAGE-I)

Komatsu Wheel Loader Model No. WA 480-6A (BE No 9172165 dated 8.12.2018)



(IMAGE-II)

Komatsu Wheel Loader Model No. WA600-6R (BE No 5597028 dated 08.11.2019 & BE No 5210050 dated 27.08.2021)



(IMAGE-III)

Komatsu Wheel Loader Model No. WA 470-6A (BE No 5209329 dated 27.08.2021)



36.6 I find from the user manuals of the subject goods which has been submitted by noticee during investigation that there are various models of the Wheel Loader like Komatsu Wheel Loader Model No. WA480-6A, Komatsu Wheel Loader Model No. WA600-6R and Komatsu Wheel Loader Model No. WA470-6A. However the basic functioning and mechanical features of these machines are the same. These are wheeled machines with a bucket mounted at its front end. The bucket is attached to the machine with two hydraulic arms to control the movement of the bucket. The bucket is used to pick up the material.

36.7 I further find from Wikipedia that a Loader is a heavy equipment machine used in construction to move or load materials such as soil, rock, sand, demolition debris, etc. into or onto another type of machinery such as a dump truck, conveyor belt, feed-hopper, or railroad car. A Loader is commonly used to move a stockpiled material from ground level and deposit it into an awaiting dump truck or into an open trench excavation. A Wheel Loader is a type of Loader, usually a 4 wheeled, tyre mounted and that has a front-mounted wide bucket or shovel connected to the end of two booms (arms) to scoop up loose material from the ground, such as dirt, sand or gravel, and move it from one place to another without pushing the material across the ground. A Wheel Loader or a Shovel Loader uses a controlled arm to put materials into a dump truck, onto a conveyor belt or a feed hopper. The possible materials are asphalt, demolition debris, dirt, feed, gravel, logs, raw minerals, recycled material, rock, sand, wood chips, etc. It is used for loading materials into trucks and moving material in construction, agriculture, or landscaping industries. I further rely on case of **Godrej & Boyce Mfg. Co Ltd¹⁴**, where Hon'ble High Court of Rajasthan held that definition given in Wikipedia can certainly be taken into consideration.

¹⁴Godrej & Boyce Mfg. Co Ltd Vs CTO, Anti-Evasion, Zone-1 Jaipur 2017(353) E.L.T.279 (RAJ.)

36.8 I find from a statement dated 08.12.2021 of Shri Kumar Purushottam where he agreed that Wheel Loaders can basically be described as wheeled machines with a front mounted bucket which pick up material through motion of the machine and discharge into the body of the other machine. It implies that Wheel Loader and Front End Shovel Loader are the same in specifications and features.

36.9 Further I find from the General Rule of Interpretation of the First Schedule of Import Tariff which clearly states that the titles of Sections, Chapters and Subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. According to GRI 1, *if a provision specifically and completely describes a product, then the product would be classified in that provision rather than in general heading.* Thus it implies that a product would be classified in specific provision if provision completely describes a product. Thus as per explanatory note, the CTH 84295100 'Front End Shovel Loader' covers wheeled or crawler machines with a front mounted bucket which pick up material through the motion of the machines, transport and discharge it. **Thus the CTH 84295100 covers all the machines with the same application and design like Wheel Loaders as the Wheel Loader is the most generic term used for Front End Shovel Loaders.** It is pertinent to mention that the imported Wheel Loaders **cannot be classified under the residual entry of Customs Tariff Heading 84295900 which is mentioned as "Other"** as Customs Tariff Heading 84295100 specifically covers Front End Shovel Loader and the same would be consistent with Rule 1 of General Rules of interpretation of the First Schedule of Import Tariff. Thus the application of the General Rules of Interpretation read with the general explanatory note to CTH 8429 implies that the classification of subject goods shall be 84295100.

36.10 I find that in the year 2017 & 2018, the noticee has imported 03 Nos. of Wheel Loaders of Model Liebherr L 580, Caterpillar 988 K & Caterpillar 972L vide Bills of Entry No. 8179960 dated 13.01.2017, 8858178 dated 11.03.2017 & 6539487 dated 26.05.2018 through this port from USA and China and declared them under the correct CTH 84295100, as the benefit of concessional rate of duty was not available for imports from USA and China. The said Wheel Loaders of brand M/s. Liebherr and M/s. Caterpillar have the same specifications and are capable of performing the same functions which are performed by the Wheel Loaders (subject goods) of M/s. Komatsu imported from Japan by the noticee. When the noticee imported similar Wheel Loaders from Japan, the noticee resorted to misclassification of the impugned Wheel Loaders under CTH 8429 5900 to avail concessional rate of duty under the Notification 69/2011 dated 29.07.2011 as amended. Hence, on joining the dots together, it becomes evident that the importer was well aware of the correct CTH of the imported Front-End Showel Loaders. He was classifying them earlier under the correct heading 84295100 when imported from USA & China (where concessional duty was not available); but changed his practice on importing a similar machine from Japan (where

concessional duty was available) and misdeclared them under the generic term-Wheel Loaders under CTH 84295900 only to avail improper duty benefit.

36.11 In view of the above discussion, I conclude that the imported Wheel Loaders can basically be described as wheeled machines with a front mounted bucket which pick up material through motion of the machine, transport and discharge it. Therefore subject goods capable of doing the exact function as described in the Explanatory notes to Chapter Heading 84295100 and hence warrant classification under CTH 8429 5100 as Front End Shovel Loaders; the specific classification for the said goods is available in the Tariff. It is evident that the importer was well aware of the specific functions and configurations of the imported Wheel Loaders and the importer resorted to misclassification of the impugned Wheel Loaders under CTH 8429 5900 to avail concessional rate of duty under the Notification 69/2011 dated 29.07.2011 as amended. It is also pertinent to note that the CTH 8429 5100 is not covered under Notification 69/2011 dated 29.07.2011 as amended and as such concessional rate of duty is not applicable to the Front End Shovel Loaders covered under CTH 8429 5100, when imported from Japan.

36.12 I further rely on the judgement of the Hon'ble Apex Court in the case of *Bharat Forge & Press Industries Private Limited*¹⁵;

"Classification of goods under residuary Entry - Criteria. -

Under a residuary entry only such goods are covered which cannot be brought under the various specific entries in the tariff. In other words unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item." (emphasis added)

36.13 Thus in view of the HSN explanatory note, Product manual, voluntary statement, General Rules of Interpretation of the First Schedule of Import Tariff and classification of similar goods from USA & China by the noticee; I arrive at the conclusion that the declared classification of subject goods under CTH 84295900 is liable to be rejected and the same is re-determined under CTH 84295100.

36.14 I further reproduce below the relevant portion of Notification 69/2011 dated 29.07.2011. The said notification extends tariff concessions to specified goods when imported into India from Japan,

"...exempts goods of the description as specified in column (3) of the Table appended hereto and falling under the Chapter, Heading, Sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding

¹⁵ *Bharat Forge & Press Industries Private Limited v. CCE, 1990 (45) E.L.T. 525 (S.C.)*

entry in column (2) of the said Table, when imported into India from Japan, from so much of the duty of customs leviable thereon as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the aforesaid Table.....”

36.15 The said notification has been amended vide Notification No. 34/2018-Cus dated 27.03.2018, further amended vide Notification No. 10/2019-Cus dated 28.03.2019 and again amended vide Notification No. 20/2021-Cus dated 30.03.2021 resulted in lower rate in percentage of Basic customs duty as 2.0% in the 2018 and 1.4% in the year 2019 and further reduced it to 0% in the year 2021. The goods covered under Notification 69/2011 dated 29.07.2011 as amended along with their respective CTH are reproduced below:

TABLE-I

Sl No.	CTH	Description	BCD Rate in percentage (unless otherwise specified) as amended vide below mentioned Notification No.		
			Notification No. 34/2018 dated 27.03.2018	Notification No. 10/2019 dated 28.03.2019	Notification No. 20/2021 dated 30.03.2021
	-	-			
576	842840 to 842940	All goods			
577	84295200 to 84331110	All goods	2.0	1.4	0
	-	-			

36.16 I find that the Notification 69/2011 dated 29.07.2011 as amended does not cover the CTH 8429 5100 which is the specific CTH of Front End Shovel Loaders. Consequently, the assessment of concessional rate of Customs duty in respect of the said imports as per serial number 577 of Notification No.69/2011 dated 29.07.2011 as amended, is liable to be rejected as it is not applicable to goods falling under the Customs Tariff heading of 8429 5100. Thus the subject goods falling under the Customs tariff heading of 8429 5100 attracts basic customs duty @ 7.5% ad valorem.

36.17 The differential duty liability has been quantified and is enclosed as Annexure-A to the SCN. The differential duty arising out of the misclassification of CTH amounts to Rs.

91,13,732/-. I find that during the course of investigation, the noticee had paid entire differential duty amounting to Rs. 91,13,732/- and interest Rs. 17,51,448/- against the import of subject goods vide Challans No. 60, 61, 62, 63, 140, 141, 142 & 143 dated 19.01.2022.

37. Whether the subject goods imported against 04 Bills of Entry having a total assessable value of Rs.10,43,46,982/- should be held liable to confiscation under Section 111(m) of the Customs Act,1962?

37.1 Noticee argued that the subject goods are classified on the basis of the information and documents provided by the Supplier viz., invoice, COO etc. That there was never any malafide intention on the part of the noticee to evade payment of duty and relied upon the following case laws:

- (i) **Lewek Altair Shipping Pvt Ltd Vs. CC¹⁶,**
- (ii) **CC Vs. Maruti Udyog Ltd¹⁷,**
- (iii) **Allseas Marine Contractors S.A. Vs. CC¹⁸,**
- (iv) **Sutures India Vs. CC¹⁹,**
- (v) **Kirti Sales Corpn. Vs. CC²⁰,**
- (vi) **Shree Ganesh International Vs. CCE²¹**
- (vii) **Bussa Overseas & Properties Vs. C.L. Mahar.²²**

37.2 Hon'ble Tribunal in case of **Lewek Altair Shipping Pvt Ltd(supra)**, held that the Customs Tariff Heading indicated in the Bill of Entry is only a self assessment by the appellant as per his understanding which is subject to re-assessment by the officers if necessary. Therefore, an assessee, not being an expert in the Customs law can claim a wrong tariff or an ineligible exemption notification and such claim does not make his goods liable to confiscation. Hon'ble Tribunal in case of **Maruti Udyog Ltd(supra)** observed that once all the required details of the goods imported are given, the party cannot be held guilty of mis-declaration only for the reason they put forward an untenable claim for exemption from duty. The present case is different from the above two cases as the importer is a big Corporate regularly importing such goods and was well aware of the correct CTH of the imported Front-End Shovel Loaders. He was classifying them earlier under the correct heading 84295100 when imported from USA &China(where concessional duty was not available);but changed his practice on importing a similar machine from Japan (where

¹⁶ Lewek Altair Shipping Pvt. Ltd Vs. CC-2019 (366) ELT 318 (Tri.-Hyd.)

¹⁷ CC Vs. Maruti Udyog Ltd - 2002 (141) ELT 392(Tri-Del)

¹⁸ Allseas Marine Contractors S.A. Vs. CC-2011 (272) ELT 619 (Tri.-Del.)

¹⁹ Sutures India Vs. CC-2009 (245) ELT 596 (Tri.-Bang)

²⁰ Kirti Sales Corpn. Vs. CC - 2008 (232) ELT 151 (Tri.-Del).

²¹ Shree Ganesh International Vs. CCE - 2004 (174) ELT 171 (Tri.-Del)

²² Bussa Overseas & Properties Vs. C.L. Mahar, ACC-2004 (163) ELT 304 (Bom.)

concessional duty was available) and misdeclared them under the generic term-Wheel Loaders under CTH 84295900 only to avail improper duty benefit. The intention to evade duty and wilful misdeclaration is established from the change in practice. Further **Maruti Udyog Ltd(supra)** case is of the year 2002 when the self assessment was not implemented in the Customs. The present case belongs to the self assessment regime. For the reasons mentioned above, both these case laws of **Lewek Altair Shipping Pvt Ltd(supra)** and **Maruti Udyog Ltd(supra)** do not apply to this case. After discussing the above 2 case laws, I find that the other 5 case laws relied upon by the noticee are on similar lines and therefore not applicable to the present case and hence not being discussed in detail.

37.3 I find that the noticee has subscribed to a declaration as to the truthfulness of the contents of the Bills of Entry in terms of Section 46(4) of the Customs Act, 1962 in respect of subject 04 Bills of Entry. As discussed supra, the noticee with full intention to evade duty had resorted to misclassification of the subject goods in a residual entry in the Custom Tariff Schedule rather than in the specific entry in the Schedule, where he was classifying similar goods earlier. Thus I conclude that the subject goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.

38.1 Whether the demand under Section 28(4) of the Act is sustainable?

38.1.1 Noticee argued that an extended period of limitation cannot be invoked under Section 28(4) of the Customs Act, 1962 and argued that allegation is limited to the correct classification of the imported goods namely 'Wheel Loader' which is a matter of legal interpretation and bona fide belief. The Noticee relied upon the following case laws:

- (i) **Cosmic Dye Chemical Vs. CCE, Bombay-1995²³**
- (ii) **Gammon India Ltd Vs. CCE.²⁴**
- (iii) **CCE, Aurangabad Vs. Bajaj Auto Limited²⁵,**
- (iv) **Orissa Bridge & Construction Corp. Vs. CCE, Bhubaneswar²⁶,**
- (v) **Lovely Food Industries Vs. CCE²⁷,**
- (vi) **Jalla Industries Vs. CCE²⁸,**
- (vii) **Rivaa Textile Inds. Ltd. Vs. CCE²⁹,**
- (viii) **Vaspar Concepts (P) Ltd. Vs. CCE³⁰,**
- (ix) **GV Exim Vs. CC³¹,**
- (x) **National Radio and Electronics Company Vs. CCE³²,**

²³ Cosmic Dye Chemical Vs. CCE, Bombay-1995 (75) E.L.T. 721 (S.C.)

²⁴ Gammon India Ltd. Vs. CCE - 2002 (146) ELT 173 (Tri. Mum)

²⁵ CCE, Aurangabad Vs. Bajaj Auto Limited - 2010 (260) ELT 17 (SC)

²⁶ Orissa Bridge & Construction Corp. Vs. CCE, Bhubaneswar -- 2011 (264) ELT 14 (SC)

²⁷ Lovely Food Industries Vs. CCE - 2006 (195) ELT 90 (Tri.)

²⁸ Jalla Industries Vs. CCE - 2000 (117) ELT 429 (Tri.)

²⁹ Rivaa Textile Inds. Ltd. Vs. CCE -2006(197) ELT 555 (Tri.)

³⁰ Vaspar Concepts (P) Ltd. Vs. CCE-23006(199) ELT 711 (Tri.)

³¹ GV Exim Vs. CC - 2003 (160) ELT 900

³² National Radio and Electronics Company Vs. CCE 2000 (119) ELT 746 (Tri.)

- (xi) **KMS Medisurgi Vs. CC³³,**
- (xii) **Sirthai Superware India Ltd. Vs. CC³⁴,**
- (xiii) **Natraj Stationery Products Vs. CCE³⁵,**
- (xiv) **Komal Trading Co. Vs. CC³⁶,**
- (xv) **Automark Technologies Vs CCE³⁷,**
- (xvi) **Singh Brothers Vs. CCE³⁸,**
- (xvii) **Steelcast Ltd. Vs. CCE³⁹,**
- (xviii) **P.T. Education & Training Services Ltd. Vs. CCE⁴⁰,**
- (xix) **K.K. Appachan Vs. CCE⁴¹ and Pratibha Processors Vs. UOI - 1996⁴².**

38.1.2 I note that if there is non- levy of duty, short levy or short payment by reason of collusion or any wilful mis-statement or suppression of facts by the importer or employee of the importer, Section 28 (4) of the Customs Act, 1962 shall be applicable.

38.1.3 The Hon'ble SC in the case of **Cosmic Dye Chemical(supra)** observed that so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e. intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The Hon'ble Tribunal in the case **Gammon India Ltd(supra)** took cognizance of the earlier judgments in which it was held that the delay between the knowledge of the Department and the issue of show cause notice was fatal to the argument that there was suppression. As already discussed above, the present case is different from the above two cases as the importer is a big Corporate regularly importing such goods and was well aware of the correct CTH of the imported Front-End Shovel Loaders. He was classifying them earlier under the correct heading 84295100 when imported from USA &China(where concessional duty was not available);but changed his practice on importing a similar machine from Japan (where concessional duty was available) and misdeclared them under the generic term-Wheel Loaders under CTH 84295900 only to avail improper duty benefit. The intention to evade duty and wilful misdeclaration is established clearly from the noticee's action to change the practice of classification. Had DRI not received intelligence to this effect, the evasion of customs duty would have gone unnoticed. Many times, the bills of entry of large corporates go in facilitation mode during assessment/examination at the customs port where it is difficult to catch the deviation.The noticee has admitted the true nature and tariff heading of the imported goods in his statement

³³ KMS Medisurgi Vs. CC-2022-VIL-358-(Tri-MUM)

³⁴ Sirthai Superware India Ltd. Vs. CC - 2019 (10) TMI 460 - (Tri- MUM)

³⁵ Natraj Stationery Products Vs. CCE - 2017 (348) ELT 568 (T)

³⁶ Komal Trading Co. Vs. CC - 2014 (301) ELT 506 (T)

³⁷ Automark Technologies Vs CCE-2019 (370) ELT 1232 (Tri. - Mumbai)

³⁸ Singh Brothers Vs. CCE-2009 (14) STR 552

³⁹ Steelcast Ltd. Vs. CCE-2009 (14) STR 129

⁴⁰ P.T. Education & Training Services Ltd. Vs. CCE-2009 (14) STR 34

⁴¹ K.K. Appachan Vs. CCE-2007 (7) STR 230

⁴² Prathibha Processors Vs. UOI - 1996 (88) ELT 12

recorded under Section 108 of the Customs Act, 1962. Moreover, in this case after completion of investigation in the case, the SCN has been issued under section 28(4) of the Customs Act, 1962. There is no delay between the knowledge of the Department and the issue of show cause notice. For the reasons mentioned above, both these case laws of **Cosmic Dye Chemicals(supra)** and **Gammon India Ltd(supra)** do not apply to this case. After discussing the above 2 case laws, I find that the other 17 case laws relied upon by the noticee are on similar lines, where the facts are different (intention to evade duty is missing) and therefore not applicable to the present case and hence not being discussed in detail.

38.1.4 In view of the above, I conclude that the noticee had suppressed the true nature of the imported goods and thereby willfully mis-stated the CTH in order to avail the lower rate of Customs duty. Thus the impugned imports satisfy the ingredients of Section 28(4) of the Customs Act, 1962 for invoking extended period of limitation.

38.2 Whether the penalty should be imposed on the importer under Section 112(a) /114A of the Customs Act, 1962?

38.2.1 Noticee argued that there has been no suppression or mis- classification by the noticee as they were under bona fide belief that the goods were rightly classifiable under Tariff Item 8429 5900. Therefore no penalty is imposable in matters of classification and interpretation and relied upon the following case laws:

- (i) **Cement Marketing Co. of India Ltd Vs. Assistant Commissioner of Sales Tax⁴³**
- (ii) **Hindustan Steel Ltd Vs. State of Orissa⁴⁴,**
- (iii) **Sutures India Vs. CC⁴⁵,**
- (iv) **Sirthai Superware India Vs.CC⁴⁶,**
- (v) **Raghav Industrial Vs. CC⁴⁷,**
- (vi) **Kohler India Vs. CC⁴⁸,**
- (vii) **Akbar Badruddin Jiwani Vs.Collector of Customs⁴⁹,**
- (viii) **CCE Vs. Balakrishna Industries⁵⁰,**
- (ix) **CC Vs. Videomax Electronics⁵¹,**

⁴³ Cement Marketing Co. of India Ltd Vs. Assistant Commissioner of Sales Tax - 1980 (6) ELT 295 (SC)

⁴⁴ Hindustan Steel Ltd. Vs. State of Orissa - 1978 (2) ELT (J 159) (SC)

⁴⁵ Sutures India Vs. CC - 2009 (245) ELT 596

⁴⁶ Sirthai Superware India Vs. CC-2019 (10) TMI 460-(Tri- MUM)

⁴⁷ Raghav Industrial Vs. CC-2019-TIOL-2559-(Tri-DEL)

⁴⁸ Kohler India Vs. CC-2017 (1) TMI 584 - (Tri- DEL)

⁴⁹ Akbar Badruddin Jiwani Vs. Collector of Customs - 1990 (47) ELT 161

⁵⁰ CCE Vs. Balakrishna Industries - 2006 (20) ELT 325 (SC)

⁵¹ CC Vs. Videomax Electronics 2011 (264) ELT 0466

- (x) **Anand Nishikawa Vs. CCE**⁵²,
- (xi) **Aban Lloyd Offshore Vs. CC**⁵³,
- (xii) **Tamil Nadu Housing Board Vs. CCE**⁵⁴,
- (xiii) **CCE Vs. Chemphar Drugs & Liniments**⁵⁵,
- (xiv) **CC Vs. Kamal Kapoor**⁵⁶,
- (xv) **CC Vs. Surbhit Impex Pvt. Ltd.**⁵⁷,
- (xvi) **Bahar Agrochem & Feeds Vs. CCE**⁵⁸,
- (xvii) **Ghanshyam Metal Udyog Vs. CC**⁵⁹.

38.2.2 The question that arose in the case of **Cement Marketing Co. of India Ltd(supra)** is whether the Assistant Commissioner of Sales Tax was right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its returns. The Hon'ble SC held that the assessee could not be said to have filed 'false' returns when it did not include the amount of freight in the taxable turnover shown in the returns and the Assistant Commissioner of Sales Tax was not justified in imposing penalty on the assessee. Penalty cannot be imposed when assessee raises a bona fide contention. In the case of **Hindustan Steel Ltd(supra)**, Hon'ble Supreme Court held that when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief then no case for imposing penalty was made out. As already discussed above, the present case is different from the above two cases as the importer is a big Corporate regularly importing such goods and was well aware of the correct CTH of the imported Front-End Shovel Loaders. He was classifying them earlier under the correct heading 84295100 when imported from USA & China (where concessional duty was not available); but changed his practice on importing a similar machine from Japan (where concessional duty was available) and misdeclared them under the generic term-Wheel Loaders under CTH 84295900 only to avail improper duty benefit. The intention to evade duty and wilful misdeclaration is established clearly from the noticee's action to change the practice of classification. Had DRI not received intelligence to this effect, the evasion of customs duty would have gone unnoticed. Many times, the bills of entry of large corporates go in facilitation mode during assessment/examination at the customs port where it is difficult to catch the deviation. The noticee has also admitted the true nature and tariff heading of the imported goods in his statement recorded under Section 108 of the Customs Act, 1962. Thus the present case is not a case of bonafide belief arising out of independent opinion but a cool calculated design by

⁵² Anand Nishikawa Vs. CCE-(2005) 7 SCC 749

⁵³ Aban Lloyd Offshore Vs. CC - 2006 (200) ELT 370 (SC)

⁵⁴ Tamil Nadu Housing Board Vs. CCE - 1994 (74) ELT 9 (SC)

⁵⁵ CCE Vs. Chemphar Drugs & Liniments - 1989 (40) ELT 276 (SC)

⁵⁶ CC Vs. Kamal Kapoor - 2007 (216) ELT 21 (P & H)

⁵⁷ CC Vs. Surbhit Impex Pvt. Ltd.-2012 (286) ELT 500 (Bom.)

⁵⁸ Bahar Agrochem & Feeds Vs. CCE., Pune-2012 (277) ELT 382

⁵⁹ Ghanshyam Metal Udyog Vs. CC-2008 (229) E.L.T. 631 (Tri. -Ahmd.)

the noticee to evade customs duty and benefit from it. Hence, the present case is different from the 17 cases listed above relied upon by the noticee.

38.2.3 Thus, the noticee by his various acts of omission and commission discussed above is liable for penalty under section 112(a) of the Act for improper importation of goods. Since the improper importation of goods has also resulted in short levy of customs duty of around Rs.91 lakhs, they are also found to be liable for penalty under section 114A of the Act. I note that both the penalties are mutually exclusive. Thus the noticee is liable to penalty under Section 114A of the Customs Act, 1962. I find that during the course of investigation, the noticee had paid the entire differential duty amounting to Rs. 91,13,732/- and interest Rs. 17,51,448/-.

39. Whether penalty should be imposed on the importer under Section 114AA of the Customs Act, 1962?

39.1 Noticee argued that penalty under Section 114AA is not sustainable as the noticees have not made any declaration, statement or document which is false or incorrect in any material particular in classifying the imported goods and relied upon **Lewek Altair Shipping Pvt Ltd(supra)**.

39.2 The Hon'ble Tribunal had observed in the case of **Lewek Altair Shipping Pvt Ltd(supra)** that claiming an incorrect classification or the benefit of an ineligible exemption notification does not amount to making a false or incorrect statement; it being not an incorrect description of goods or their value but only a claim made by assessee. Thus, even if the appellant makes a wrong classification or claims ineligible exemption, he will not be liable to penalty under Section 114AA of Customs Act, 1962.

39.3 As discussed above, in the present case, the noticee was well aware of the true nature and function of the imported Front-End Shovel Loader but mis-classified the same in order to avail the benefit of lower rate of Customs duty. The noticee was classifying the subject goods earlier under the correct heading 84295100 when imported from USA &China (where concessional duty was not available); but changed his practice on importing a similar machine from Japan (where concessional duty was available) and misdeclared them under the Wheel Loaders under CTH 84295900 only to avail improper duty benefit. Thus it is evident that the noticee had intentionally and premeditatedly signed and used various documents such as the Bills of Entry containing false or incorrect declarations particular with respect to the CTH, to evade customs duty to the tune of Rs. 91 Lakhs. Thus the false declaration in the Bills of Entry was not a matter of independent opinion but a cool calculated design by the noticee to evade customs duty and benefit from it. Therefore, I find that the noticee is liable for penalty under Section 114AA of the Customs Act, 1962.

ORDER

40. Keeping the facts and circumstance of the case in mind, I decide to keep the fine and penalty on the lower side. In view of the above, I pass the following order:

40.1 I reject the declared classification of the said goods under CTH 8429 5900 imported vide 04 nos. of Bills of Entry (as per Annexure-A to the SCN) and re-determine it under CTH 8429 5100.

40.2 I reject the availed benefit of lower rate of basic customs duty as per Serial No.577 of Notification No.69/2011 dated 29.07.2011 (as amended) in respect of the Wheel Loaders imported vide the subject 04 Bills of Entry and order for their assessment without benefit of lower rate of basic customs duty.

40.3 I confirm the demand and order for recovery of the differential duty of total **Rs.91,13,732/ (Rupees Ninety-One Lakh Thirteen Thousand Seven Hundred Thirty-Two only)** (as calculated and annexed as Annexure 'A' to SCN in respect of the said Bills of Entry) under the provisions of Section 28 of the Act along with applicable interest under section 28AA of the Act. I order for appropriation of the already paid amount of **Rs.1,08,65,180/- (One Crore Eight Lakh Sixty-Five Thousand One Hundred Eighty only) (Rs. 91,13,732/-duty + Rs.17,51,448 interest)** vide TR6 Challans No. 60, 61, 62 63, 140, 141, 142 & 143 dated 19.01.2022 against the above said liabilities.

40.4 I hold the goods imported under the said Bills of Entry with the total assessable value of **Rs. 10,43,46,982/-(Rupees Ten Crore Forty Three Lakh Forty Six Thousand Nine Hundred Eighty Two only)** liable for confiscation under the provisions of section 111(m) of the Act. However, in lieu of confiscation, I impose a redemption fine of **Rs. 15 lakhs (Rupees Fifteen Lakh only)** under Section 125 of the Act.

40.5 I impose a penalty equal to the short paid duty and interest upon M/s. Ultratech Cements Limited under Section 114A of the Act, provided that where such duty and interest is paid within thirty days from the date of the order of the proper officer determining such duty, the amount of penalty liable to be paid under this section shall be twenty-five percent of the duty or interest, as the case may be, so determined. The benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days.

40.6 I impose a penalty of **Rs. 30 lakhs (Rupees Thirty Lakh only)** upon M/s.Ultratech Cements Limited under the provisions of Section 114AA of the Act.

41. This order is issued without prejudice to any other action that may be taken against the noticees or persons or imported goods under the provisions of the Customs Act 1962, or any other law for the time being in force in India.



Vivek
30.04.23

(Vivek Pandey)
आयुक्त सीमाशुल्क (आयात-I)
Commissioner of Customs (Import-I),
नवीन सीमाशुल्क भवन, मुंबई
New Custom House, Mumbai-01

To,

M/s. Ultratech Cements Limited(IEC No. 0304009547)
A Wing, Ahura Centre, 1st Floor, Mahakali Caves Road,
Andheri(East), Mumbai 400093.

Copy to:

1. The Pr. Chief Commissioner of Customs, Mumbai Zone-I, New Custom House, Mumbai.
2. The Additional Director, Directorate of Revenue Intelligence, Jaipur Regional Unit, 8 & 9 Bhaghat Vatika-I, Civil Lines, Jaipur-302006
3. The ADG (CEIB), Central Economic Intelligence Bureau, Janpath Bhavan, B-wing, 6th Floor, New Delhi-110001.
4. The Deputy Commissioner of Customs, Group 5, New Custom House, Mumbai.
5. The Supdt./CHS, NCH, Mumbai – For Display on Notice Board.
6. Office Copy.