



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, बेलाई एस्टेट,  
मुंबई-400001.

दूरध्वनि-22757401 फैक्स-22757402

ई-मेल: [adjn-commr-imp1nch@gov.in](mailto:adjn-commr-imp1nch@gov.in)

इ-फा.सं. GEN/ADJ/COMM/527/2021

O/O COMMR-CUS-IMP-II-ZONE-I-MUMBAI

के द्वारा जारी किया गया , : विवेक पाण्डेय

आदेश दिनांक: 17.01.2023

आयुक्त सीमाशुल्क (आयात-1)

जारी दिनांक: 17.01.2023

सी.ए.ओ. क्रमांक : 66/2022-23/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)

DIN No. 202301770000008328DB

### 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 - I

**OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I)**

2<sup>nd</sup> FLOOR, NEW CUSTOM HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE,  
MUMBAI - 400001.

Tel. No. 22757401 Fax No. 22757402

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F.No. GEN/ADJ/COMM/527/2021

O/O COMM-R-CUS-IMP-II-ZONE-I-MUMBAI

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

Date of Order: 17.01.2023  
Date of Issue: 17.01.2023

C.A.O. NO.: 66/2022-23/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)

DIN NO. 202301770000008328DB

**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 dated 26.11.2021 issued vide F. No. CUS/SIIB/INT/18/2021-SIIB-O/O-COMMR-CUS-IMP-I-ZONE-I, regarding misuse and wrong availment of benefit vide sr. no. 524 (1) (a) of Exemption Notification No. 50/2017 dated 30.06.2017 (as amended by Notification no. 25/2019 dated 06.07.2019) and non-inclusion of the cost towards erection and commissioning charges in the declared Assessable Value, for the goods imported by M/s Eastern Coalfields Limited – reg.**

### FACTS OF THE CASE

Intelligence was received by the officers of Special Investigation and Intelligence Branch (Import) [SIIB(I)], New Custom House (NCH), Mumbai, regarding misuse and wrong availment of Notification No. 50/2017 dated 30.06.2017<sup>1</sup> as amended by Notification No. 25/2019 dated 06.07.2019 for the goods imported by M/s Eastern Coalfields Limited (M/s ECL)<sup>2</sup> vide Bills of Entry nos. 2201377 and 2201454, both dated 01.01.2021. Accordingly, SIIB (I), NCH, Mumbai initiated an investigation in the case of the imports made by the importer. The Preliminary enquiries revealed the fact that M/s Coal India Limited (M/s CIL)<sup>3</sup>, Kolkata, West Bengal, is the parent company of M/s ECL. The EDI system indicated that the said Bills of Entry were filed by M/s ECL, declaring the goods as "**CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION**" under CTH 87041010 claiming concessional rate of BCD @ 15% under sr.no. 524(1)(a) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019. The goods were supplied by M/s Caterpillar INC., USA, (hereinafter referred as Manufacturer) through their authorised Indian Agent, M/s Gainwell Commosales Pvt. Ltd., Kolkata<sup>4</sup> as per their contract.

2. The consignments covered under said 02 Bills of Entry nos. 2201377 and 2201454, both dated 01.01.2021, were put on hold by SIIB (Import), NCH. The details of the said consignments are as per Table -I below:

**Table- I**

S. No.	BOE No./Date	Description as per BOE	Benefit Claimed	Assessable Value (INR)	Total Duty Paid (@ 15% BCD, INR)
1	2201377/ 01.01.2021	CATERPILLAR 190T REAR DUMPER MODELS 789D SRNO SPD00973 (CKD) WITHALL NECESS COMPONENTS FOR ASSEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,41,02,556.82	4,62,23,175.90



<sup>1</sup> also referred to as the said exemption notification or impugned notification

<sup>2</sup> hereinafter referred to as the importer or Noticee-1

<sup>3</sup> hereinafter referred to as Noticee-2

<sup>4</sup> hereinafter referred to as Supplier or Noticee-3

2	2201454/ 01.01.2021	CATERPILLAR 190T REAR DUMPER MODELS 789D SRNO SPD00972 (CKD) WITHALL NECESS COMPONENTS FOR ASSEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,40,41,805.62	4,61,93,334.90
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3. The importer had filed the Bills of Entry **under self-assessment u/s 17(1)** of the Customs Act, 1962 (hereinafter referred as Act) declaring that the goods imported vide above referred 02 BOE's are *in CKD conditions having engine, gearbox, and transmission mechanism not in pre-assembled condition.*

4. On the basis of the above intelligence, the Officers from SIIB(I), NCH undertook the examination proceedings for the goods covered under 02 Bills of Entry nos. 2201377 and 2201454, both dated 01.01.2021, under Panchnama dated 17.02.2021, in presence of Shri Sharad Mohan, Custom Broker, M/s On Dot Express, (11/1613). **The Panchanama proceedings revealed following facts and findings:**

- i. Item named "BANJO" in the packing lists, is a standalone unit and is the transmission mechanism of the rear dumpers. Transmission mechanism "BANJO" was already in pre-assembled form.
- ii. Item mentioned as "Engine in the packing list with net weight of 9897 Kgs, is a stand-alone unit" and is already in pre-assembled form. All the necessary parts of the engine were already assembled in the said item. The engine has been mentioned as a one complete item in the packing list of all B/Es and has been allotted an engine number also.
- iii. The engine has already been allotted a specific engine number by the manufacturer. The manufacturer would assign the number to an equipment once it is set in completely pre-assembled form. Engines of the said BOE's appeared to be in pre-assembled form.
- iv. Items mentioned as "Engine Parts" in the packing list of said BOE are just mere attachments to the engine and even without these attachments the engine can work.
- v. Goods covered under examined BOE's were found completely identical in all aspects and had absolute similarity in shape, size and form.
- vi. Imported goods appeared to be not as per declaration made by the importer and the submissions made thereof.



5. The above findings gave reasons to believe that M/s ECL, had mis-declared the description of goods covered under 02 Bills of Entry nos. 2201377 and 2201454, both dated 01.01.2021, in as much as the pre-assembled form of engine, transmission mechanism and driveshaft are concerned and therefore the goods were seized vide Seizure Memorandum dated 17.02.2021, in terms of section 110 of the Customs Act, 1962.

6. Further, to ascertain the technical aspects of the goods covered under said 02 BOE's, the Custom's empanelled Chartered Engineer Shri Rajendra S. Tambi, conducted the re-examination of said goods. **The Chartered Engineer Shri Rajendra S. Tambi, submitted the inspection report for 02 Bills of Entry nos. 2201377 and 2201454, both dated 01.01.2021 vide Chartered Engineer Certificates with Ref No: CE1532 and CE1531, both dated 04.03.2021, respectively, wherein he made the following submissions in his reports:**

i. The chassis was inspected with chassis numbers: CAT0789DTSPD00973 and CAT0789DTSPD00972, imported vide BOE's 2203177 dated 01.01.2021 and 2201454 dated 01.01.2021 respectively and are in pre-assembled condition having all cylinders, valves, hoses, pipes, hydraulic and electrical mechanism assembled together and are basically, sub-assemblies of the dumpers. Pre-assembled means all the parts and components of the chassis have already been assembled in the assembly line of the manufacturing facility to manufacture the said chassis.

ii. The engines were inspected with engine numbers: 7TR03851 and 7TR03850, imported vide BOE's 2201377 and 2201454 both dated 01.01.2021 respectively and are in pre-assembled condition. They are in complete pre-assembled form although not mounted on the chassis. Pre-assembled means all the parts and components of the engine have already been assembled in the assembly line of the manufacturing facility to manufacture the said engines.

iii. Transmission Mechanisms bearing serial numbers: D8001250 and D8001248, imported vide BOE's 2201377 and 2201454 both dated 01.01.2021 respectively, mentioned in packing list as "BANJO", are also in pre-assembled form although not mounted on the chassis. All the parts and components of the Transmission Mechanism i.e. BANJO has already been pre-assembled in the assembly line of the manufacturing facility.

iv. Drive shaft mentioned in the packing List as "DRIVE SHAFT" is basically a sub-assembly for the dumper and is in pre-assembled form.

v. Engine parts mentioned in the packing list, viz pipes, hoses, hardware, seals etc are basically attachments to the engine. These pipes viz pipes, hoses, hardware, seals etc are basically attachments to the engine which has been imported in pre-assembled form. **The pre-assembled engine will start even without these attachments in place.**



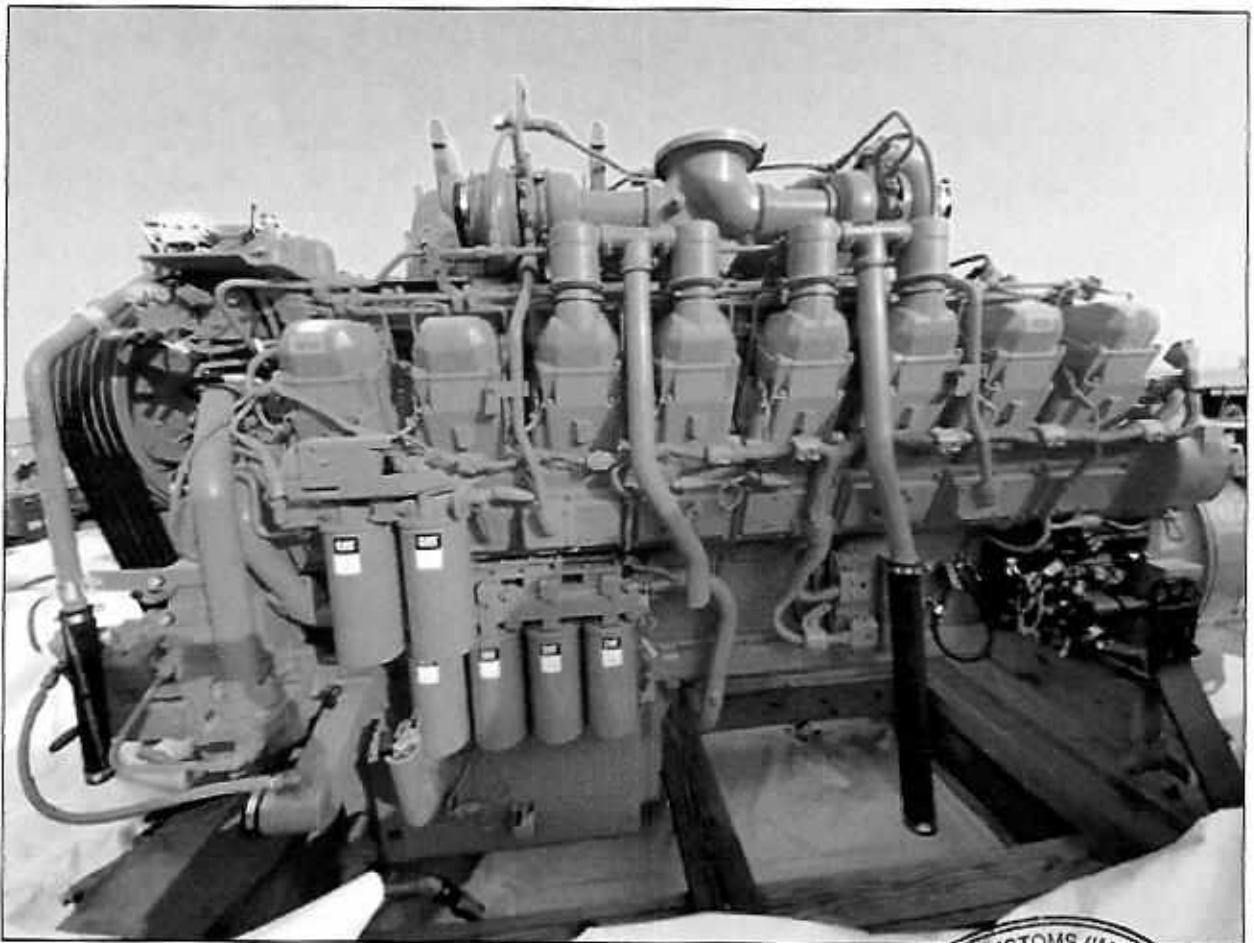
vi. Parts mentioned as "INTAKE" have parts including the intake parts viz. hardware, plates, tubes, flange, clamps, seals etc. are basically attachments of other sub-assemblies, which are in pre-assembled form. Some of these parts have no relation whatsoever with the engine/transmission mechanism.

vii. Chartered Engineer Shri Rajendra S. Tambi, certified that the goods imported are not in a completely knocked down condition as there are various sub-assemblies viz. Chassis, Engine, Transmission mechanism, Driver Cabin etc which are combined together to erect a dumper. These sub-assemblies cannot be assembled on site but only on an assembly line in the manufacturing facility.

viii. Chartered Engineer Shri Rajendra S. Tambi submitted the conclusion that engine, transmission mechanism, driver cabin, chassis main body etc., are in pre-assembled form but not mounted on chassis or a body assembly.

6.1 For the sake of clarity, the scanned copies of chartered engineer's certificate along with the **photographs of the engine, transmission mechanism and drive shaft** are reproduced below:

**1. Engine**



2. Transmission mechanism declared as "BANJO"



3. Gear Box declared as "Drive Shaft"



4. Sample copy of Chartered Engineer's Certificate

**Rajendra S. Tambi**

- Chartered Engineers & Valuers - Customs Empanelled at Mumbai, JNPT & Air Cargo (Mumbai and Delhi)
- Registered Valuers under the Companies Act (IBBI Govt/Bank/IT etc.)
- Insurance Surveyor and Loss Assessor
- 'Competent Person' under the Factories Act.

Off. : 403, Nilambari, Near NHP School, Sector 19, AIROLI, NAVI MUMBAI 400 708. Mob.: 9324181461 / 9699961461  
E-mail : tambiraj1@gmail.com

Sr No CE1532 DATE 04/03/2021

**Chartered Engineer Certificate**  
To whomsoever It May Concern

1. Date of Examination : 03/03/2021
2. Bill of Entry no. 2201377
3. Date of Bill of Entry: 01/01/2021
4. Invoice no.: AMX115796 DTD 15/10/2020
5. Examined the goods in the presence of Shri Vikas Bhardwaj, SIO, SIIB (I), Shri Sharif Khan , G-card holder of M/s ON DOT EXPRESS. (CB) on 03/03/2021. The photographs of all goods covered under the said Bill of Entry were also taken which is enclosed to this certificate.

The goods imported consists of different sub-assemblies viz. Engine, Cabin ,Transmission mechanism, Chassis, Drive Shaft, etc.

1. Model 789 D Chassis bearing Serial no. **CAT0789DTSPD00973** mentioned at Sr No. 1 of the packing list and photograph of which is enclosed as P-1. The chassis is in pre-assembled condition having all cylinders, valves, hoses, pipes , hydraulic and electrical mechanism assembled together and is basically a sub-assembly of the dumper. Pre-assembled means all the parts and components of the chassis have already been assembled in assembly line of manufacturing facility to manufacture the said chassis.
2. Engine bearing Serial no. **7TR03851** mentioned at S. No. 15 of the packing list and photograph of which is enclosed as P-2. The Engine is in pre-assembled condition and is basically a sub-assembly of the dumper. It is in complete pre-assembled form although not mounted on the chassis. Pre-assembled means all the parts and components of the Engine have already been assembled in assembly line of manufacturing facility to manufacture the said Engine.
3. Transmission mechanism bearing Serial no. **D8001250** mentioned at S. No. 8 of the packing list as 'BANJO' and photograph of which is enclosed as P-3. The Transmission mechanism is in pre-assembled condition and is basically a sub-assembly of the dumper. It is in pre-assembled form although not mounted on the chassis. Pre-assembled means all the parts and components of the Transmission mechanism have already been assembled in assembly line of manufacturing facility to manufacture the said Transmission mechanism.

Continued

Seen  
05/18/21

Seen





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Sr No CE1532

DATE 04/03/2021

4. The Engine and Transmission mechanism (also called Banjo) are having unique serial no and have all the essential characteristics to be termed as Engine and Transmission Mechanism. They both are complete assemblies and same has been acknowledged by supplier allotting them description as ENGINE 7 BANJO in the packing list and the unique identification equipment number in the form of Serial Number.
5. The part mentioned at Serial No 4 of packing list as "INTAKE" are having other parts including the intake parts and many of these these parts viz. hardware, plates, tubes, flange, clamps seals etc are basically attachments of other sub assemblies which are in pre-assembled form. These attachments are required to connect the engine to other sub-assemblies of the dumper such as transmission mechanism, etc. However, Some of these parts etc have no relation whatsoever with the engine / transmission mechanism
6. Drive Shaft mentioned at S. No.14 as 'DRIVE SHAFT' photograph of which is enclosed as P-4, is basically a sub-assembly of the dumper. They are in pre-assembled form although not mounted on the chassis.
7. Engine parts mentioned at S. No. 11 of the packing list and photograph of which is enclosed as P-5. These parts viz. pipes, hoses, hardware, seals etc are basically attachments to the engine which has been imported is in pre-assembled form. These attachments are required to connect the engine to other sub-assemblies / parts of the dumper such as transmission mechanism, etc. But the pre-assembled engine will start even without these attachments in place
8. Handrails, mentioned at serial No13 of the packing list and photograph of which is enclosed as P-9, are basically safety rails on both side of ladders which is used to step up in the cabin from ground. Also packed on same pallet were Parts and photograph of which is enclosed as P-6. Some of these parts viz. hardware, plates, tubes, flange, clamps seals etc are basically attachments of other sub assemblies which are in pre-assembled form. These attachments are required to connect the engine to other sub-assemblies of the dumper such as transmission mechanism, etc. Some of these parts like mirror, instruments etc have no relation whatsoever with the engine / transmission mechanism
9. RH Platform, mentioned at serial No 10 of the packing list and photograph of which is enclosed as P-7, is also pre-assembled. It is base or platform placed above wheels on which driver cabin is mounted.
10. Fuel Tank, mentioned at serial No 12 of the packing list and photograph of which is enclosed as P-8, is use for storage and supply of the fuel.
11. F Strut mentioned at Sr no 6 & 7 of packing list, and photograph of which is enclosed as P-12 is basically a constituent of transmission system and is in preassembled form.
12. Cab or Driver Cabin, mentioned at Sr no 2 of Packing list and photograph of which is enclosed as P-10, has all the electrical circuitry, instruments panel, steering, seating, canopy etc preassembled
13. Rims- 6 nos - photograph of which is enclosed as P-11, mentioned at Sr no 3,4 and 14 of the packing list, are rims for tyre.

Contd----

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Sr No CE1532

DATE 04/03/2021

14. It is hereby certified that the goods imported vide above Bill of Entry no. 2201377 dated 01/01/2021 are not in a completely knocked down condition as there are various sub-assemblies viz. Chassis, Engine, Transmission mechanism, Cabin etc. which are combined together to erect a dumper. These sub-assemblies cannot be assembled on site but only on an assembly line in manufacturing facility.

In conclusion Engine, Transmission Mechanism, Driver Cabin, chassis main body etc are in a preassembled form but not mounted on chassis or a body assembly.

## REMARKS

- i) We have carried out thorough visual examination only from outside and after opening the item. No other test was carried out due to limitation of the premises
- ii) This Chartered Engineer's Certificate are issued without prejudice to the best of our knowledge.
- iii) This report is an evidence of our findings at the time and place of inspection our firm does not assume responsibility for physical alterations of the goods inspected which may have occurred after the date / time of inspection.
- iv) Shall this certificate be accepted/rejected by whomsoever it may be concerned with the understanding that the CE jointly or severally are not responsible for any Claims/Damages.
- v) Since the items are subject to variable opinions and conditions, this report is issued based on the documentary evidences provided and our physical inspection and findings of the items offered for our inspection at the time and place of inspection.

I hereby declare that the particulars and statements made in this certificate are true and correct.

Certified by.



*Rajendra Tambi*  
Rajendra Tambi  
Chartered Engineer

7. The Goods covered under these 02 BOE's were also found to be completely identical to each other in all aspects. In fact, the goods were covered under the same contract and have been imported in the same state of packing with the identical description. This fact was re-confirmed by Shri Ravindra Prasad, GM/Clearing and Forwarding, M/s CIL, Kolkata vide his letter dated 03.03.2021. The examination proceedings and CE Certification established that the imported goods were not in line with importer's declaration as "Caterpillar make 190T rear dumpers model 789D in CKD condition, containing all necessary components for assembling a complete vehicle as per contract having engine, gearbox and transmission mechanism not in a pre-assembled condition", as Engine, Gearbox and Transmission Mechanism were found in pre-assembled form and not mounted on chassis. Goods covered under said 02 BOE's i.e, BOE's 2201377 and 2201454 both dated 01.01.2021 (as detailed in Table- I above), were seized vide Memorandum dated 17.02.2021 under section 110 of the Customs Act,1962.

8. On request of the importer for the provisional release of the seized goods, competent adjudicating authority granted the permission for **provisional release** of the seized goods covered under said 02 BOE's i.e, BOE's 2201377 and 2201454 both dated 01.01.2021 (as detailed in Table- I above), under section 110A of the Customs Act, 1962, with condition of an execution of 100% Bank Guarantee for the differential duty amount along with bond deposition for the declared value of the seized goods.

9. The seized goods covered under stated 02 BOEs were released provisionally after the compliance of above stated conditions by the importer after due submission of Bank Guarantee issued by ICICI Bank Limited vide Ref No: 0229NDLG00007121 dated 02.03.2021 for the differential duty amount of Rs. 2,64,90,728/-and Indemnity Bond No: H-918749 dated 05.03.2021 for the assessable value of goods, Rs. 18,81,44,363/-.

10. Subsequent to the seizures and provisional release of dumpers imported vide 02 Bills of entry as mentioned in Table – I above, M/s. ECL, imported 16 more rear dumpers vide 16 bills of entry (as tabulated below in Table-II) by wrongly availing the benefit of serial no. 524(1)(a) of the Notification No. 50/2017-Customs dated 30.06.2017 as amended vide Notification No. 25/2019-Customs dated 06.07.2019. The goods were examined by SIIB (I), NCH, Mumbai and were subsequently seized. On requests of the importer for the provisional release of the seized goods, competent adjudicating authority granted the permission for provisional release of the seized goods covered under following 16 BOE's with pre-condition of an execution of 100% Bank Guarantee for the differential duty amount along with bond for the full value of the seized goods:



Table - II

Sr. No	BE no. and date	Description in the Bill of Entry	Benefit Claimed	Assessable Value (INR)	Total Duty Paid @15% BCD (INR)
1.	3012551/ 04.03.2021	CATERPILLAR 190T REAR DUMPER MODELS 789D SR.NO. SPD00990 (CKD) WITHALL NECESS COMPONENTS FOR ASSEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,31,57,895.92	4,57,59,159
2	3012552/ 04.03.2021	CATERPILLAR 190T REAR DUMPER MODELS 789D SRNO SPD00991 (CKD) WITHALL NECESS COMPONENTS FOR ASSEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,31,57,895.92	4,57,59,159
3	3012514/ 04.03.2021	CATERPILLAR 190T REAR DUMPER MODEL 789D SR.NO.SPD00989 (CKD)WITH ALL NECESS COMPONENTS FOR ASEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,31,39,688.33	4,57,50,215
4	3008225/ 04.03.2021	CATERPILLAR 190T REAR DUMPER MODEL 789D SR.NO.SPD00988 (CKD)WITH ALL NECESS COMPONENTS FOR ASEMBLING A COMPLET VEHICLE	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,31,57,895.92	4,57,59,159



5	3427195/ 03.04.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01012	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,37,23,366	4,60,36,917
6	3427247/ 03.04.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01009	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,37,23,366	4,60,36,917
7	3427248/ 03.04.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01010	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,37,23,366	4,60,36,917
8	3427250/ 03.04.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01008	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,37,23,366	4,60,36,917
9	3896691/ 10.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01029	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,44,242,18	4,63,811,76



10	3896695/ 10.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01027	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,44,24,218	4,63,81,176
11	3896698/ 10.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01030	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,44,24,218	4,63,81,176
12	3896702/ 10.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01028	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,44,24,218	4,63,81,176
13	4142519/ 31.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01045	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,36,68,691	4,60,10,061
14	4144448/ 31.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01044	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,36,68,691	4,60,10,061



15	4144526/ 31.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01042	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,36,68,691	4,60,10,061
16	4145502/ 31.05.2021	CAT 190T REAR DUMPERS 789D CKD WITH COMPONENTS FOR ASSEMBLY, ENGINE, GEAR BOX TRANSMISSION NOT PREASSEMBLED SR SPD01043	BCD @ 15% vide Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019	9,36,68,691	4,60,10,061

11. All the mentioned 16 rear dumpers imported vide above said 16 B/Es were identical to the 02 dumpers provisionally released (as per Table-I) in all aspects with an exception of one discrepancy. The discrepancy was observed in the descriptions given for initial 06 B/Es of the first 02 Lots i.e., "CATERPILLAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, SR NO SPD00 WITH ALL NECESS COMPONENTS FOR ASSEMBLING" and the description details given for last 12 B/Es imported vide 3<sup>rd</sup> lot, 4<sup>th</sup> lot and 5<sup>th</sup> lot, i.e., "CAT 190T REAR DUMPERS 789D CKD WITH COPONENTS FOR ASSEMBLY ENGINE, GEAR BOX, TRANSMISSION NOT PREASSEMBLED SR SPD00". The word "NECESS" was removed although the invoice descriptions for all these B/Es were identical with no change in description. The discrepancy was clarified from the importer's authorised CHA, M/s On Dot Express vide letter dated 24.05.2021 submitting that all imports of dumpers were same as imported in earlier consignments which were examined by Chartered Engineer. M/s ECL gave their confirmation that all imports of dumpers 190T 789D are identical and same as imported earlier.

12. Importer had claimed the benefit of Serial No: 524 (1)(a) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 claiming BCD at the rate of 15%. The examination findings along with CE reports submitted by Chartered Engineer Shri Rajendra S. Tambi, suggest that the goods shall be covered under Serial No. 524 (1)(b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019 and shall attract BCD at the rate of 25%.

13. During the course of the investigation, it was found that M/s CIL, had entered into an agreement with Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 with



M/s Caterpillar Inc and M/s GMMCO Ltd. for the import of **total 102 nos. of 190T dumpers.** On perusal of the agreement, it was seen that **84 nos. of dumpers were to be imported by M/s NCL and remaining 18 nos. were to be imported by M/s ECL.** Both M/s NCL and M/s ECL are subsidiaries of M/s CIL, which is the parent company of both of them and has administrative control of both identities. The case of both the importers were being investigated separately, as two different identities. The above referred contract was a tripartite agreement among M/s Caterpillar Inc., USA as a manufacturer, M/s GMMCO Ltd., Kolkata, as a supplier and M/s CIL, as a purchaser, wherein M/s TIFL became the supplier of goods for subject 18 Dumpers to be supplied to M/s ECL. Later, M/s CIL, issued an amendment to the contract vide Ref No: CIL/C2D/190T Dumper/R-66/17-18/A-479 dated 28.07.2020, **where the required amendment was done to amend the name of the supplier of subject goods from M/s TIFL to M/s GCPL.**

14. On perusal of the said agreement, it was found that the scope of work of supplier is given in para 5.1 under "Special Condition of Contract" and as per Para 5 of the agreement, **Rs 30,00,000/- per machine shall be paid to the supplier for the purpose of erection and commissioning.** On perusal of subject B/Es, it was ascertained that erection and commissioning charges were not added in the assessable value for the purpose of payment of customs duty and accordingly investigation was initiated for the evasion of custom duty by way of not including the erection and commissioning charges.

15. As there was mis-declaration in respect of description of goods covered under referred Bills of Entry, the **statement of Shri Harish Avadhani, Head of Commercial, Logistics and IT, M/s GCPL,** was recorded u/s 108 of the Customs Act, 1962 on 29.07.2021 wherein he inter alia stated that:-

- i. Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 was executed between M/s GMMCO Ltd, M/s CIL, Kolkata & M/s Caterpillar Inc, USA for the supply, installation, commissioning and support of Caterpillar make total 102 numbers of 190T Dumper of Model Caterpillar 789D;
- ii. Out of 102 dumpers, 84 dumpers were to be installed at different sites of M/s Northern Coalfields Limited (NCL) by another Dealer of M/s Caterpillar INC., USA i.e. M/s GMMCO Limited and 18 Dumpers were to be installed at the mining sites of M/s ECL i.e., Rajmahal, Jharkhand by his company i.e. M/s GCPL;
- iii. Amendment was made in the said contract vide Amendment -I dated 28.07.2020 vide which they were allowed to deliver 18 dumpers to M/s CIL on behalf of M/s Caterpillar Inc., USA;
- iv. M/s CIL, Kolkata is the parental company of their client **M/s ECL** and all the import formalities of M/s ECL Ltd are done by M/s **CIL, Kolkata.**



- v. They certify that all 18 dumpers are completely identical in all aspects and hence the change in description in BOEs is an inadvertent error;
- vi. M/s GCPL, recommended the appointment of CHA M/s On Dot Express to GM, Materials Management and based on this M/s CIL, Kolkata appointed and authorised the said CHA for the customs clearance of 18 dumpers of Caterpillar make 190T Dumper of Model Caterpillar 789D;
- vii. Packing lists, Invoices, Bill of Lading, Insurance Certificate and other documents are forwarded to M/s GCPL by their manufacturer M/s Caterpillar INC., USA through email and they scrutinized the documents and thereafter they forwarded the same to CHA M/s On Dot Express;
- viii. CHA, M/s On Dot Express prepared the checklist and sent the same to Shri Syamal Samantha, Chief Manager, Clearing and Forwarding, CIL, Kolkata and to M/s. GCPL also;
- ix. **All 18 Dumpers imported by M/s ECL and 84 Dumpers imported by M/s Northern Coalfields Ltd. are absolutely identical in nature with no change at all. They all have been imported in the same form also;**
- x. Claimed benefit of 15% duty in line with Notification No. 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019, availed by M/s Coal India Ltd, Kolkata, is based on the letter given by their manufacturer:
- xi. M/s GCPL has got no technical documents to justify the claims of goods imported being in CKD condition; that M/s GCPL relied on the information given by their manufacturer and proceeded with claiming benefit.
- xii. In case M/s GCPL. would not have claimed the notification benefit, M/s GCPL would have been in complete contradiction with their Principal company i.e. M/s. Caterpillar Inc, USA and further M/s GCPL would have had to pay extra duty from their own pockets; that to avoid any contradiction with their principal and to avoid financial burden upon them, they toed the line and did not pay the extra duty;
- xiii. M/s CIL, Kolkata, is the parental company of their importer, M/s ECL, vide our mail dated 11.12.2020; that benefit in all 18 B/Es has been claimed in line with Notification No: 50/2017 dtd 30.06.2017 as amended by Notification No: 25/2019 dtd 06.07.2019, for Basic Custom Duty at the rate of 15%.; that M/s GCPL, does not have any documents to support the CKD claims made in support of claimed benefit.
- xiv. M/s GCPL, did not do any verification to verify the claims; that M/s GCPL, placed an absolute reliance on the justification letter issued by their principal manufacturer M/s Caterpillar INC., USA, dated 19.04.2019 to M/s CIL, Kolkata, where M/s Caterpillar INC., USA assured that goods imported would be in CKD condition;





- xv. Rs 30,00,000/- per equipment is being paid to M/s GCPL by M/s CIL on account of being the Authorised Indian agent of M/s Caterpillar INC., USA, is going to do all the activities of erection and onsite commissioning on behalf of M/s Caterpillar INC., USA for all the 18 Dumpers to be supplied to M/s ECL and to be installed and erect at Rajmahal Mining Site.;
- xvi. M/s Caterpillar INC., USA also provides its licensed software by the name "Electronic Technician" to M/s GCPL employees, which allows them to synchronize the electric component of dumper with mechanical parts; that dealership condition and technical training by M/s Caterpillar Inc., USA, demands the presence of M/s Caterpillar INC., USA authorised dealers in India as the condition of sale for any Caterpillar products in India.

16. Further, the **statement of Shri Pratul Dev Sharma, General Manager, Materials Management Division (MM), CIL, Kolkata** was recorded u/s 108 of the Customs Act, 1962 on 06.08.2021, wherein he inter alia stated that: -

- i. Out of 102 dumpers, 84 meant for M/s NCL were to be supplied by M/s GMMCO Ltd and balance 18 meant for M/s ECL were to be supplied by M/s GCPL.
- ii. As per the contract, the supplies to M/s ECL by M/s GMMCO, were assigned to another dealer of M/s Caterpillar Inc., USA i.e, M/s Tractor India Pvt Ltd., Kolkata which later became M/s GCPL;
- iii. **All these dumpers are absolutely identical in nature in all aspects and all have been imported in the same form.** Imported dumpers have identical Packing list with same name of parts, invoices and other Specifications; that Majority of the party of dumpers have been imported with an exception of tyres and dump body as per contract;
- iv. Shri Syamal Samanta, Chief Manager, C&F Division, CIL proposed this notification benefit and the same was approved by Shri Ravindra Prasad, GM, C&F, CIL. This proposal was based upon the justification of manufacturer M/s Caterpillar Inc, USA vide Ref No: CIL/190T/Price Justification /18-19 dtd 19.04.2019, which was duly incorporated in our Tripartite agreement contract No: CIL/C2D/190T/ Dumper/R-66/17-18/153 dated 02.12.2019 on page No: 27; that the same fact about the condition of goods being imported was repeated by supplier M/s GCPL in its letter dated 16.04.2021; that apart from justification letter by their manufacturer ,Caterpillar Inc, USA with Ref No: CIL/190T/Price Justification /18-19 dtd 19.04.2019 conforming the state of shipment, there was no other documentary proof till the execution of contract.



17. Further, the **Statement of Shri Syamal Samanta, Chief Manager, Clearing and Forwarding (C&F), CIL, Kolkata** was recorded u/s 108 of the Customs Act, 1962 on 06.08.2021, wherein he inter alia stated that: -

- i. His department, Clearing and Forwarding Department of M/s CIL was responsible for filing the above said BOEs on behalf of its subsidiaries;
- ii. He processed the import documentation of M/s ECL for all 18 BOEs;
- iii. M/s GCPL, provided the import documents like Packing List, Invoice and Bill of Ladings on behalf of manufacturer M/s Caterpillar Ltd., USA to M/s CIL;
- iv. M/s CIL is further provided with the checklist for respective B/Es from their authorised CHA M/s On Dot Express, which was authorised by M/s CIL on M/s GCPL recommendation; that his department scrutinized the submitted checklists and various entries and gave the final approval for filing BOEs
- v. Once the B/Es are filed, M/s CIL on behalf of M/s ECL, pays the duty; that Change in description given in BOE for last 12 B/Es was not observed by M/s CIL in scrutiny and the same came to their notice only after examination of cargo by Customs Authorities ; that their CHA M/s On Dot Express submitted a clarification for the same vide its letter dated 24.05.2021; that M/s CIL had no intention to evade duty as their manufacturer has been giving the same descriptions in all invoices;
- vi. That for the claimed benefit M/s CIL solely relied on the justification and certificates submitted by their manufacturer M/s Caterpillar Inc, USA along with shipping documents i.e, Bill of Ladings and Invoices for each consignment conforming the state of shipment; that M/s CIL didn't conduct any other verification from its side.

18. The **Statement of Shri Sharad Mohan, Custom Broker- M/s On Dot Express**, was recorded u/s 108 of the Customs Act, 1962 on 09.08.2021, where he inter alia stated that:-

- i. M/s On Dot Express was authorised by M/s CIL to arrange custom clearance for 18 BOEs in total, imported for their subsidiary M/s ECL;
- ii. Advance sets of documents were given prior to arrival of shipment by Shri Syamal Samanta, Chief Manager, Clearing and Forwarding, M/s CIL to prepare the checklist for filing of BOEs and the same was sent on mail to Shri Syamal Samanta, Chief Manager, Clearing and Forwarding, M/s CIL for the purpose of approval of CTH, Description and Benefit of Claimed Notification;
- iii. Once the approval and concurrence received the BOEs were submitted to department and then M/s CIL on behalf of M/s ECL, pays the duty;
- iv. These dumpers are absolutely identical in nature as they all have same model and similar packing list and invoices;



- v. The change in the description for last 12 B/Es was proposed by him vide his mail dated 01.04.2021, in line with importer's instruction to file item description in BOE should be as per shipping document only;
- vi. Shri Syamal Samanta, Chief Manager, Clearing and Forwarding, M/s CIL approved the new description vide his mail dated 03.04.2021, advising them to file BOE as per new declaration since it is in line with BL; that Shri Syamal Samanta, Chief Manager, Clearing and Forwarding, M/s CIL approved the new description vide his mail dated 03.04.2021;
- vii. Official of M/s GCPL, Shri Tuhin Ray, was also the recipient of description change mails dated 01.04.2021 and subsequent approval mail from Shri Syamal Samanta, Chief Manager, Clearing and Forwarding, M/s CIL 03.04.2021;
- viii. These dumpers are identical; the shown CE Inspection reports can be applied for all 18 imported dumpers;
- ix. Goods are not eligible for the claimed benefit and needs to be reclassified attracting higher rate of duty of 25 percent in line with Sr. No. 524(1)(b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019;
- x. Importer has not given any documents to him for submissions in technical support of their claimed duty benefit or challenged the department technical findings.

19. To get clarity about the technical aspect of imported goods from Importer, the **Statement of Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, Kolkata** was recorded u/s 108 of the Customs Act, 1962 on 24.08.2021, wherein he inter alia stated that: -

- i. Contract No: CIL/C2D/190T/ Dumper/R-66/17-18/153 dated 02.12.2019 was issued for procurement of the requirement of M/s CIL subsidiaries i.e, M/s ECL and M/s Northern Coalfields Ltd (M/s NCL) of total 102 numbers of Caterpillar Make 190T Rear Dumpers Model 789D;
- ii. Out of 102 dumpers, 84 were meant for M/s NCL to be supplied by M/s GMMCO Ltd and balance 18 were meant for M/s ECL to be supplied by M/s GCPL; that all these 18 dumpers have been imported in the same manner as all dumpers have identical packing lists, invoices and other details;
- iii. Vide the said B/Es Majority portion of dumpers have already been imported, with its parts having essential characteristics for the intended performance;
- iv. He can't comment on goods being imported in Completely Knock Down (CKD) condition and he got no documentary submission for the same;
- v. His purview covered the technical specifications of contract only and goods being imported in CKD condition is not covered under



- vi. All dumpers are identical and hence technical inspection reports by Chartered Engineer given for 02 dumpers can be applied for all ordered 102 dumpers including these 18;
- vii. He is in conformity with the conclusions drawn in Chartered Engineer reports for Engine and drive shaft with them being in standalone units and in pre-assembled form; that they are also being given unique serial numbers to be identified as Engine and Driveshaft and have got all the essential characteristics to be identified as engine and Driveshaft;
- viii. Parts mentioned as "Engine part" appears to be external attachments to the engine; that Engine and drive shaft with them being in standalone units and in pre-assembled form and not fitted or mounted on the chassis.

20. Importer placed reliance on the technical advice of the supplier and mentioned the same at page no. 27 of the contract executed between importer, supplier and manufacturer vide Contract No. CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019, stating that "In case, at the time of importation or subsequently, if the BCD for equipment is levied more than 15% for the CKD condition of import, the differential amount along with interest, penalty etc. will have to be paid by M/s GMMCO Limited.,". Vide an Amendment dated 28.07.2021, M/s CIL assigned the supplies of requirement of M/s ECL to M/s GCPL, (new name of M/s Tractor India Pvt Ltd). The same amendment obligates M/s GCPL to abide with every condition of the said Contract.

21. **Findings of investigation : Therefore, from the statements recorded and stated above, it can be inferred that:**

(i) From the above submissions of Shri Harish Avadhani, Head of Commercial, Logistics and IT, M/s GCPL, it appears that Rs. 30,00,000/- per equipment paid to M/s GCPL by M/s CIL for the purpose of erection and commissioning of imported dumpers, fall under the ambit of Condition of Sale and hence needs to be included in the declared assessable value. It also appears that despite having no proof in support of the claimed CKD form of imported goods, supplier proceeded with the claimed benefit for the imported goods in line with Serial No: 524 (1) (a) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019 claiming BCD at the rate of 15% on the basis of declaration of goods as "CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION" to avoid paying extra duty. Shri Harish Avadhani, Head of Commercial, Logistics and IT, M/s GCPL, has clearly stated that Rs. 30,00,000/- per equipment is to be paid to M/s GCPL by M/s CIL on account of being the Authorised Indian agent of M/s Caterpillar INC., USA. M/s GCPL, is going to do all the activities of erection and onsite commissioning on behalf of M/s Caterpillar



INC., USA for all the 18 Dumpers to be supplied to M/s ECL. The presence of an authorised agent of M/s Caterpillar Inc., is essential on account of a technical expertise provided by M/s Caterpillar Inc., to its agents and hence the service on account of this expertise and payment for the same falls under the category of CONDITION OF SALE. This submission established the fact that Rs. 30,00,000/- paid to M/s GCPL by M/s CIL is to be included in declared assessable value.

(ii) From the above statement of Shri Pratul Dev Sharma, General Manager, Materials Management Division (MM), CIL, Kolkata, it appears that 102 dumpers imported by M/s ECL and M/s NCL are identical in all aspects. It further appears that M/s CIL has no documentary proof or any other evidence to support their submission of imported goods being in CKD condition and also does not have documents to support duty benefit claimed.

(iii) From the above Statement of Shri Syamal Samanta, Chief Manager, Clearing and Forwarding (C&F), CIL, Kolkata it appears that, M/s CIL, Kolkata is responsible for proposing the duty benefit vide the said notification for all 18 B/Es without having any documentary evidence and technical documents. It is to be concluded that all these dumpers are absolutely identical in nature in all aspects and all have been imported in the same form. Imported dumpers have identical Packing lists with the same name of parts, invoice and other Specifications. Majority of the parts of dumpers had been imported with an exception of tyres and dump body as per referred contract. M/s CIL conducted no verification on its part to ascertain the claims made by manufacturer and supplier.

(iv) From the above statement of Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, Kolkata, it is concluded that Engine and drive shaft are standalone units and are in pre-assembled form. They are also being given unique serial numbers to be identified as Engine and Driveshaft and have got all the essential characteristics to be identified as engine and Driveshaft. It further appeared that parts mentioned as "Engine part" appears to be external attachments to the engine. These submissions clearly invalidate the importer's claim for benefit under Serial No. 524 (1)(a) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 and are liable to be charged BCD at the rate of 25% under Serial No. 524 (1)(b) of said notification. Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, Kolkata, mentioned that operational usage and other technical parameters are being verified by the authorized inspecting engineers of the subsidiary. This submission further cements the fact that the process of importation is completed only after the Acceptance Test by the importer of erected dumpers. This evidence shows that erection and commissioning is a practice undertaken before acceptance test and above is a condition of sale and the cost for the same is Rs. 30,00,000/- per equipment, that needs to be included in the declared assessable value of all the imported dumpers.



(v) Therefore, from the statements as referred above, it could be concluded that supplier M/s GCPL, chose not to disclose the correct form of imported goods i.e., Engine, Gearbox and Transmission Mechanism being in pre-assembled form, to avoid payment of extra Customs Duty in line with Serial No. 524 (1) (b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019. The Erection and Commissioning charges were cited as post-importation charges and hence were not added in declared assessable value. However, M/s Caterpillar INC., USA does provide specialised training, technology and material to M/s GCPL, for the purpose of erection and commissioning of imported dumper units. Therefore, such charges are part of the contract and one of the conditions of sale of the goods.

**22. Following facts and finding were also unearthed during the course of investigation:**

(i) M/s Caterpillar INC., USA authorised their Indian Agent M/s GMMCO Limited to submit the bid and to sign the contract against the tender issued by M/s CIL. Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019, which was executed among M/s GMMCO Ltd, M/s CIL, Kolkata & M/s Caterpillar Inc, USA. This contract was executed in reply to a tender that was awarded to manufacturer via M/s GMMCO Limited, the supplier, for the supply, installation, commissioning and support of Caterpillar make 102 numbers of 190T Dumper of Model Caterpillar 789D. Out of these, 84 dumpers were to be installed at different sites of Northern Coalfields Limited (NCL) by M/s GMMCO Limited. **Remaining 18 Dumpers were to be installed at the project sites of M/s ECL, by another Dealer of M/s Caterpillar INC., USA i.e., M/s GCPL, which was earlier known as M/s Tractors India Private Limited (TIPL).** M/s CIL, being the parent company of M/s NCL and M/s ECL, awarded this contract for the importation of 102 Dumpers, executed between M/s GMMCO Ltd, M/s CIL, Kolkata & M/s Caterpillar Inc., USA. These dumpers will be supplied to different project sites of M/s CIL mining sites like Khadia, Amlori, Jayant, Rajmahal, Nigahi, Dudichua and others in varied quantities.

(ii) Vide its letter dated 11.04.2019 with Ref No: CIL/C2D/190T Dumper/R-66/17-18/43, M/s CIL sought justification for the query that equipment's under contract will be imported in Completely Knocked Down kit under chapter heading 87041010 to be read with Notification No. 50/2017 dated 30.06.2017. The Importer also laid down the condition that at the time of importation or subsequently, the correct rate of BCD happens to be more than 15%, the differential amount along with interest, penalty etc., will be paid by the supplier.

(iii) In reply to the said query supplier M/s Caterpillar INC., USA issued a letter dated 19.04.2019 with Ref No: CIL/190T/price Justification/18-19 stating that the machines would be shipped in completely disassembled conditions in 20-25 packages. M/s Caterpillar INC., USA further confirmed that offered supply will be received in completely knocked down



condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition. M/s Caterpillar INC., USA stated that:

*"The machine will be invoiced, dispatched and shipped in above said condition and will be delivered on CIF basis hence forth will be cleared by their dealer M/s GMMCO Limited".*

(iv) M/s Caterpillar INC., USA confirmed the dispatching of invoice in line with its justification dated 19.04.2019, however no conclusive documentary evidence has been submitted to justify the description for imported goods. M/s Caterpillar INC., USA submission that machines will be shipped in completely disassembled conditions in 20-25 packages, found to be in contravention with packing list for the respective import's invoices as there was only 15 Packages per equipment in every packing list.

(v) Based on M/s Caterpillar Inc., USA, letter dated 19.04.2019, M/s GMMCO Limited has certified vide their letter dated 27.04.2019 and gave an undertaking that in case, at the time of importation or subsequently, the correct rate of BCD happens to be more than 15%, the differential duty amount along with interest, penalty etc, will be paid by M/s GMMCO Limited.

**23. As per the CE Certificates and above referred statements, it appears that engine, drive- shaft and transmission mechanism were in pre-assembled form and not mounted on a chassis. The same fact is further confirmed by the following facts:**

(i) All the packing lists have declared the engine as a single sub-assembly with specific serial numbers.

(ii) All the packing lists have declared BANJO i.e. transmission mechanism as single sub-assembly with specific serial numbers.

(iii) The Chartered Engineers have certified that i.e., engine, gearbox and transmission mechanism are in pre-assembled form.

(iv) Engine parts mentioned in invoices are only attachments as certified by Chartered Engineer.

(v) Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, was in agreement with the conclusions drawn for Engine and driveshaft by Chartered Engineer that both are standalone units and are in pre-assembled form.

(vi) The clause of contract as referred above clearly shows that the importer and supplier had thread bare scrutiny of the conditions of the notification before executing the contract. The supplier was well aware about the facts that the engine, gearbox and transmission mechanism were imported in pre-assembled form only.



24. From the perusal of the Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019, if engine or gearbox or transmission mechanism are in pre-assembled form and not mounted on chassis then the same shall be covered under Serial No. 524(1)(b) of the Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019.

25. The importer had themselves certified in their packing list that engine and transmission mechanism i.e., Banjo, have attained their essential characteristics as both are provided with unique serial numbers. Since essential characteristics have already been attained by engine and transmission mechanism then it appears that the same were in pre-assembled form.

26. The manufacturer of goods M/s Caterpillar Inc., USA, in all its invoices has declared that engine, gearbox and transmission mechanism are not in pre-assembled condition. However, the packing list issued by the supplier clearly identifies the engine, Banjo (Transmission Mechanism) and gearbox as a pre-assembled unit. It is evident that manufacturer, M/s Caterpillar Inc., has manipulated the invoices with the intention to avoid Custom duty.

27. The manufacturer of goods had categorically stated in the Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 that dumpers will be supplied in a completely knock down condition with engine, gearbox and transmission mechanism not in a pre-assembled condition but still instead of complying with the agreement, the manufacturer has contravened the conditions of contract and imported engine, gearbox and transmission mechanism in a pre-assembled condition

28. M/s GCPL, was the Indian dealer of goods on behalf of the manufacturer. Therefore, M/s GCPL was responsible for providing services on behalf of the manufacturer to the importer and its subsidiaries. M/s GCPL, has not supplied the goods in terms of conditions of their contract which states that goods shall be supplied as *"Caterpillar make 190T rear dumpers model 789d in CKD condition, containing all necessary components for assembling a complete vehicle as per contract having engine, gearbox and transmission mechanism not in a pre-assembled condition"*. However, they have supplied the goods with engine, gear box and the transmission mechanism in pre-assembled form/condition. Thus, mis-declared the goods for undue duty exemption benefit. They were also helping the importer in preparation of customs documents and clearance of goods. They were fully aware regarding agreement and mis-declaration in invoices. Thus, they claimed the wrong benefit of exemption notification by resorting to mis-declaration of goods.





29. The importer in respect of the said 16 Bills of Entry also, as tabulated above under Table- II, mis-declared the goods as to be not in the pre-assembled condition. However, during the examination of the goods under Panchnamas dated 19.03.2021, 16.04.2021, 25.05.2021 and 15.06.2021, the engine, gearbox and transmission mechanism were found in pre-assembled condition and hence to be covered under Serial no. 524 (1) (b) of the Notification no. 50/2017-Customs attracting a higher rate of BCD (@25% as against the claimed 15%. Thereby, the goods covered in respect of these 18 Bills of Entry, were seized under Section 110(1) of the Customs Act, 1962 vide seizure memorandums dated 19.03.2021, 16.04.2021, 25.05.2021 and 15.06.2021. The subject goods covered under the above referred 16 BOEs were identical in nature, description and state of packing to the goods covered under the BOEs referred in Table-I for which the Chartered Engineer has given the certification, stating that the Engine, Transmission Mechanism and Driveshaft are in pre-assembled form and that subassemblies if combined together with Engine, Transmission Mechanism and Driveshaft would erect a dumper.

30. On the request of the importer, the adjudicating authority has allowed provisional release of the seized goods covered under 16 bills of entry also (as detailed in Table – II above), on submission of bond equal to the value of the seized goods and bank guarantee equal to the differential duty. M/s. ECL, Furnished Bank Guarantee no. 0229NDLG00012421 dated 23.03.2021 of Rs. 5,24,63,962/- issued by ICICI bank, in respect of Bills of Entry mentioned at serial no. 1 to 4 of Table – II above. Bank Guarantee No:0006NDLG00019522 of Rs. 5,27,85,000/- dated 29.04.2021 issued by ICICI Bank, in respect of Bills of entry mentioned at serial no. 05 to 08 of Table- II above. Importer further submitted Bank Guarantee No:0006NDLG00043022 of Rs. 5,31,79,720/- dated 09.06.2021 issued by ICICI Bank, in respect of Bills of entry mentioned at serial no. 09 to 12 and Bank Guarantee No: 0006NDLG00054522 of Rs. 5,27,54,208/- dated 28.06.2021 issued by ICICI Bank, in respect of Bills of entry mentioned at serial no. 13 to 16 of Table- II above.

31. **Erection and Commissioning:** Following facts and submissions on record, substantiate that Rs. 30,00,000/- per equipment paid by importer to supplier against the cost of erection and commissioning, should be added in the declared assessable value:

(i) As per said contract Rs. 30,00,000/- per equipment was to be paid for erection and Commissioning charges per equipment, which is included in the composite contract but not in the declared assessable value. The contract price is on CIP (Cost Insurance Paid to) basis, that is the final place of destination. Therefore, the erection and Commissioning charges become part of CIP basis price, which evidences that the erection and Commissioning is related to the goods imported and delivery of the goods is to be taken only after erection and commissioning activity.



(ii) The agreement is for the supply, installation and Commissioning of equipment and not for equipment supply only, thus goods imported were to be installed and commissioned to execute the contract in totality. The erection, testing and commissioning, has been defined as incidental services in the agreement. It has been specifically written that the supplier shall be responsible for erection and commissioning within 30 days of receiving the equipment at site. It further states that if supplier fails to commission the equipment within the specified period then liquidated damages will be recovered at the rate of 0.5% of the landed price of the equipment along with accessories per week or part thereof for the delayed period subject to maximum of 5% of the landed price of equipment along with accessories.

(iii) The contention by importer for non-inclusion of erection and commissioning charges on account of it being a post-importation activity does not hold ground due to the fact that import on CIP basis stands completed with the change of ownership of goods from SUPPLIER to IMPORTER, after the delivery of dumpers at the selected site of importer after due erection and commissioning. The liability of supplier till the place of delivery is established by the "Delivery Terms" (at Page:35 of contract No: CIL/C2D/190T/Dumper/R-66/17-18/153 dated 02.12.2019 Tri-party agreement amongst CIL, M/s Caterpillar Inc., USA and M/s GMMCO Limited, Kolkata.).

(iv) The process of importation is completed only after the Acceptance Test by the team of M/s CIL hence it can be inferred that the erection and commissioning service was the condition of sale of imported goods and the cost for the same needs to be included in declared assessable value.

32. During the course of investigation, M/s CIL deposited the differential amount of duty for dumpers in question (18 for M/s ECL) vide its letter dated 24.09.2021 along with DD:931721 dated 20.09.2021 for an amount of Rs. 23,76,73,616/- and Payment Challan No: 54 dated:27.09.2021.

33. **Conclusions of Investigation :** Therefore, from the investigations conducted by SIIB (I), NCH, Mumbai, it appeared that:

(i) The goods imported under total 18 B/E's {02 B/Es (as detailed in Table - I above, plus 16 BOE (as detailed in Table- II above), seized and subsequently provisionally released} filed by M/s ECL, were not as per their declaration and mis-declared as "CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION". However, goods found were having pre-assembled engine, gearbox and transmission mechanism, which were not eligible for notification benefit as claimed vide Sr. No. 524 (1)(a) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019. Therefore, the goods



are liable for confiscation under section 111(m) of customs Act 1962. BCD @25% is leviable on goods as per Sr. No. 524 (1)(b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019. The importer along with supplier, has wilfully mis-stated in their invoices along with B/Es. Since there is wilful mis-statement of facts in declared invoices and B/Es therefore differential duty is demandable under Section 28(4) of Customs Act, 1962. Accordingly, importer is also liable for penal action under section 114A of Customs Act, 1962. Further, during the examination, it was ascertained that engine and transmission mechanism has been given a specific number. The above facts were not declared either by supplier or importer to department. Therefore, they have knowingly used invoices with wrong declaration for importation of dumpers. Thus, they are liable for penalty under section 114AA of Customs Act, 1962.

(ii) During investigation it came on record that the importer, supplier and manufacturer are in absolute collusion to submit wilful misstatement by suppressing the facts about the form/nature of goods and thereby claimed the undue notification benefit. Therefore, this act of omission and commission on their parts rendered the goods liable for confiscation under section 111(m) of the Customs Act, 1962.

(iii) The supplier M/s GCPL, has not supplied the goods in terms of conditions of their contract which states that goods shall be supplied as "*in completely knocked down condition containing the necessary components, parts or sub-assemblies, for assembling a complete unit with engine, final drive and transmission mechanism not in a pre-assembled condition*". However, they have supplied the goods with engine, gear box and the transmission mechanism in pre-assembled form/condition. Thus mis-declared the goods for undue duty exemption benefit and abetted in the omission and commission in collusion with the importer and rendered the goods liable for confiscation under Section 111 (m) of the Customs Act 1962. Therefore, the M/s GCPL has rendered themselves liable for penal action under Section 112(a) of Customs Act, 1962. M/s GCPL (the Indian authorized dealer/supplier on behalf of the manufacturer M/s Caterpillar Inc, USA), has intentionally made use of false and incorrect documents in collusion with the importer M/s ECL, to avail undue advantage of BCD exemption by resorting to mis-declaration of goods. Therefore, the M/s GCPL has rendered themselves liable for penal action under section 114 AA of Customs Act, 1962, also.

(iv) The Cost of erection and commissioning charges were not included in the declared assessable value as per their contract. Such payments from the purchaser to the supplier are being made in relation to the expertise provided by manufacturer to importer, through their authorised supplier and hence the cost of erection and commissioning deemed to be the CONDITION OF SALE of the imported goods, by the buyer to a third party to satisfy an obligation of the seller. This clearly indicate that value declared for all the imported consignments are not true transaction value as the cost of erection and commissioning have



not been included in declared assessable value. The Rule 10 of CVR 2007 clarifies that – *“Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.”*. Therefore, the declared value of all the imported consignments (as per Annexure-I) are liable to be rejected in terms of section 12 of CVR 2007.

(v) The wilful mis-declaration and suppression of facts for claim of undue notification benefit led to evasion of Custom Duty of Rs 26,42,17,615/- as detailed in Annexure-I of subject SCN, which was liable to be recovered under section 28(4) of Customs Act, 1962, along with applicable interest under section 28 (AA) of Customs Act, 1962.

#### **34. Roles played by involved Entities:**

(i) It was alleged that the importer, M/s ECL, submitted the incorrect description for the subject 18 B/Es and availed the undue duty exemption. The Importer was not sure about the form/nature of imported goods and the importer kept on enquiring the supplier and manufacturer for the same. Importer also tried to shrug off its responsibility by placing the clauses in said contract that if the payment of liability of increased duty happens to be more than 15%, M/s GCPL has to pay the same. This clause proves that the importer was aware about the conditions of notification well before the goods were imported. The importer was well aware that payment of cost of Erection and Commissioning charges i.e., Rs. 30,00,000/- per equipment was one of the conditions of sale purchase as per their contract and the same was includible in the assessable value under Rule 10 (1)(e) of CVR, 2007. However, they did not include it in the value with sole intention to evade the applicable customs duty.

(ii) Further, it was alleged that the supplier, M/s GCPL, acted in connivance with the manufacturer and provided the materials to enable the importer to file the wrong description of the imported goods. For the purpose of duty evasion, the supplier and manufacturer provided wrong information in the import documents such as mis-declaring the form/nature of imported goods to fit into the claimed notification. Neither the Importer M/s ECL nor the supplier M/s GCPL and the manufacturer could provide any document, establishing that the Engine, Transmission Mechanism and Driveshaft are not in pre-assembled form as they have declared. Therefore, the supplier M/s GCPL and the importer M/s ECL, both wilfully suppressed the fact and mis-declared the goods (Engine, Transmission Mechanism and Driveshaft) that imported goods are not in pre-assembled form. The CE reports, visual inspection and the photographs brought out in para 6 above unassailably establishes that the Engine, Transmission Mechanism and Driveshaft, are in pre-assembled form. Further M/s GCPL would provide all the technical assistance for assembling and commissioning of the dumpers, on behalf of the manufacturer M/s Caterpillar Inc., USA and for such activities M/s GCPL would charge Rs 30,00,000/- per equipment from the importer. It also appears that the



manufacturer M/s Caterpillar Inc., USA has supplied the goods on the condition that the technical assistance would be provided by the supplier M/s GCPL against the payment. Therefore, the charges received by the M/s GCPL towards the erection and commissioning would fall under the ambit of conditions of sale. Therefore, Rs 30,00,000/- per equipment paid by the importer to M/s GCPL towards erection and commissioning charges, is includable in the assessable value. Such charges, is one of the condition of sale of goods to the importer and cannot be claimed as payment towards post importation activities.

35. Accordingly, the Show Cause Notice dated 26.11.2021 was issued vide F. No. CUS/SIIB/INT/18/2021-SIIB-O/O-COMMR-CUS-IMP-I-ZONE-1-MUM and M/s Eastern Coalfields Ltd. and M/s Gainwell Commosales Pvt. Ltd., were called upon to Show Cause to the Commissioner of Customs (Import-I), New Custom House, Ballard Estate, Mumbai - 400001, as to why:

**For M/s. ECL (Noticee-1):**

(i) The benefit claimed @15% BCD under Serial No. 524 (1) (a) Notification No: 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019 should not be denied for the goods covered under 18 BOE's (Provisionally released, as per Annexure-I of SCN) and higher rate of BCD @ 25% should not be charged under Serial No. 524 (1) (b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019.

(ii) The erections and commissioning charges of Rs. 30,00,000/- per unit should not be included in the declared assessable value of all 18 BOE's (Provisionally released, as per Annexure-I of SCN) in line with Rule 10 of CVR, 2007;

(iii) The declared assessable value in respect of 18 BOE's (Provisionally released, as per Annexure-I of this SCN) should not be rejected in terms of Rule 12 of CVR, 2007;

(iv) The declared assessable value in respect of 18 BOE's should not be re-determined as Rs. 1,74,20,22,839/- (as per Annexure-I of SCN) under Section 14 of the Customs Act, 1962 read with the Rule 10 (Determination of value of imported goods) of Customs Valuation Rules, 2007;

(v) The differential duty of Rs 26,42,17,615/-, for the goods covered under 18 BOE's (Provisionally released, as per Annexure-I of SCN) should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the said Act;

(vi) The amount of Rs 23,76,73,616/- paid vide DD:931721 dtd 27.09.2021 should not be appropriated against the total differential duty demand of Rs 26,42,17,615/-, for the goods covered under 18 BOE's (Provisionally released, as per Annexure-I of SCN);



(vii) The Bank Guarantees deposited for the total amount of Rs 23,76,73,618/- submitted at the time of provisional release of the goods covered under 18 BOE's (Provisionally released, as per Annexure-I of SCN) should not be encashed and the amount if so recovered, should not be appropriated against the duty demand, interest, fine and penalty.

(viii) The goods covered under 18 BOE's (Provisionally released, as per Annexure-I of SCN), having re-determined assessable value of Rs 1,74,20,22,839/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962;

(xi) Penalty should not be imposed on M/s. ECL, under Section 114A of the Customs Act, 1962 for evasion of duty by wilful mis-statement and suppression of facts and/or under Section 112(a) of the Customs Act, 1962 for rendering the goods liable for confiscation under Section 111(m) of the Customs Act, 1962.

(x) Penalty should not be imposed under section 114AA of the Customs Act, 1962 for wilfully and intentionally making use of false and incorrect documents by resorting to mis-declaration of the description of the goods.

**For M/s. CIL (Noticee-2)**

No charge has been levelled against them in the SCN.

**For M/s. GCPL (Noticee-3):**

(i) Penalty should not be imposed on M/s GCPL, under Section 112 (a) of the Customs Act, 1962 for their act of omission and commission in mis-declaring the goods, rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962.

(ii) Penalty should not be imposed on M/s GCPL, under Section 114AA of the Customs Act, 1962 for intentionally making use of false and incorrect documents by resorting to mis-declaration of goods.

**36. Summary of Investigation Conducted in respect of identical goods imported by sister concern company i.e. M/s Northern Coalfields Limited of Noticee-I.**

36.1 M/s Coal India Limited (Parent Company of NCL and ECL) entered into an agreement vide Contract No. CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 with M/s GMMCO Ltd(Supplier in case of NCL) and M/s Caterpillar (Manufacturer) for the supply, installation, commissioning and support of caterpillar make 102 numbers of 190T dumper of Model Caterpillar 789D(identical in all aspects). Out of these 102 Dumpers, 84 dumpers were to be imported by M/s NCL and remaining 18 dumpers were to be imported by M/s ECL. In respect of dumpers being imported by M/s NCL, SIIB(I), received an intelligence that M/s NCL is misusing and wrongly availing benefit of Notification No.



50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019. Thereafter, SIIB(I) after conducting an investigation in respect of the following 76 bills of entry (50 BOE already cleared and 26 provisionally released) imported by M/s NCL, issued a SCN dated 27.05.2021.

Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date
1	9284011/ 23.10.20	20	7770981/ 29.05.20	39	8418004/ 09.08.2020	58	9106188/ 08.10.20
2	9284020/ 23.10.20	21	7770990/ 29.05.20	40	8418008/ 09.08.2020	59	2190772/ 31.12.2020
3	9284056/ 23.10.20	22	7770999/ 29.05.20	41	8418021/ 09.08.2020	60	2190860/ 31.12.2020
4	9284063/ 23.10.20	23	7771004/ 29.05.20	42	8418027/ 09.08.2020	61	2190888/ 31.12.2020
5	9284073/ 23.10.20	24	7771009/ 29.05.20	43	8687732/ 03.09.20	62	2191115/ 31.12.2020
6	9284075/ 23.10.20	25	8022753/ 29.06.2020	44	8687827/ 03.09.20	63	2191250/ 31.12.2020
7	9284079/ 23.11.2020	26	8022759/ 29.06.2020	45	8687947/ 03.09.20	64	2191355/ 31.12.2020
8	9284087/ 23.11.2020	27	8022764/ 29.06.2020	46	8688075/ 03.09.20	65	2191409/ 31.12.2020
9	7527056/25 .04.20	28	8022767/ 29.06.2020	47	8688226/ 03.09.20	66	2191493/ 31.12.2020
10	7559096/ 30.04.20	29	8022774/ 29.06.2020	48	8688356/ 03.09.20	67	2641738/ 05.02.2021
11	7559587/ 30.04.20	30	8022777/ 29.06.2020	49	8688471/ 03.09.20	68	2641755/ 05.02.2021
12	7559833/ 30.04.20	31	8022779/ 29.06.2020	50	8688562/ 03.09.20	69	2641786/ 05.02.2021
13	7559941/ 30.04.20	32	8022785/ 29.06.2020	51	9096282/07. 10.20	70	2641804/ 05.02.2021
14	7560376/ 30.04.20	33	8417892/ 09.08.2020	52	9101824/ 08.10.20	71	2641805/ 05.02.2021
15	7560435/ 30.04.20	34	8417915/ 09.08.2020	53	9102742/ 08.10.20	72	2642117/ 05.02.2021
16	7560670/ 30.04.20	35	8417939/ 09.08.2020	54	9103237/ 08.10.20	73	2967221/ 01.03.2021
17	7770956/ 29.05.20	36	8417951/ 09.08.2020	55	9107488/ 08.10.20	74	2967224/ 01.03.2021



18	7770962/ 29.05.20	37	8417963/ 09.08.2020	56	9107046/ 08.10.20	75	2967276/ 01.03.2021
19	7770975/ 29.05.20	38	8417995/ 09.08.2020	57	9105642/ 08.10.20	76	2967278/ 01.03.2021

36.2 Further, SIIB(I) in respect of the following 08 bills of entry (provisionally released) of the same contract, imported subsequently by M/s NCL, issued a SCN dated 08.07.2021 on the same ground to earlier SCN dated 27.05.2021.

Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date	Sr. No.	BoE No. / Date
1	3387131/01 .04.2021	3	3387841/01. 04.2021	5	3907456/1 1.05.2021	7	4112486/28.05.2 021
2	3387385/01 .04.2021	4	3387842/01. 04.2021	6	3908511/1 1.05.2021	8	4112662/28.05.2 021

36.3 Both the SCNs dated 27.05.2021 and 08.07.2021 have already been adjudicated by the Commissioner of Customs, Import-I, NCH vide Order in Original dated 25.05.2022. Operative portion of the said order is reproduced below:

i. *I reject the benefit claimed @15% BCD under Serial No: 524 (1) (a) Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019, for the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] and order for assessment of the said 84 Bills of Entry at higher rate of BCD @ 25% under Serial No. 524 (1) (b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019.*

ii. *I order that erections and commissioning charges of Rs.30,00,000/- per unit is to be included in the declared assessable value of all 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] in line with Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.*

iii. *I order for re-determination of the declared assessable value of Rs.8,00,82,42,472/- in respect of 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated*





08.07.2021)] to Rs.8,26,02,42,472.10, under Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.

iv. I confirm the demand and order for recovery of the differential duty of total Rs.128,68,24,528/-, for the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] under Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the said Act. I appropriate the duty of Rs. 112,75,60,539/- for 84 nos. of 190 T dumpers paid by the importer after the issuance of the Show Cause Notices towards the recovery of the confirmed differential duty as above.

v. I order for confiscation of the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)], having re-determined assessable value of Rs 8,26,02,42,472.10 under Section 111(m) of the Customs Act, 1962. However, I give an option to the importer to redeem the above said goods on payment of Redemption Fine of Rs. 6,00,00,000/- (Rupees Six Crores only) under Section 125 of the Customs Act, 1962.

vi. I impose a penalty equal to the short paid duty and interest upon the importer, M/s NCL, under Section 114A of the Customs Act, 1962, provided that where such duty and interest, is paid within thirty days from the date of assessment, 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.

vii. I impose penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s. Northern Coalfields Limited under Section 114AA of the Customs Act, 1962.

viii. I order encashment of the Bank Guarantees deposited for the total amount of Rs.34,30,42,161/- submitted at the time of provisional release of the goods covered under 26 BOE'S (as detailed in para 1 and Table- II above) and Rs. 10,51,82,469/- submitted at the time of provisional release of the goods covered under 08 Bills of Entry (as detailed in Table – III above), towards the duty, interest, redemption fine and penalty imposed on the importer, M/s NCL.

ix. I impose penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s GMMCO Ltd, Kolkata under Section 112 (a) of the Customs Act, 1962 for their act of



*omission and commission in mis-declaring the goods, rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962.*

x. *I impose a penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s GMMCO Ltd, Kolkata under Section 114AA of the Customs Act, 1962.*

36.4 In the present case, 18 dumpers imported by M/s ECL under the same contract are identical in all aspect with 84 dumpers imported by M/s NCL as stated by Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, Kolkata and Shri Harish Avadhani, Head of Commercial, Logistics and IT, M/s GCPL during their statement recorded under Section 108 of the Customs Act, 1962.

**37. RECORD OF PERSONAL HEARING OF NOTICEES , CROSS EXAMINATION OF WITNESSES & SUBMISSIONS OF NOTICEES.**

37.1 Personal hearing was granted on 28.02.22 by my predecessor Commissioner to M/s ECL (Noticee-1) and its holding company, M/s CIL (Noticee-2) and M/s GCPL. (Noticee-3). During the personal hearing dated 28.02.2022, M/s Shetty, Malhotra & Associates, Advocates, representatives of Noticee-1 and the Noticee-2 requested for cross-examination of 6 persons - Shri Rajendra S. Tambi, C.E., Shri M. Vairamohan, CE, Shri Bablu Porel, Retired GM (Excavation), Engineering and Equipment Division(EED), M/s CIL, Kolkata, Shri Sharad Mohan, Customs Broker- M/s On Dot Express, Shri Pratul Dev Sharma, GM, CIL, Shri Harish Avadhani, Head (Commercial), M/s GCPL and further vide letter dated 01.07.2022 requested for cross examination of Shri Mahesh Chandra Singh, H Card Holder, Customs Broker- M/s On Dot Express. Cross Examination of all the above mentioned persons was allowed. M/s GCPL vide their letter dated 22.02.2022 requested for cross-examination of Shri Rajendra S. Tambi, C.E, Shri Sharad Mohan, Proprietor, Customs Broker-M/s On Dot Express, Shri Bablu Porel, Retired GM (Excavation), Engineering and Equipment Division(EED), M/s CIL, Kolkata and Shri Harish Avadhani, Head (Commercial), GCPL and the same was allowed..

37.2 Accordingly, cross-examinations of the following persons were conducted by the representatives of the Noticees as mentioned in Table below:

Sr. No.	Name of the person	Date on which cross-examination conducted by M/s ECL/CIL or its representatives	Date on which cross-examination conducted by M/s GCPL or its representative
1.	Shri M. Vairamohan, C. E.	22.03.2022 (at 12.30 hrs)	Did not request for the cross-examination



2.	Shri Bablu Porel, Retired General Manager (Excavation), Engineering and Equipment Division, CIL, Kolkata	23.03.2022 (at 11.45 hrs)	11.07.2022 at 1330 hrs
3.	Shri Rajendra S. Tambi, C.E.	27.04.2022 at 13.30 hrs and 09.03.2022 (In the case of M/s NCL)	04.04.2022 at 1300 hrs and 27.04.2022 at 1300 hrs
4.	Shri Harish Avadhani, Head (Commercial), M/s GCPL	27.04.2022 at 1200 hrs	05.04.2022 at 1200 hrs
5.	Shri Sharad Mohan, Customs Broker, Proprietor, M/s On Dot Express	30.06.2022 at 1327 hrs	30.06.2022 at 1554 hrs
6.	Shri Pratul Dev Sharma, GM (Materials Management ), CIL	30.06.2022 at 1200 hrs	Did not request for the cross-examination
7.	Shri Mahesh Chandra Singh, Customs Broker, M/s On Dot Express	14.09.2022 at 1130 hrs and 29.09.2022 12:30 hrs	Did not request for the cross-examination

37.3 Further, the cross examination of Shri Vikas Bhardwaj, Senior Intelligence Officer of SIIB (I) was not allowed by the adjudicating authority as he was only investigating the matter and his statement itself was not recorded or relied upon in the SCN.

37.4 After completion of the cross examination of the persons as mentioned above, opportunities for personal hearing were granted to all the noticees.

37.5 Shri L.S. Shetty, Advocate and Shri Darshan Bafna, Advocate, M/s Shetty, Malhotra & Associates, appeared before me on behalf of the Noticee-1 and Noticee-2 for the personal hearings dated 28.10.2022, 09.11.2022 and 21.11.2022 and submitted their written replies 28.10.2022 and 21.11.2022 respectively. Shri Arvind Baheti, Advocate, M/s Khaitan & Co., appeared before me on behalf of Noticee-3 for the personal hearing dated 28.10.2022 and reiterated their already submitted submissions dated 17.08.2022.

**38. Summary of Various Submissions made by M/s ECL & M/s CIL (noticee-1 and noticee-2):-**

38.1 Noticee-1 and Noticee-2 submitted that Department, while issuing the SCN in this case, fell into a grave error by misreading and misconstruing the true meaning and purport of the Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019, by illegally alleging or projecting that even the said 3 parts of the dumpers, that is Engine, Gearbox and Transmission Mechanism should also be imported in CKD condition, which is impossible to comply with by any importer, since such Engine, Gearbox and Transmission Mechanism which are manufactured in the assembly line of the factory abroad, can only be imported in un-assembled form, i.e. different assemblies thereof are imported



separately as provided under the Notification in this case and then to re-assemble in India by making the Engine functional and workable. This is what exactly the Notification contemplates and provides for. However, the Customs in this case, unfortunately misread and misconstrued the said Entry at 524(1)(a) to mean that not only the dumpers are required to be imported in CKD condition, but also Engine, Gearbox and Transmission Mechanism also required to be imported in CKD condition. Further, they submitted their detailed submission on the following points:-

**38.1.1 Engine, Gearbox and Transmission Mechanism are not in a pre-assembled condition**

(i) Having regard to the wording of the Notification, it is clear that the goods imported are eligible for the benefit of the Notification under Clause (1)(a) of Entry 524. The fact that the dumpers have been imported in CKD condition and its Engine, Gearbox and Transmission Mechanism not in Pre-assembled condition is supported by the **Certificate dated 02.11.2020 of Chartered Engineer, Shri Vairamohan.**

(ii) Opinion on CAT 190T Dumper - dated 17.02.2022 by IIT, Kharagpur, clearly and unequivocally certifying the fact that the said 3 parts of the Dumpers in question – Engine, Gearbox and Transmission Mechanism are **imported in unassembled form** and not in Pre-assembled condition.

(iii) In this context it is worthwhile to place on record the fact that import of an engine “not in pre-assembled condition”, simply means importing the engine without the main sub-assemblies attached to it. The following are the main assemblies of a Dumper-Engine :-

(i) Radiator; (ii) Cooling line connection; (iii) Air intake connection; (iv) Hydraulic lines & Harness connection; (v) Engine Harness connection; (vi) Hardware for connection; (vii) Exhaust line connection and; (viii) Air filter assembly.

Admittedly, none of the above assemblies were attached to the imported dumper-engines and each of the said assemblies are imported as parts / components. In such a case, the Ld. Commissioner is not justified in alleging in the SCN that the engine, gearbox and transmission mechanism have been imported in pre-assembled condition and not in un-assembled form.

(iv) Even with respect to the Certificates issued by Shri Rajendra S. Tambi, Chartered Engineer, now it has come on record his clear-cut admission that for issuing the Certificates by him to the Customs Department, he had carried out only visual examination of the goods covered by 6 Bills of Entry on 9.11.2020 and 19.11.2020. He gave 6 separate Certificates, though identical in all respects. As per these certificates, the goods covered by the 6 Bills of Entry are not in a completely knocked down condition. Para 13 of each of the certificates may be referred to in this connection.



(v) It is very pertinent to submit here that a perusal of page 3 of the said certificates shows the 'Remarks' and the Serial No. 1 of the remarks reads as follows: -

*"1) We have carried out thorough visual examination only from outside after opening the item. No other test was carried out due to limitation of the premises".*

From the above remarks, it is abundantly clear that only visual examination of the goods was carried out.

(vi) It is also submitted that Shri Rajendra S. Tambi, Chartered Engineer was cross-examined by the Advocates of M/s. GMMCO Ltd. before the Ld. Commissioner during the Adjudication proceedings held in the case of NCL. Answer to question No. 17 is very significant. Both the question and answer are reproduced below:

*"Q 17: I am showing you complete engine part list of the dumper engine which is required to assemble an engine. Can you confirm that all these parts have been pre-assembled or not in the engine.*

*Ans: Since I have seen the engine from outside and not opened the engine, I cannot confirm whether all these parts were inside the engine or not"*

(vii) It is therefore, the admitted position that the goods were not properly examined physically by the said Chartered Engineer before he proceeded to conclude in his Certificates that the Engine, Gearbox and Transmission Mechanism are in pre-assembled condition. **He admits that the same were examined visually from outside without opening the items.**

(viii) In this context it is worthwhile to refer to the case of **Talwar Bros. (P) Ltd. Vs. Collector of Customs – 1992 (59) ELT 323 (T)** decided by the Hon'ble Tribunal, where the issue involved was whether the wood product sought to be exported was finished product or not. The Addl. Commissioner who adjudicated the case, on inspection of the goods, came to the conclusion that the product was still in the primary stage referred to as sawn timber and hence concluded that the exporter has misdeclared the goods. Consequently he ordered confiscation of the goods. In appeal before the Hon'ble Tribunal, it was held that since the order is passed on visual examination by the Addl. Collector, the same cannot be upheld. In rendering this decision, the Hon'ble Tribunal took into consideration the observations of the Hon'ble Bombay High Court in the case of **Karendra Kumar & Co. Vs. Shahapurkar – 1989 (42) ELT 381 (Bom).**

(ix) In view of the above, it is submitted that there is no merit in the SCN issued in this case, since the Customs Department erred in **relying upon the C.E. Certificates of Shri Rajendra S. Tambi and by rejecting the earlier Certificates issued by Shri M. Vairamohan**, which are true and genuine.

(x) In this context, it is worthwhile to place on record for clearing the doubts on the part of the Customs Department that a decision rendered by the Hon'ble Tribunal in the case of



**BMW India Pvt. Ltd. Vs. Commissioner of Customs, Chennai-V as reported in 2019 (366) ELT A28 (Tri-Chennai)** does not at all support the Customs Department for substantiating the allegations made out in this SCN. On a complete perusal of the entire judgment, it would be clear that factually that case cannot be fitted into the present case. In the present case, as seen from the packing list, both engine and transmission mechanism have been brought along with their constituent parts for making them fully assembled. From the facts of the BMW case, however, it is seen that both engine and transmission mechanism were brought as single products. Therefore, ratio of that case is not at all applicable to the present case.

### **38.1.2 COMPLAINTS LODGED BY TATA HITACHI THE L-2 BIDDER: -**

(i) In this context, it is quite significant and germane to place on record the fact that during the course of finalization for award of the Contract in this case of import of 102 numbers of Rear Dumpers, the L-2 Bidder, viz: M/s. TATA Hitachi Construction Machinery Company Private Limited ("TATA Hitachi", for short) who lost the contract, tried their level best to stall the award of Contract to the successful bidder – Caterpillar Inc, USA and their local Suppliers, viz. GMMCO Ltd. It is a matter of fact that the said TATA Hitachi lodged as many as 3 Complaints, one after another alleging impossibility of the dumpers being imported in CKD condition, as quoted by the successful bidders – Caterpillar Inc, USA and GMMCO Ltd., Kolkata. As required and mandated clearly by the relevant directions and circulars issued by the Government of India, the CIL referred the said Complaints to the Panel of Independent External Monitors (IEMs) of CIL, who are appointed by the Central Vigilance Commission (CVC), New Delhi and whose role is to ensure the transparency, fairness and objectivity in the tendering process of CIL.

(ii) It is very pertinent to submit here that while rejecting the said series of the baseless Complaints lodged by the L-2 Bidder, one after another, running into as many as 3, all shot on mere assumptions and presumptions for their self-serving purpose, the IEMs, however, specifically came to the conclusion that there was no merits whatsoever, in all the 3 Complaints lodged by the L-2 Bidder and advised the CIL for the purpose of protecting its interest, to consider stipulating of a specific clause in the Contract to be entered into with M/s. GMMCO Ltd. and the Manufacturer - Caterpillar Inc., USA, providing that if at the time of importation of dumpers or subsequently, the Basic Customs Duty to be levied by the Customs is more than 15% as claimed by them in their bid, on account of the condition of import as quoted in their bid and as confirmed by Caterpillar and GMMCO, such additional duty, beyond 15% BCD would be borne by GMMCO, in line with the undertaking already furnished by them.



**38.1.3 ILLEGAL DENIAL OF PRE-NOTICE CONSULTATION BY THE COMMISSIONER TO CIL, WHICH IS NOT INVOLVED IN ANY COLLUSION, ETC.**

(i) CIL and its advocates were orally informed by the Ld. Commissioner that the Proviso to Section 28(1)(a) is not applicable to this case, since there is collusion / willful mis-statement / suppression of facts involved in this case and thus the case falls under Section 28(4) of the Customs Act, 1962, to which Pre-Notice Consultation is not applicable. As there is no question of any collusion or willful mis-statement or suppression of facts committed by the CIL or its subsidiaries and thus their case cannot fall under Section 28(4) of the Customs Act, 1962 as falsely alleged by the Department in this case. Under such circumstances, the Authority ought to have issued notice u/s.28(1) of the Act before drawing an erroneous conclusion of collusion. Further, for the said obvious reason, there is no order to that effect passed by the Authority although the said objection was raised in writing and by oral submissions at the preliminary stage. Reliance placed on Judgment dated 20.09.2022 passed by the Hon'ble Delhi High Court in the case of **M/s. Victory Electric Vehicles International Pvt. Ltd. vs. Union of India and Anr.**

**38.1.4 Denial of Cross examination of Shri Vikash Bhardwaj, SIO.**

(i) It is submitted that during the course of the adjudication proceedings, both the Hon'ble Commissioners, that is your goodself in this case of ECL and your predecessor-Commissioner who has already adjudicated the 2 SCNs issued to NCL, have allowed cross-examinations of all the witnesses whose statements were recorded and are relied upon in this Show Cause Notice issued to ECL, as well as the other 2 SCNs issued to NCL, including one Rajendra Tambi, Chartered Engineer, whose reports were subsequently requisitioned by the Customs during the investigations stage. Unfortunately, however, your goodself as well as your predecessor-Commissioner have illegally rejected the cross-examination of Shri Vikas Bhardwaj, Senior Intelligence Officer (SIO) of SIIB-Import Customs, who is the Investigating Officer of this case and the one who recorded the statements of 5 witnesses relied upon in this SCN issued to ECL and 4 witnesses relied upon in the 2 SCNs issued to NCL as stated hereinabove, using inducement and/or duress or threat on such witnesses.

**38.1.5 Proper Officer to issue Show Cause Notice under section 28 of Customs Act, 1962: -**

(i) It is submitted that the "proper officer" to issue Show cause notice under Section 28 of the Customs Act, 1962 is the Officer who had assessed and cleared the goods at the first instance. This has been so held by the Hon'ble Supreme Court in the case of **Canon India Pvt. Ltd. V/s. Commissioner of Customs reported in 2021 (376) ELT 3(S.C.)**.

(ii) In view of the above judgement, **the Commissioner is not the proper Officer** and hence he could not have issued the Show cause notice, for he is not legally competent. This



submission was already canvassed before the Ld. Predecessor Commissioner at the time of hearing before him of NCL SCNs as well as in the written submissions filed therein. However, the Commissioner has held that he is competent to issue the Show cause notice in terms of Section 5(2) of the Customs Act, 1962. It is submitted that this finding of the Ld. Commissioner is legally incorrect and runs contrary to the ratio decided in the above-mentioned judgement recently echoed by the Hon'ble Supreme Court.

**38.1.6 ALLEGATION OF COLLUSION SANS ANY EVIDENCE CIL IS A GOVT. OWNED COMPANY:**

(i) **Mere clearance of goods by relying on a particular Chapter/Entry of the Notification itself would not involve any collusion**, even if the importer gains/saves some customs duty benefit as a result of relying on such different classification. This has been clearly demonstrated by the abovesaid order passed by the Hon'ble Delhi High Court in the case of M/s. Victory Electric Vehicles International Pvt. Ltd. vs. Union of India and Anr.

(ii) The descriptions given in the Bs/E that the 3 items were not in Pre-assembled Condition, was based on the bona fide belief that the documents furnished by manufacturer and the Supplier represented the correct and true state of affairs. On the mere ground that a Clause 7.5 has been inserted in the Contract to that effect. It is only for protecting the financial interest of CIL and the Government of India. The said Clause No. 7.5 does not in whatsoever manner depicts or even hints at any type of collusion between the CIL on one side and the Suppliers with the Manufacturers on the other side.

(iii) In the present case the department having been satisfied itself about the self-assessment undertaken by the importer, did not resort to the action as provided under the said provisions of Section 17 of Customs Act. In the light of this, it is submitted that there was no collusion, or mis-declaration or wilful suppression of facts, whatsoever, on the part of the importer.

(iv) Without Prejudice to the afore stated grounds, it is respectfully submitted that Customs cannot allege collusion, or making any wilful mis-statement or suppression of facts, without there being the mens rea on the part of the importer—CIL/ECL.

(v) It is submitted that the nomenclatures used in Section 28(1) & (4) of the Customs Act, 1962, namely "Collusion", "Wilful Mis-statement" and "Suppression of Facts" are the strong words having serious implications, thereby warranting to be construed strictly in the matter of Interpretation of Penal Statute like the Customs Act.

(vi) The issue as to what would amount to wilful mis-statement or suppression of fact has been dealt with by the Supreme Court in **Uniworth Textiles Ltd. v CCE, Raipur (2013) 9 SCC 753: 2013 SCC** wherein it has been held that mere nonpayment of duties is not





equivalent to collusion or wilful mis-statement or suppression of facts, otherwise there would be no situation for which ordinary limitation period would apply.

### 38.1.7 EXPERT OPINION GIVEN BY IIT-KHARAGPUR DISPROVES THE CUSTOM'S ALLEGATIONS

(i) In this context, kind attention is invited to the Expert Opinion rendered by IIT Kharagpur on 17.02.2022 clearly certifying the fact that the said 3 parts of the Dumpers viz. Engine, Gearbox and Transmission Mechanism imported in this case are **un-assembled parts** and not pre-assembled condition, as wrongly and falsely claimed by the Department in the SCNs. Here below reproduced is the said Opinion with the conclusions drawn by the IIT – Kharagpur in its detailed Report drawn at the request of the CIL for finding out the factual position of the pre-assembly status of the imported dumpers

(ii) It is submitted that the expert opinion rendered by IIT Kharagpur in this case cannot be brushed aside lightly in the absence of a contrary expert opinion obtained by the Customs Department. This is supported by the judicial outlook propounded by the Hon'ble M.P. High Court as reported in 1992 (62) ELT 241 (M.P.) in the case of **Panama Chemical Works Vs. Union of India**. In this context it is also worthwhile to refer to and rely upon the ratio decided by the Hon'ble Tribunal in the case of **Unibourne Food Ingredients LLP vs. Commissioner of Customs, Jamnagar (Prev)** in Customs Appeal No. 10680 of 2020. Further reliance placed on **Uni Colloide Impex Pvt. Ltd., Vs. Commissioner of Customs, Mumbai**.

### 38.1.8 BURDEN OF PROOF LIES ON THE DEPARTMENT

(i) It is submitted that the burden of proof lies on the Department, which has not been discharged by the Customs in this case. The Apex Court time and again enunciated this principle in hosts of cases. Reliance is placed on judgement of *Vinod Solanki vs. Union of India and Anr. (2008) 16 SCC 537* and judgement in *Uniworth Textiles Ltd. v CCE, Raipur*. Uniworth Textiles is decided under Section 28 of the Customs Act itself, clearly mandating that the Burden of Proof is on the Customs Department while alleging collusion, mis-declaration, etc.

### 38.1.9 JUDICIAL OUTLOOK ON INNOCENT IMPORTERS, WHO ARE NOT RESPONSIBLE FOR ANY COLLUSION

(i) Following Judgments passed by the Hon'ble Supreme Court, High Courts and the CESTAT, clearly holding that every importer who acted bona fidely and in good faith, rather becoming a scapegoat of the illegalities committed by the third parties, cannot be made liable for the Mandatory Penalty under section 114A of the Customs Act, 1962:-

- A. C.C., ICD, Tughlakabad, New Delhi vs. Orient Ceramics and Industries Ltd.  
on 5 April, 2016.



- B. Sirthai Superware India Ltd vs Cc (Nhava Sheva-iii) Mumbai on 10 October, 2019
- C. Graphite India Ltd. vs. Commissioner of Customs (Port), Kolkata
- D. Metal Ore vs. Commissioner of Customs (Import), Mumbai

(ii) It is, therefore, submitted that CIL being a totally innocent party, without having been involved itself in any Customs Duty evasion case, even if the Supplier and Manufacturer were to be ultimately held liable for their failure to prove the fact of unassembled form of the 3 parts.

#### 38.1.10 ABSOLUTELY NO CASE ON VALUATION ANGLE PAYMENT OF ERECTION & COMMISSIONING CHARGES REPRESENTS POST-IMPORTATION ACTIVITY

(i) In this regard, it is submitted that the Customs Valuation Rules, 2007 mandate that where the declared value is sought to be rejected by the Department, then the value shall be determined by proceeding sequentially in accordance with Rules 4 to 9 of the Rules. The Show Cause Notice in this case, however, straightaway seeks to add to the declared value, the cost of erection and commissioning which is not permissible in law.

(ii) As per the statutory provisions relating to Valuation of Goods, it can be summarized that charges towards post importation activity such as erection and commissioning of the imported goods is not liable to be included in the valuation of imported goods for computing Customs duty, unless such post-importation activity is a condition of sale for the imported goods.

(iii) It is submitted that the Show Cause Notice Proceeds on the erroneous footing that since the employees of M/s. GMMCO Ltd./ GCPL are being provided specialized training and technology by M/s. Caterpillar Inc. for the purpose of erection and commissioning of the goods, it is deemed to be a condition of sale.

(iv) It is submitted that the Show Cause Notice blissfully ignores the fact that the erection and commissioning of the goods, in this case Dumpers imported in CKD condition are post importation activities. These charges have no bearing on the transaction value of the goods. In this connection, reliance is placed on the decision of the Hon'ble Tribunal in the case of **Bharat Aluminum Co. Ltd.** vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri) decided on 23.04.2019 and the judgement of the Hon'ble Supreme Court in the case of **Tata Iron & Steel Company Ltd.** vs. Commissioner of Central Excise & Customs, Bhubaneshwar reported in 2000 (116) ELT 422 (SC).



39. Summary of Submissions of M/s GCPL (Noticee-3)

39.1 M/s Khaitan & Co., Advocates on behalf of the Noticee-3, submitted their written reply dated 17.08.2022 on the following points:

39.1.1 The Notice is ex-facie bad in law for the reason that no pre-consultation was carried out:-

(i) Vide Circular No. 1053/02/2017-CX Dated 10 March, 2017, the Central Board of Indirect Taxes and Customs has issued instructions in respect of Show Cause Notices, adjudication and recovery thereof. Vide paragraph 5.0 thereof, it was stated that pre Show Cause Notice consultation was mandatory where the demand of duty is greater than Rs. 50 Lakhs.

(ii) Similar as *supra* was again **reiterated** vide **Circular No. 1076/02/2020-CX dated 19 November 2020** by the Central Board of Indirect Taxes and Customs, at paragraph 4 thereof.

(iii) In the present case, **no pre-consultation proceedings** have been carried out by the customs department prior to issuance of the Notice, which is mandatory.

39.1.2 Without prejudice, the Notice is ex-facie bad in law for the reason that it is wholly without jurisdiction: -

(i) Hon'ble Supreme Court in *Canon India Private Ltd. vs Commissioner of Customs* [2021 SCC Online SC 200] has held the phrase "the proper officer" occurring in Section 28(4) of the Customs Act, 1962 is akin to a power of re-assessment and hence, only the officer who has the power of assessment or has actually caused assessment is entitled to seek recourse of demand notice under Section 28(4) of the Customs Act, 1962.

(ii) Therefore, the inevitable conclusion is that the Notice is sans jurisdiction and for this reason alone, deserves to be dropped forthwith.

39.1.3 In addition to *supra*, the Notice seeking to demand duty in respect of ten finally assessed and released consignments is also sans jurisdiction and bad in law

(i) The Notice impugns ten (10) dumpers which have been provisionally released but finally assessed **without considering request of "First Check"**, In terms of Section 46 of the Customs Act, 1962 every importer is required to make entry of the goods by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed forms and subscribe to a declaration as to the truth of the contents of such bill of entry. However, where he is unable to furnish all the requisite particulars at the goods the proper officer may, pending the production of such information, permit him, previous to the entry thereof, to examine the goods in the presence of an officer of customs. **In other words, where examination is sought by the importer before assessment, (i.e. First Check Assessment),**



it cannot be said that the importer has subscribed to a declaration as to the truth of the contents of such bill of entry. In the present case, the importer has sought First Check and therefore, there was no declaration as to the truth or accuracy of the particulars of the goods.

#### 39.1.4 Probity of the evidence relied in the Notice

(i) The chartered engineer, Rajendra Tambi was of the view that the engine and transmission mechanism as imported was in a pre-assembled state but not mounted on the chassis. The reasoning at arriving such conclusion was that all parts and components have already been assembled on the assembly line and leftover parts are in the nature of ancillary equipments only.

(ii) However, it is submitted that the said reports are absolutely and unequivocally unreliable as evidenced from the cross-examination proceedings conducted on 04 April 2022 and 27 April 2022.

(iii) Rajendra Tambi has in his **cross examination** stated clearly that BANJO is a sub-assembly of the transmission mechanism and further, a transmission mechanism would be said to be pre- assembled only if driveshaft and gearbox are connected together. This is absolutely contrary to what has been stated in the reports relied upon in the Notice. Hence, in so far allegation of transmission mechanism being pre-assembled is concerned, the same is absolutely false and consequently, reliance placed thereon in the Notice is unsustainable in law.

(iv) Even in respect of the engine, Rajendra Tambi has stated on 04.04.2022 as thus during the cross-examination:

*Q.47 In as much as imported engine is concerned, can it function without a radiator?*

*Ans. The imported engine can start but it cannot run the dumper without a radiator.*

*Q.51 A machine is always designed for its optimal performance for desired function. Can you describe the desired function of the imported engine? Can the imported engine be said to be complete if it fails to perform desired function?*

*Ans. Imported engine is used for powering the dumper. No, in present condition, the inspected engine cannot cool or power the dumper for long.*

(v) It is submitted that there is no mention of gearbox in the Chartered Engineer's report. However, in the foregoing statements he has, without even physically examining the gearbox and without the knowledge of the gearbox being imported, stated that that the imported gearbox is in pre-assembled condition. Thereafter, being reminded that the gearbox was not part of his report, he stated that he does not recall and have to look at his working notes



However, on 27.04.2022, he states that his working notes were in his mobile phone and he has lost his mobile phone and even being a professional empanelled with Customs authorities and issuing the reports aware of the consequences and importance of working notes, he has not maintained another physical or electronic copy of such working notes on the basis of which such allegations were made. This in itself shows the callous and negligent manner in which he has issued his findings and for the various inconsistencies as detailed supra, no reliance can be placed thereon. The same deserves to be discarded forthwith.

(vi) No reliance can be placed on the statements of Sharad Mohan, Harish Avadhani and Bablu Porel to fasten allegation of mis-declaration of the imported goods as either they are not domain experts or have retracted/contradicted their statements during cross-examination.

**39.1.5 That the imported goods are eligible to benefit of Notification No. 50/2017 under Sr. No. 524(1)(a)**

(i) It is undisputed that the description does not qualify the meaning of the words "engine", "gearbox" or "transmission." In this regard, no reference can be drawn to the Customs Tariff which is applicable to classification of these items. In other words, engine and engine parts which are generally covered by Heading 84.07 or Heading 84.09 of the Customs Tariff and gearbox and transmission equipment which is generally covered by Heading 84.83 cannot be read as a limiting scope to interpreting the text of Sr. No. 524 of the Notification No. 50/2017.

(ii) The above is for the reason that Sr. No. 524 of the Notification No. 50/2017 is an exemption notification issued under Section 25 of the Customs Act, 1962 and as held by the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai vs Dilip Kumar & Company [2018 (361) ELT 577 (SC)]*, any exemption notification is to be strictly interpreted and there is no place for intendment in the same. Further reliance is placed on the judgement of the Hon'ble Supreme Court in *Jain Engineering Co. Vs Collector of Customs [1987 (32) ELT 3 (SC)]*.

(iii) Therefore, basis the averments supra, it is an inescapable conclusion that the remit of the words "engine", "gearbox" and "transmission" cannot be limited to their customs classification and therefore, are to be understood in their common parlance. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in **United Offset Process Pvt. Ltd. vs Asst. Collector of Customs, Bombay & Ors. [1989 Supp. (1) SCC 131]**.

(iv) Further to supra, it is submitted that **Sr. No. 524 of the Notification does not define or provide implicitly any guidance of what constitutes "pre-assembled."** In the absence of any such statutory guidance, recourse has to be made to dictionary meanings of judicial precedents.



(v) In this regard, reference is drawn to the meaning of "pre-assembled" as given in Merriam Webster dictionary which reads as "having been assembled in advance". Therefore, as an example, for an engine to not be in a pre-assembled condition, what is required is that the engine is not assembled in advance. As the meanings suggest, the determining factor must be whether the engine in itself is complete and assembled or not.

(vi) In this regard, further reference is made to illustrated Oxford Dictionary which defines "engine" as "a mechanical contrivance consisting of various several parts working together, esp. as a source of power". Similarly, the Concise Oxford English Dictionary defines "engine" as "a machine with moving parts that converts power into motion".

(vii) Further reference is made to order dated 17 September 2018 of the Hon'ble CESTAT, Chennai in Appeal No. C/40966/2015 (BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V) wherein identical entry contained in Sr. No. 344 of Notification No. 12/2012-Cus dated 17 March 2012 was the subject matter of interpretation.

(viii) From the above, what can be discerned is that for an engine, gearbox or transmission to be treated as not pre-assembled, it is crucial that all essential/integral parts which render these items complete in all respects save for any connecting or mounting parts, should be absent. In other words, if the said item is not capable of functioning by itself without any other item, it would not be pre-assembled. Therefore, the correct determination of pre-assembled under Sr. No. 524 of Notification No. 50/2017-Cus dated 30 June 2017 is whether an engine, transmission or gearbox can function *sans* introduction of any other part or item or component. As has been exhaustively explained in the averments *supra*, **the imported goods are not capable of functioning by themselves and hence, are not functional in nature.** Reliance in this regard is placed on the judgement of the Hon'ble Supreme Court in *J.B.A. Printing Inks Ltd. vs Collector of Central Excise [2000 (115) ELT 24 (SC)]* wherein it was held that an engine is non-functional without a radiator and hence, being a part, is essential to the engine.

(ix) Juxtaposing *supra* against the facts, it is essential that the condition of the goods at the time of import impugned in the Notice be determined first. The dumpers in question are imported in a completely knocked-down condition, a fact which is undisputed in the Notice, and each dumper is imported in fifteen (15) different packages, details of which are *infra* which can also be seen from a bare perusal of the packing list.

(x) Whether engine is in pre-assembled condition:

i. In view of the above legal and factual analysis, it needs to be evaluated as to whether the engine is in the pre-assembled condition or not. It is an admitted fact that cooling



(radiator), air intake line, exhaust line and engine harness are not pre-assembled to the engine assembly and therefore, the question arises as to whether cooling (radiator), air intake line, exhaust line and engine harness are parts of the engine or not.

ii. At this juncture, it is also appropriate to submit that technical requirement of the engine are provided in Clause 4.1 of the Tender documents dated 26 March 2018 as extracted below:

#### 4.1 Engine

The dumper shall be powered by a direct injection 4-stroke Diesel Engine of not less than 1300 kW net power measured between 1700 and 2200 r/min according to ISO 9249. The engine shall be provided with 24V electrical starting, dry type 2 stage air cleaner with dust evacuator, dust level indicator and 2 stage fuel filter with water separator.

The engine shall have a water jacket cooling system, thermostatically controlled, using an engine driven water pump, with the cooling water re-circulated through a heavy-duty radiator. The system shall be capable of providing sufficient cooling to allow the dumper to continuously operate at full rated output at the maximum ambient temperature. The radiator cap shall be fastened with the body with the help of suitable capacity chain/locking arrangement.

iii. Similarly, Technical Specification of the Contract as per Clause 4.1 is as below:

The dumper shall be powered by a Caterpillar make, 3516B EUI model direct injection 4-stroke Diesel Engine of 1335 kW net power measured at 1750 r/min according to ISO 9249. The engine shall be provided with 24V electrical starting, dry type 2 stage air cleaner with dust evacuator, dust level indicator and 2 stage fuel filter with water separator.

The engine shall have a water jacket cooling system, thermo-statically controlled, using an engine driven water pump, with the cooling water re-circulated through a heavy-duty radiator. The system shall be capable of providing sufficient cooling to allow the dumper to continuously operate at full rated output at the maximum ambient temperature. The radiator cap shall be fastened with body with the help of suitable capacity chain/locking arrangement.

iv. It is an undisputed fact that cooling device i.e. radiator, which is part of technical specification of the engine as per tender as well as contract has been shipped separately and would be assembled at site by the engineers of the Noticee.



v. As radiator is a part of the engine specification as per tender as well as contract documents entered between parties who regularly deals in the subject goods, it must be held that in common parlance, radiator is part of the engine.

vi. Noticee further submits that engine number is engraved on the engine block at the time of casting itself. Further, each and every engine shipped by Caterpillar was assembled and tested in the factory and dis-assembled for shipment. Thus, engine block bears a unique engine number which by no stretch of imagination could be construed as engine in pre-assembled condition.

(xi) Whether transmission mechanism is in pre-assembled condition:

i. It is submitted that the transmission mechanism is a mechanism to transmit power generated by the engine to the wheels in a controlled manner. Such is the definition in the Oxford Dictionary as also Merriam-Webster. "transmission" as defined in the Dictionary of Automotive Engineering (2<sup>nd</sup> ed.) by Don Goodsell is as follows:

*"transmission (1) Mechanical unit containing a manual or automatic change-speed gear system and associated actuating machinery. (2) Collective term for the components such as clutch, gearbox, driveshaft, whereby power is transmitted from the engine to driven wheels"*

The definition extracted above clearly shows that driveshaft is an integral component of a transmission mechanism and is integral to the same.

ii. Juxtaposing this against the facts, it is an undisputed fact that the drive shaft, which is an essential, integral part of the transmission mechanism failing which the mechanism is inoperable has been imported in a separate box and is not integrated/ connected/ mated to the BANJO, which has been said to be the transmission mechanism in the Notice.

iii. In view of the above, it is submitted that allegation in the Notice that the transmission mechanism is in a pre-assembled condition is factually wrong. The inescapable and terse conclusion is that the transmission mechanism is not in a pre-assembled condition at the time of import.

(xii) Whether Gearbox is in pre-assembled condition:

i. The Notice alleges that the drive shaft is a mechanical gear box in pre-assembled condition. It is submitted that the drive shaft does not have any gear and therefore, cannot be considered as gearbox *simpliciter*. A gear box is the part containing gears, i.e., the equipment that changes the relation of the engine speed with the speed of the wheels. It is undisputed that the driveshaft does not have any gears and neither does it control any such relationship. A driveshaft is a *simpliciter* device that transfers the mechanical power of torque and rotation from the engine to the wheels. Hence, by no stretch of imagination can the same be termed as a gearbox.





(xiii) In view of the above, it is submitted that neither engine nor transmission mechanism is in pre-assembled condition

39.1.6 Without prejudice to the above, there is no mis-declaration in terms of Section 111(m) of the Customs Act, 1962.

(i) The Notice proposes confiscation and penalties under the extant provisions of the Act for the reason that the imported goods have been mis-declared which attracts Section 111(m) thereof.

(ii) Without prejudice to the above, even if without admitting, it is presumed that impugned goods are not eligible to benefit of the Notification No. 50/2017 under Sr. No. 524(1)(a), it is submitted that there is no mis-declaration. A bare perusal of the text of Section 111(m) of the Customs Act, 1962 reveals that the same is attracted in the event if goods do not correspond in value or any entry made under the Customs Act, 1962 only. "Entry" has been defined in Section 2(16) of the Customs Act, 1962 as ""entry" in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84."

(iii) It is submitted that there was no claim of the goods being pre-assembled or not in the entry made in the Bills of Entry for the first two lots of imports. For this purpose, the packing list and/ or invoice or other import documents such as the Bill of Lading are absolutely irrelevant. Therefore, on first principles itself, Section 111(m) of the Customs Act, 1962 is inapplicable in the present case for the reason that the entry made under Section 46 of the Customs Act, 1962 in the Bill of Entry is correct and the goods imported actually match the description.

(iv) It is further submitted that as the importer has sought First Check Assessment for the goods covered under ten (10) Bills of Entry [Lot No. 1 to 3 of Annexure-1 to the Notice], it cannot be said that the importer has subscribed to a declaration as to the truth of the contents of such Bills of Entry as required under Section 46(4) of the Customs Act, 1962. In absence of declaration to truth or accuracy of the particulars of the goods, charge of mis-declaration under Section 111(m) of the Customs Act, 1962 cannot be sustained.

(v) In addition to *supra*, it is further submitted that mere claiming of an exemption notification or a concession notification does not amount to mis-declaration under Section 111(m) of the Customs Act, 1962 as held by the Hon'ble Supreme Court in *Northern Plastic Ltd. vs. Collector of Customs & Central Excise* [1998 (101) E.L.T. 549 (S.C.)].



**39.1.7** No penalty is imposable under Section 112(a) of the Customs Act, 1962

(i) It is submitted that allegations under Para 33.ii of the notice can be put into two categories as below:

- (i) Wrong description of the imported goods in the invoice with respect to nature of the assembly of engine, transmission mechanism and drive shaft to enable importer to claim ineligible benefit of the Notification under Sr. No. 524 of Notification No. 50/2017-Cus dated 30 June 2017;
- (ii) Suppression of erection and commissioning charges which being condition of sale, was includable in the assessable value.

(ii) It is submitted that Section 112(a) of the Customs Act, 1962 for penalty for commission or omission of an act or abetment of such act rendering goods liable to confiscation under Section 111 of the Customs Act, 1962. A bare perusal of the text of Section 112(a) of the Customs Act, 1962 would show that twin test as stated below must be fulfilled to impose penalty thereunder:

- (i) Goods must be held liable for confiscation under any of the provision of Section 111 of the Customs Act, 1962; and
- (ii) Person must have committed or omitted to an act or abetted such act rendering goods liable to confiscation.

(iii) It is submitted that the impugned goods have been exported by the manufacturer, viz., Caterpillar. The Noticee, being the dealer of Caterpillar, facilitated the performance of the obligations contained in the agreement. In terms of the agreement, the responsibility of each party was defined as below:

- i. M/s Caterpillar Inc., USA: To supply dumper in completely knocked-down condition
- ii. M/s Gainwell Commosales Pvt Ltd: Body building, erection and commissioning, after-sales service

**It is an undisputed fact that the name of the Noticee is not appearing in any import document.**

(iv) In view of the above, it is submitted that the proposal of penalty based on misconceived facts that the Noticee is the supplier of impugned goods is factually incorrect and therefore, unsustainable.

(v) It is submitted that penalty is leviable for acts committed by a person and is personal to such act. **No penalty can be imposed on the Noticee as an agent for faults of Caterpillar, principal in the present case.** Reliance in this regard is placed on the judgment



of *Sea Bridge Maritime Agencies Pvt. Ltd. vs CC, Mumbai [1999 (108) ELT 250 (Tri.-Mumbai)]*.

(vi) Further, in as much as inclusion of the erection and commissioning charges in the valuation of impugned goods is concerned, there is no allegation that Noticee has sought payment of these consideration in a clandestine manner. The contract clearly elaborates the service to be provided by the Noticee and fee to be paid for such service. The Noticee is not privy to as to whether such erection and commissioning charges is includible or not as it has neither filed impugned Bills of Entry nor signed any declaration to that effect. If there is any lapse, it is solely on the main Noticee and the Noticee has no role therein.

(vii) It is submitted that the cost of erection and commissioning is in relation to post-import expenses incurred in India and is therefore, not directly connected to the imported goods at all. It is settled law that no additions of post-import expenses can be done to the assessable value. Reliance in this regard is placed on the judgment of the Hon'ble CESTAT in *NCL Industries Limited vs Collector of Customs, Bombay [2005 (189) ELT 193 (Tri.-Mumbai)]* as affirmed by the Hon'ble Supreme Court at *2015 (322) ELT A91 (SC)*.

**39.1.8** No penalty is imposable under Section 114AA of the Customs Act, 1962

(i) It is submitted that mere claiming of an exemption cannot amount to a false declaration. No penalty can be imposed under Section 114AA of the Customs Act, 1962 for the reason that the entire issue in the present case is the true purport and meaning of the word "*pre-assembled*" as occurring in Sr. No. 524(1)(a) of the Notification. As a matter of fact, considering the technical nature of exercises done in the Notice including adducing reports of chartered engineers, it is trite that the issue in the present case is one of legal interpretation and therefore, cannot be termed as malafide intent or contumacious conduct on part of the Noticee in any event. Hence, for this reason also, Section 114AA of the Customs Act, 1962 cannot be invoked.

(ii) At this juncture, it is also submitted that the undisputed fact is that the Noticee is not the author of the documents which have been alleged to be false and/ or fabricated. It is trite that the customs clearance formalities especially with respect to declarations made were not the subject matter or responsibility of the Noticee and therefore, no malafide intention attracting penalty under Section 114AA of the Customs Act, 1962 can be attributed to the Noticee. Reliance is placed on *Parag Domestic Appliances vs. Commissioner of Customs, Cochin 2017 (10) TMI 812-CESTAT Bangalore* and *Premax Logistics vs. Commissioner of Customs, Chennai, 2017 TMI 483-CESTAT Chennai*.



### Discussion and Findings

40. I have gone through the case records and replies/submissions of all the noticees . Personal hearings have been given to all of them . The Show Cause Notice dated 26.11.2021 alleges misdeclaration of the description of imported goods by the importer to avail lower duty exemption on 18 Bills of Entry<sup>5</sup> of Caterpillar 190T Rear Dumpers filed during the period from 01.01.2021 to 31.05.2021 (listed in Table-I & II above) . With respect to these 18 import consignments, the following issues arise for determination in this adjudication :

- i. Whether benefit claimed @ 15% BCD under Sr. No. 524 (1) (a) of Notification No. 50/2017-Cus dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019 shall be applicable for the imported goods or higher rate of BCD at the rate 25% covered under Sr. No. 524 (1) (b) of the said Notification shall be applicable for the imported goods? Related to this issue are the questions : Whether Cross examination of Shri Vikash Bhardwaj, SIO is required? Whether the opinion given by the Professor of IIT-Kharagpur should be considered?
- ii. Whether erection and commissions charges of Rs. 30 Lakhs per unit shall be included in the declared assessable value for calculating the customs duty?
- iii. Whether the imported goods are liable for confiscation under Section 111(m) of the Customs Act, 1962?
- iv. Whether the demand under Section 28(4) of the Customs Act, 1962, is sustainable? Whether pre-notice consultation was required? Whether the penalty is imposable under Section 114A/112 (a) and Section 114AA of the Customs Act, 1962 on M/s ECL?
- v. Whether the penalty is imposable under Section 112(a) and Section 114AA of the Customs Act, 1962 on M/s. GCPL?
- vi. 'Proper Officer' to issue Show Cause Notice under section 28 of Customs Act, 1962.

Let me take up the issues one by one.

41. **Whether benefit claimed @ 15% BCD under Sr. No. 524 (1) (a) of Notification No. 50/2017-Cus dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019 shall be applicable for the imported goods or higher rate of BCD at the rate 25% covered under Sr. No. 524 (1) (b) of the said Notification shall be applicable for the imported goods? Whether Cross examination of Shri Vikash Bhardwaj, SIO is required? Whether the opinion given by Professor of IIT-Kharagpur should be considered?**

<sup>5</sup>Also referred to as the said 18 bills of entry



41.1 It is on record that these 18 dumpers are identical to the 84 dumpers covered in the Show Cause Notices dated 27.05.21 and 08.07.21 and adjudicated by my predecessor Commissioner<sup>6</sup> vide OIO dated 25.05.2022 . These 102 (84 +18)Caterpillar 190T Rear Dumpers are part of the same contract , the documentation and declaration on the bills of entry , packing list ,etc. are almost identical and therefore the issues in the present SCN are identical to the earlier 2 SCNs already adjudicated. Reliance in this regard is placed on the statements of Shri Harish Avadhani, Head of Commercial, Logistics and IT, M/s GCPL, Shri Pratul Dev Sharma, General Manager, Materials Management Division (MM), CIL, Kolkata and Shri Bablu Porel, General Manager (Excavation), Engineering and Equipment Division (EED), M/s CIL, Kolkata dated 29.07.2021, 06.08.2021, 24.08.2021 respectively. Therefore , it is relevant to go through the analysis and findings of the Ld Commissioner in the OIO dated 25.05.2022 on this first issue of misdeclaration , which is reproduced below .

*“ 30. Classification of the product is not in dispute in the present case. However, dispute is between Sr. No. 524(1)(a) and Sr. no. 524(1) (b) of the Notification no. 50/2017-Cus dated 30.06.2017. Sr. no. 524(1) covers a completely knocked down kit containing all necessary components, parts or sub-assemblies for assembling a complete vehicle and 524(2) contain other than completely knocked down kits. Since in both 524(1) (a) and Sr. no. 524(1) (b), the goods are considered to be in Completely Knocked Down kits and therefore, there is no dispute that the goods have arrived in CKD condition. However, in 524(1) (a), engine, gearbox and transmission mechanism are not in pre-assembled condition but in 524(1)(b) engine or gearbox or transmission mechanism is in a pre-assembled form not mounted on a chassis or a body assembly. The argument of the importer is that the engine, gearbox and transmission mechanism is not in a pre-assembled condition while the argument of the department is that the engine and transmission mechanism are in a pre-assembled form. There is no dispute that whatever assemblies have arrived were not mounted on a chassis or a body assembly. Thus, if any of the components i.e. the engine or transmission mechanism is in a pre-assembled form, the argument of the department will sustain.*

31. Department has given the following arguments in their support:

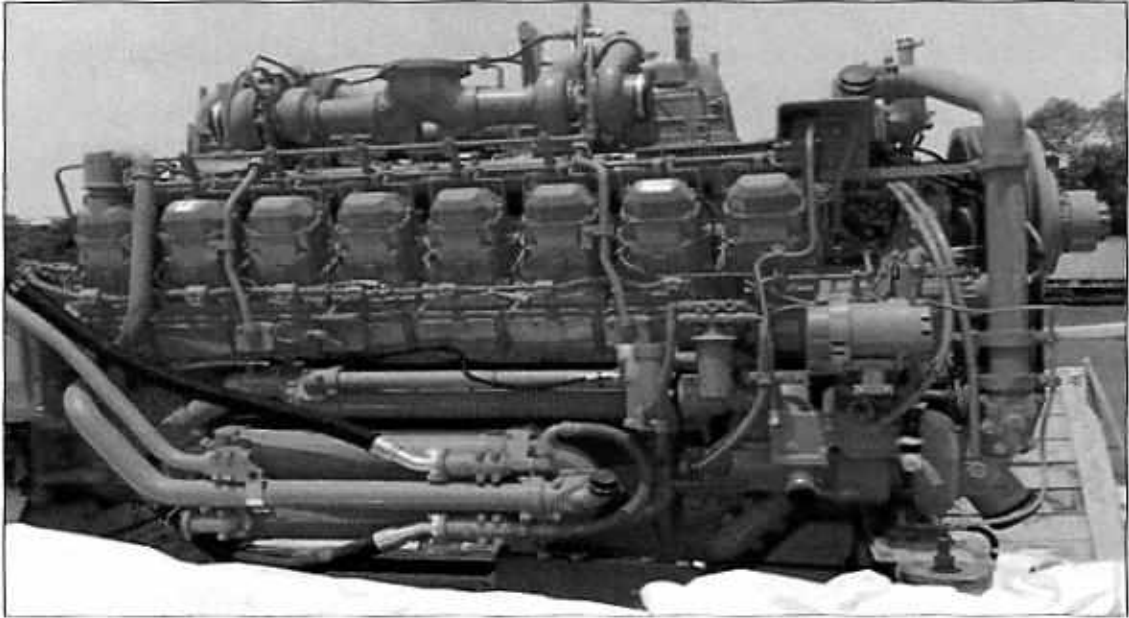
- i. All the packing lists have declared engine as single sub-assembly with specific serial numbers.
- ii. All the packing lists have declared BANJO i.e. transmission mechanism as single sub-assembly with specific serial number.
- iii. Both the Chartered Engineers have certified that i.e., engine and transmission mechanism are in pre-assembled form. Even the C.E. appointed by the importer himself also re-confirmed that the engine and transmission mechanism are in pre-assembled form.
- iv. Engine parts mentioned in invoices are only attachments as certified by Chartered Engineer. It has been further argued that importer has further certified in their packing list that engine and transmission mechanism i.e. Banjo have attained their essential characteristic as both are provided with unique serial numbers. Department has further argued that since the essential characteristic has already been attained as declared by importer, thus, engine and transmission mechanism are in pre-assembled form.

32. There is no dispute that the entire importation was done under the contract no. CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 entered among M/s

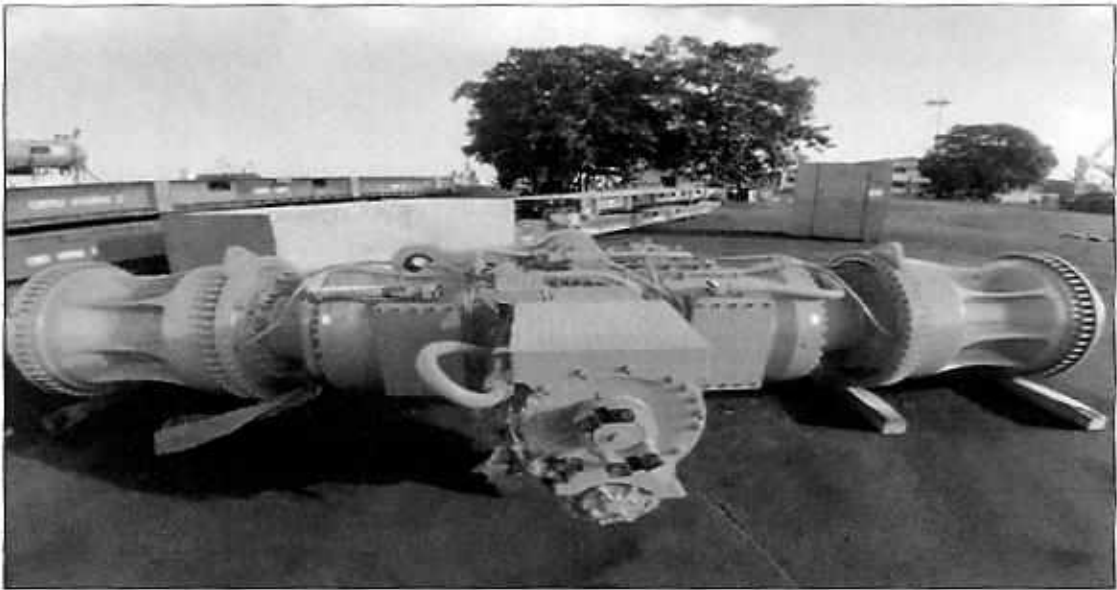
<sup>6</sup> also referred to as the earlier adjudicating authority or the Ld. Commissioner



GMMCO Ltd, M/s Coal India Ltd. (M/s CIL), Kolkata & M/s Caterpillar Inc., USA whereby 84 dumpers were to be supplied to importer i.e. NCL by M/s. Caterpillar through their agents in India i.e. GMMCO. As per the SCN, 50 Bills of Entry were already granted clearance clearing 50 dumpers. However, investigation was initiated thereafter and each dumper was seized under panchanama by issuance of seizure memo, by taking the photographs of actual goods imported. The coloured photograph of the engine is reproduced below:



Similarly, coloured photograph of Banjo is reproduced below:



33. It has been confirmed by the importer that all the consignments imported were in the same condition, therefore, the photographs reproduced above for engine and transmission mechanism i.e. Banjo is applicable to all consignments of the importer.

36.1 I find that the present case was initiated by the department on the basis of Chartered Engineer Certificate dated 09.11.2020 where the said Chartered Engineer (C.E.) i.e. Shri Rajendra S. Tambi certified that Engine is in complete pre-assembled form although not mounted on a Chassis. I have gone through the said C.E. Certificate dated 09.11.2020. In the said C.E. Certificate, details of all goods as described in Packing List has been mentioned. The sample copy of the Packing List is scanned as below:



CATERPILLAR		PACKING LIST				ORIGINAL	
SELLER / EXPORTER CATERPILLAR INC 100 NORTHEAST ADAMS ST PEORIA, ILLINOIS 61629-3350, USA				SHIPPING ORDER NO. BSVKJ			
APPLICANT / IMPORTER NORTHERN COALFIELDS LTD. NCL HQ, PANJIREH BHAWAN, PO. SINGRAULI, DIST. SINGRAULI, MADHYA PRADESH, INDIA, PIN - 486889				L/C NUMBER : 09928191M000490		L/C ISSUANCE DATE : December 13, 2019	
				L/C ISSUING BANK : SBI, KOLKATA		VESSEL NAME : ALLIANCE ST. LOUIS	
				PORT OF LOADING : VOY. V128		PORT OF EXIT : JACKSONVILLE MUMBAI, INDIA	
Pkg Desc	Prod Desc	Gross Wt (Kg)	Net Wt. (Kg)	High (inch)	Wide (inch)	Long (inch)	CBM
UNIT	789D CHASSIS	28660.00	28660.00	134	150	396	130.84
SKID	ENGINE	10487.00	9897.00	103	90	126	26.60
BOX	ENGINE PARTS	653.00	608.00	37	51	109	3.35
SKID	PARTS	2068.00	1977.00	89	49	90	6.39
SKID	RH PLATFORM	2751.00	2600.00	110	100	169	30.40
SKID	FUEL TANK	1099.00	993.00	86	65	97	8.85
SKID	HANDRAILS	2396.00	2306.00	65	88	157	14.64
SKID	FSTRUT	4953.00	4754.00	56	57	118	6.11
SKID	FSTRUT	4953.00	4754.00	56	57	118	6.11
SKID	BANJO	20194.00	20149.00	51	116	251	34.16
SKID	CAB	2176.00	2086.00	76	69	109	9.32
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BOX	DRIVE SHAFT	181.00	136.00	19	15	65	0.30
SHIPPING MARKS AS PER BL		90293.00	88478.00				284.650
ALL PACKING DETAILS INCLUDING DESPATCH AS REQUESTED IN TERMS OF CONTRACT NO. CIL/C20/19GT DUMPER/RH 66/17-18/153. Dated: 02.12.2019							
ADDITIONAL INFORMATION IEC CODE: AABCN4884H HS CODE: 87041010  IMPORT UNDER NON-NEGATIVE LIST OF FOREIGN TRADE POLICY 2015-2020							
CATERPILLAR INC				SIGNATURE: 			
DATE ISSUED: 28 Sep 20							

36.2 The description given as per the C.E. Certificate for goods available as per Packing List is as per Table below:

Sr. No. of Packing List	Description of goods mentioned in Packing List	Description of goods mentioned in C.E. Certificate
1	789 D CHASSIS	Chassis having all cylinders, valves, hoses, pipes, hydraulic and electrical mechanism.
2	ENGINE	Engine.
3	ENGINE PARTS	Pipes, hoses, hardware, seals etc. which are basically attachments to the Engine.
4	Parts	Parts i.e. hardware, plates, tubes, flange, clamps, seals etc. which are basically attachments of other assemblies which are required to connect the engine to other sub-assemblies/parts of dumper such as Transmission Mechanism etc. Some of the parts like Mirror, instruments have no relation whatsoever with the Engine/Transmission Mechanism.
5	RH PLATFORM	Base of Platform placed above wheels on which driver cabin is mounted.
6	FUEL TANK	Fuel Tank used for storage and supply of fuel.



7	HANDRAILS	Handrails which are basically safety rails on both side of ladders which is used to step up in the cabin from the ground.
8	FSTRUT	Fstrut is basically a constituent of Transmission System.
9	FSTRUT	Fstrut is basically a constituent of Transmission System.
10	BANJO	Transmission Mechanism mentioned in Packing List as 'Banjo'
11	CAB	Driver Cabin having all electrical Circuitry, instrument panel, steering, seating, canopy etc.
12	2 RIMS-TOPY	Rims for Tyre.
13	2 RIMS-TOPY	Rims for Tyre.
14	2 RIMS-TOPY	Rims for Tyre.
15	DRIVE SHAFT	Drive Shaft.

36.3 The content of the Packing list as described by the C.E. has not been disputed by any of the noticees or their representatives. It is also to be mentioned here that the Packing List of all the dumpers are also the same and the above facts are also not disputed by the Noticees. 50 dumpers were already cleared prior to investigation and it is also confirmed by the importer that packing list of all the dumpers either seized or cleared are the same in all aspects.

37.1 It is to be noted here that the packing list of each dumper constitute the entire dumper. On careful examination of the packing list, the following facts can be arrived:

- i. The Sr. no. 1 of the packing list consists of Chassis.
- ii. The item mentioned at Sr. no. 12, 13 and 14 are Rims for tyres.
- iii. The Sr. no. 11 of packing list is Cabin or Driver Cabin.
- iv. The Sr. no. 7 of packing list consists of handrails which are basically safety rails on both sides of ladder.
- v. The Sr. No. 5 of the packing list is RH Platform which is placed above wheels on which driver cabin is mounted.
- vi. The Sr. No. 6 of the packing list is Fuel Tank.

I find that above parts are not the matter of dispute in the present case.

37.2 I find that the following assembly/sub-assemblies etc. as described in the packing list are matter of dispute in present case:

- i. 'Engine' as declared in Sr. No. 2 of packing list.
- ii. 'Engine Parts' as declared in Sr. No. 3 of packing list.
- iii. 'Parts' as declared in Sr. No. 4 of packing list.
- iv. 'Banjo' as declared in Sr. No. 10 of packing list.





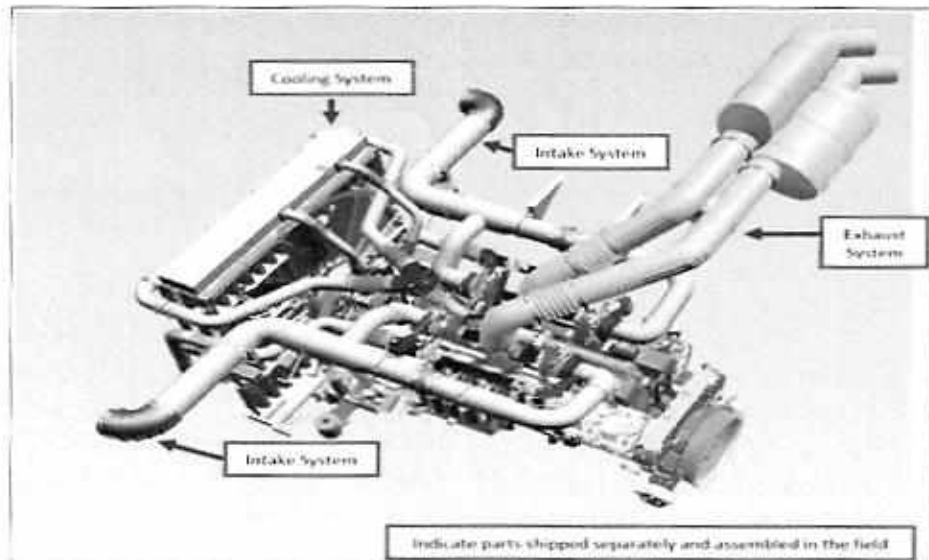
- v. 'F Strut' as declared in Sr. No. 9 and 10 of packing list.
- vi. 'Drive Shaft' as declared in Sr. No. 15 of the packing list.

38. On perusal of C.E. Certificate of Shri Rajendra S. Tambi, it can be inferred that Engine, Engine Parts and 'Parts' as declared in Packing List are related to Engines. Further, Banjo, Fstrut and Drive Shaft are related to Transmission Mechanism.

39. I find that in all packing List, Engine has been declared as specific product. There is no dispute that such engine as declared in packing list was never mounted on a chassis. I find that there is a specific engine no. in all cases which has also not been disputed by all the noticees. As per C. E. Certificate, the Engine parts consists of Pipes, hoses, hardware, seals etc. which are basically attachments to the engine to connect the engine to other sub-assemblies/parts of dumpers. Similarly, 'Parts' consists of hardware, plates, tubes, flanges, clamps, seals etc. which are attachments of other assemblies required to connect the engine to other sub-assemblies. Therefore, on perusal of the packing list, it is seen that the parts/engine parts consist of attachments for attaching Engine to other assemblies/sub-assemblies. **When engine has been declared in packing list with exclusive engine number, normally it should be inferred that engine is in pre-assembled condition.** Moreover, the parts which has been declared separately are mere attachments for attaching engines to other sub-assemblies. Wherever dumper is imported in CKD condition, there will be always different parts/sub-assemblies/components to be assembled together and while erecting the dumper these have to be attached through different attachments. Therefore, declaration of engine in packing list with exclusive engine numbers proves that engine has been imported in pre-assembled condition. Further, I find that M/s GMMCO in their submissions dated 12.04.2022 in Paragraph 8.16.14 have submitted that each and every Engine shipped by Caterpillar was assembled and tested in factory and dis-assembled for shipment. It clearly evidences that Engine was already assembled and dis-assembly was only with respect to attachment as evidenced in packing list.

40. I find that Noticee no. 1 has relied upon their supplier letter dated 12.11.2020 which states that Engine in its as-shipped configuration cannot perform its intended function without critical sub-assemblies shipped separately such as Radiator, Air Cleaner & Pre-Cleaner which are separately supplied along with over 140 line items. They have further stated that in order to make an engine fully operational to propel a truck, the Radiator, Air Cleaner & Pre-Cleaner needs to be assembled with about 16 types of tubing supplied as separate parts in Box named Engine parts box. Once fully assembled with the parts and sub-assemblies the engine system is complete ready for erection. Their supplier M/s GMMCO has argued that cooling (radiator), air intake line, exhaust line and engine harness are not pre-assembled to the engine assembly. They also argued that cooling device i.e. radiator, which is part of technical specification of the engine was shipped separately and assembled at site. In their support they have also given the pictorial representation of the engine system indicating its assembly at site, which has been reproduced below:





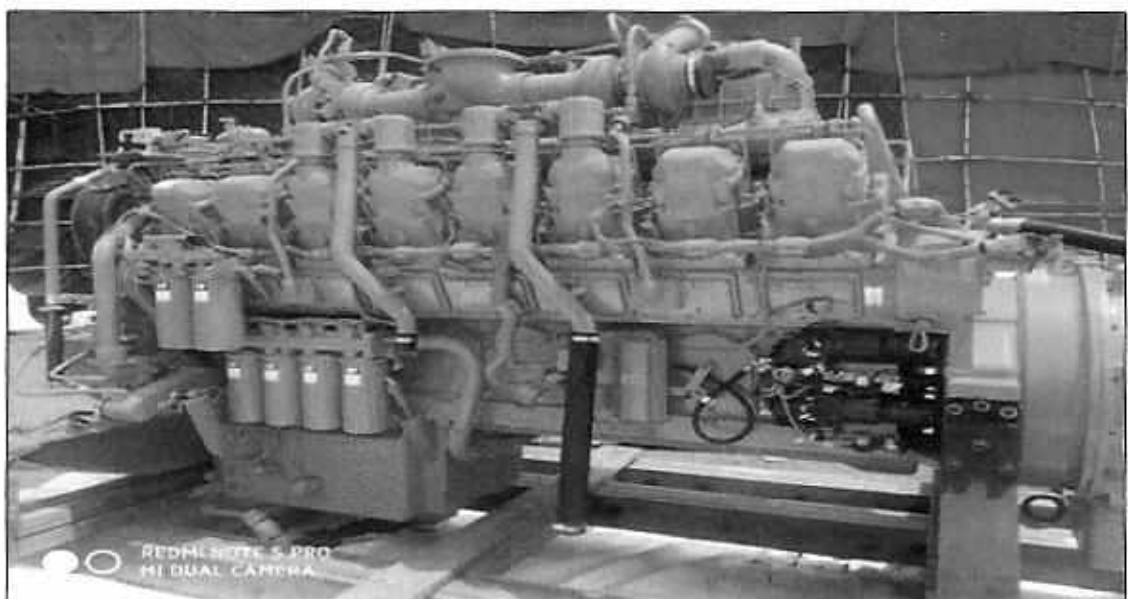
They have also argued that engine number is engraved on the engine block at the time of casting itself.

41. I find that as per Sr. No. 524 of exemption Notification no. 50/2017-Customs dated 30.06.2017, Motor vehicles imported as Completely Knocked Down (CKD) kit has been categorised in 2 parts –

i. Engine, Gearbox and Transmission Mechanism not in a pre-assembled condition

ii. Engine or Gearbox or Transmission Mechanism in a pre-assembled condition but not mounted on a Chassis or body assembly.

I find that Noticees have argued that unless above mentioned three units i.e. Engine, Gearbox and Transmission Mechanism become fully functional, they are not in a pre-assembled form. I find that the definition of pre-assembling has not been given in the said Notification. The Noticee no. 2 i.e. M/s GMMCO in paragraph 8.16.13 of their submissions dated 12.04.2022 has argued that more than 9000 parts are required to assemble the engine. In this regard, I place the engine which has been imported in pictorial form as placed below:



On perusal of the above picture of engine, it can very well be concluded that the above declared engine consisted of thousands of parts which has taken the shape of engine. Each part of the engine has got a different name and description. When different parts are assembled to achieve a different product, the name of the part loses its significance and the new product gets a new name. In the present case, when thousands of parts are assembled together, a final name was given to the resultant product and that name

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given by the manufacturer is called 'Engine'. Thus, it has to be inferred that engine is pre-assembled. When engine is not pre-assembled, in such situations, resultant product of assembly of parts cannot be called engine. In the present case, they have not brought various parts of engine to be assembled on assembly line but they have brought thousands of parts assembled together and themselves called it as Engine. In such situation, it has to be inferred that Engine has been 'pre-assembled'.

42. Both the noticees have argued that the engine which has been brought is not in operation phase and certain more parts are needed to be added such as Radiator, Air Cleaner & Pre-Cleaner to make it functional. Moreover, the professor of IIT Kharagpur has given his opinion on the basis of functionality of the engine. I find that as per notification there is no condition that engine has to be in operational phase. Therefore, argument of both the noticees that engine has to be in operational phase, to be considered pre-assembled is not sustainable.

43. I find that clarification of any product is governed by General Rules of Interpretation (GRI) of First Schedule of Customs Tariff Act, 1975. Rule 2(a) of GRI is reproduced below –

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

Although such explanation has already been given for the purpose of classification, however, it is specific that 'any reference to heading in an article should be taken with reference to an article in an incomplete or unfinished form having essential characteristic of complete or finished article. The above explanatory notes give an indication that if the essential characteristic of an article is achieved, it shall get a name of finished article only. The above principal shall apply in the present case where the essential characteristic of engine is achieved and the supplier themselves have named the article as engine.

44.1 I find that Noticee no. 2 i.e. M/s GMMCO in para 8.16.2 of their written reply dated 12.04.2022 has enclosed in Annexure -15 which consists of Shipping Configuration and Engine Installation & Commissioning details for 789D Cat dumpers purchased by M/s NCL. As per the Engine installation & Commissioning, they have declared the parts which need to be connected. Their submission is scanned below:

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**Engine Installation & Commissioning: Part details**

- Listed 5 packages include parts for Engine Installation & Commissioning

ENGINE SYSTEM	Skid / Box Details	Package Sl No
Radiator	Chassis Unit	1
Engine Assembly	Engine Skid	2
Cooling Line connection – Loose Parts	Engine Part Box	3
Air Intake Line Connection – Loose Parts	Engine Part Box	3
Torque converter Hydraulic Lines & Harness Connection – Loose Parts	Engine Part Box	3
Engine Harness Connection – Loose Parts	Engine Part Box	3
Hardware for connection – Loose Parts	Hardware Box – Part Skid	4
Exhaust Line Connection – Loose Parts	Intake Box – Part Skid	4
Air Filter Assembly	RH Platform Skid	5

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44.2 I find that above documents state as to how the Engine System is to be installed and commissioned. Engine system consists of (i) Radiator (ii) Engine

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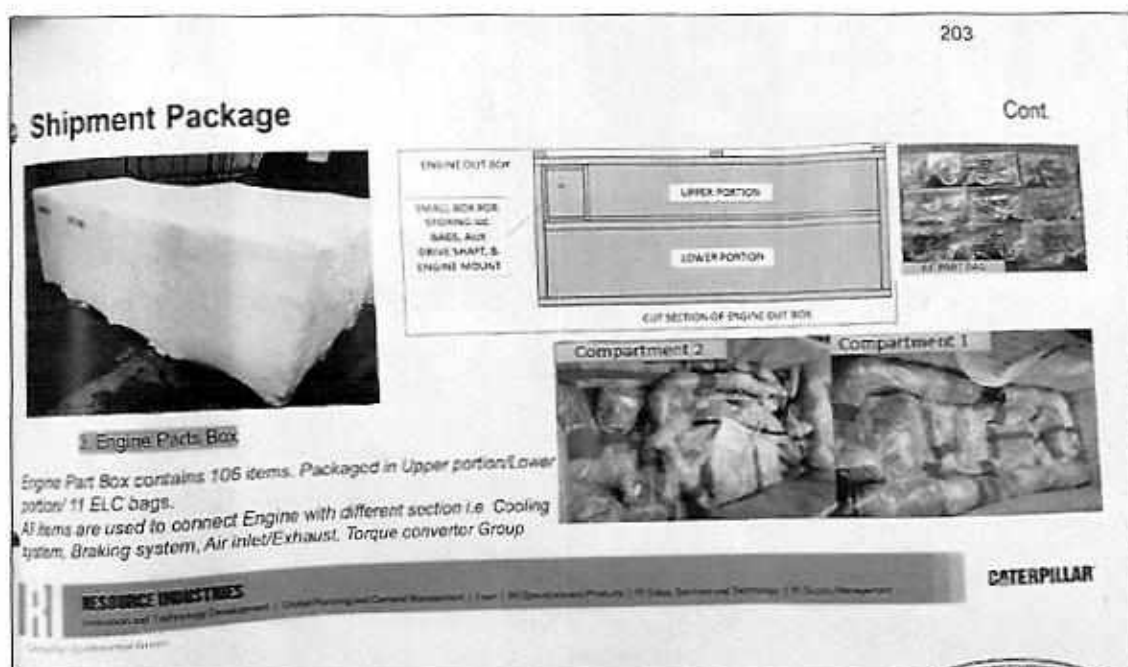


Assembly (iii) Cooling line connection (iv) Air Intake line connection (v) Torque convertor Hydraulic Lines and Harness connection (vi) Engine Harness Connection (vii) Hardware for connection (viii) Exhaust Line connection (ix) Air Filter Assembly.

44.3 It is to be noted that the entire 9 assemblies consist of Engine system and engine is one of the assembly. Thus, both the noticees are actually arguing that engine system is not in a pre-assembled condition. But the fact remains that out of the 9 assemblies in an engine system, 'Engine' is itself one of the assembly. The exemption notification talks about the engine and not the engine system. The condition of the Sr. no. 524 (1) (b) of exemption notification no. 50/2017-Customs dated 30.06.2017 is that Engine should be in pre-assembled condition, and does not say that the Engine system should be in pre-assembled condition. Thus, as per Engine installation and commissioning details submitted by the Noticee no. 2, it is clear that Engine was in pre-assembled condition but different other assemblies like radiator, air filter assembly and other assemblies like cooling line, air intake line etc. were needed to be connected to make entire engine system.

44.4 I find that M/s GMMCO in their letter dated 12.11.2020 have also stated that when radiator, air cleaner and pre-cleaner are assembled with other parts, engine system is completely ready for erection. As claimed by the Noticee no. 2, sub-assemblies like radiator, air cleaner and pre-cleaner are parts of the entire Engine System and the engine is one of the sub-assemblies of the Engine System. These sub-assemblies cannot be a part of the engine but part of Engine System. Therefore, argument of Noticee no. 2 that radiator is essential part of engine is not sustainable and hence, case law of **J.B.A. Printing Inks Ltd. vs Collector of Central Excise [2000 (115) ELT 24(SC)]** is not applicable in the present case. In the said case of **J.B.A. Printing Inks Ltd. vs Collector of Central Excise**, issue was of classification of Radiator Assembly wherein it was held that internal combustion engine cannot function without a cooling device i.e. radiator. I find that the issue in the said case was with regard to Internal Combustion Engine. In the present case, the product is a dumper which functions with the help of Engine System; radiator is one of the part of the entire Engine System and Engine being one of the part. I find that nature of two different Engines cannot be compared. Therefore, the said case law of **J.B.A. Printing Inks Ltd. vs Collector of Central Excise** is not applicable in the present case.

44.5 I am reproducing the document submitted by Noticee no. 2 for engine parts box:



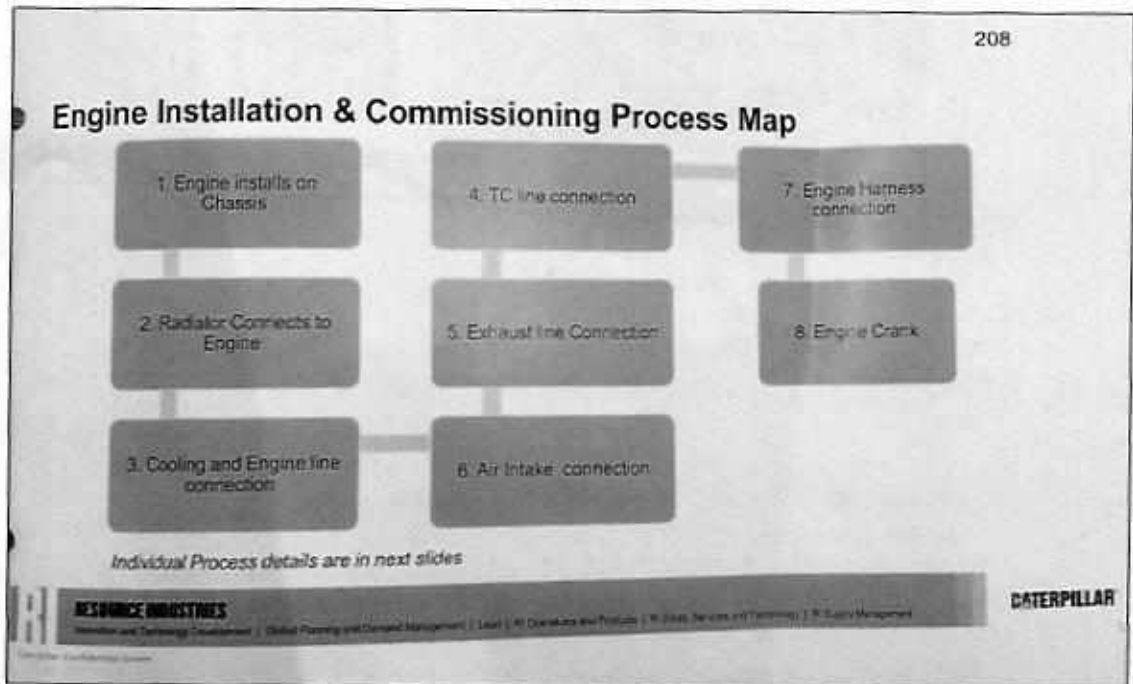
I find that in the above said document, the following is mentioned:



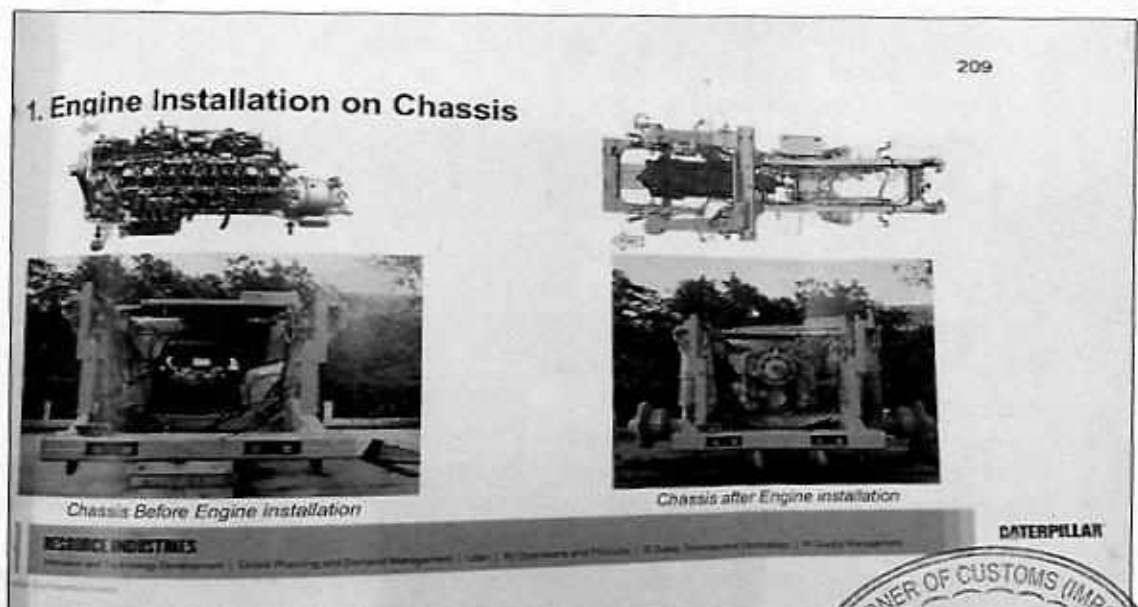
**“Engine Part Box contains 106 items. Packaged in Upper Portion/Lower portion/11 ELC bags. All items are used to connect Engine with different Section i.e. Cooling System, Braking Section, Air Inlet/Exhaust, Torque Converter Group”**

Thus, they themselves have certified in their document that all items are used to connect **ENGINE** with different section i.e. Cooling System, Braking Section, Air Inlet/Exhaust, Torque Converter Group. Thus, it is very clear that engine was having a separate identity and the cooling system, braking system etc. were having different identities and these all were to be connected to the engine. The above said document itself proves that Cooling System, Braking Section, Air Inlet/Exhaust etc. are not parts of the engine but they are connected to the engine to create engine system.

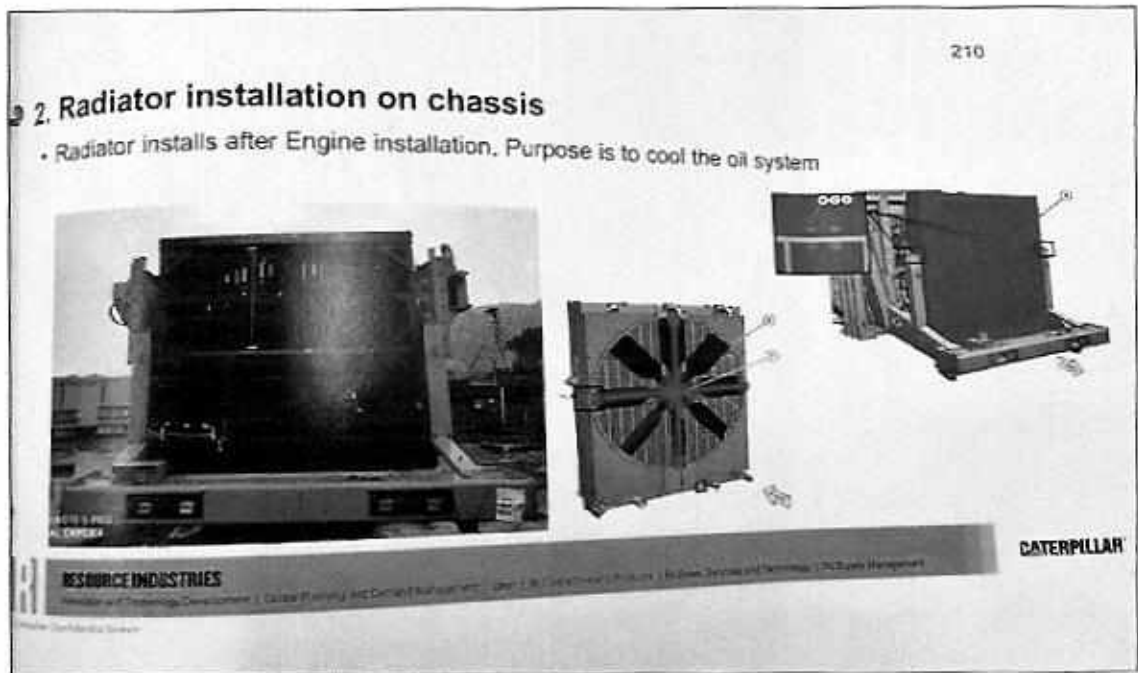
44.6 Now, I am reproducing the engine installation & Commissioning process Map as submitted by Noticee no. 2 as below:



On perusal of the same, it is clear that first engine is to be installed on a Chassis and thereafter radiator is to be connected to engine and other different lines is to be connected to engine as per sequence show above. Further, I am reproducing below the photograph of the Engine installation on Chassis which gives the complete evidence that the product which has been declared as engine has been installed on Chassis –



44.7 Although Noticee no. 2 has claimed radiator as a part of Engine, as per the document submitted by them, the radiator is installed on Chassis after engine installation. The scanned copy of the document is reproduced below:



45. On the basis of the evidence submitted by Noticee no. 2, it is clear that engine was imported in pre-assembled form, which is evident by documents submitted by noticee no. 2 as above. The other assemblies which noticee claims to be parts of engine are not parts of engine but other assemblies which are connected to the engines creating the engine system. The condition of the Sr. No. 524 of the exemption notification no. 50/2017-Customs dated 30.06.2017 is that engine should be pre-assembled from and not the engine assembly. Multiple documents submitted by them clearly evidenced that engine was in pre-assembled form.

46. I find that in the case of **BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V** as reported in 2019 (366) E.L.T.A28(Tri-Chennai), Hon'ble CESTAT held that "since the imported goods i.e. engine assembly, transmission sub-assembly/gearbox of motor cars have been listed with their corresponding part numbers in the packing list and the manufacturer supplied these goods in the form of single product having Unique Identification Number engraved on it, the same are to be considered in pre-assembled form." I find that this judgement is squarely applicable in the present case as Engine and Transmission Mechanism have been imported as a single product with unique identification number engraved on it.

47.1 Noticee no. 1 has stated that **Shri Syamal Samanta** has retracted his statement and the statements of the Chartered Engineers cannot be relied as they are not automobile engineers. I find that entire case was built up on the basis of documentary evidence and not only on the basis of statements. The C. E. Rajendra S. Tambi during the examination of the goods has presented the facts of the case and documentary evidences prove that the engine was in pre-assembled form. Noticee no. 2 themselves have given sufficient documents as discussed above to establish that the engine was in pre-assembled form. **Shri Syamal Samanta** has retracted his statements dated 01.12.2020 and 03.12.2020 recorded under Section 108 of the Customs Act, 1962 on 14.09.2021, after a gap of more than nine months of giving his statement during investigation. It is pertinent to mention that the retraction of the statement was made after more than three months from the conclusion of investigation and subsequent to issuance of second SCN dated 08.07.2021. In this regard, I rely on the below mentioned judgements wherein it is held that **retraction of statement recorded under Section 108 of the Customs Act, 1962, after a considerable gap of nine months from depositing before the investigating agency and even after a gap of 3 months from the issuance of SCN, cannot take away the evidentiary value of the said statements.**



•The Hon'ble High Court of Delhi in the matter of **H.R. Siddique Vs Director, Enforcement Directorate** as reported in 2015 (318) E.L.T. 182 (Del.) has held that "Retraction of confessional statement containing admission of wrong doings by appellant came after more than ten years at the stage of personal hearing only and not before that - Had the appellant subjected to threat, coercion or pressure, as alleged by him rather belatedly, he would have retracted his confessional statement soon after making the same once the alleged threat, coercion or pressure ceased to influence the action of appellant - Appellant failed to disclose as to how he was pressurized, coerced, or tortured, and by whom, when he made the earlier confessional statement - Statement was also duly corroborated by independent evidence."

•Hon'ble Tribunal, Mumbai in the matter of **P.B. Nair C&F Pvt. Ltd. Vs Commissioner of Customs (General), Mumbai** as reported in 2015 (318) E.L.T. 437 (Tri. - Mumbai) has held that "Proceedings under Section 108 ibid is a judicial proceeding and if any retraction of confession to be made, to be made before same authority who originally recorded the statement - Confessional statements never retracted before the authority before whom the statement was recorded, belated retractions of statements after about one and half years cannot take away the evidentiary value of original statement."

Further, I find that the Chartered Engineer certificate and the IIT Kharagpur certificate dated 17.02.2022 were more of an opinion and the fact that Engine was pre-assembled is to be established on the basis of technical literature and interpretation of Customs Rules. As discussed above, technical literature and interpretation with regard to Custom laws clearly establishes that the Engine was in pre-assembled condition.

47.2 Noticee no. 1 had sought the cross-examination of the Investigating Officer of the subject case which was disallowed as he was the investigating officer whose statement was never recorded during case. Noticee no. 1 have further submitted that denial of Cross- Examination of the very Investigating Officer is clearly in violation of the Principles of Natural Justice, thus vitiating the entire adjudication proceedings in this case. In this regard, I rely on the below mentioned judgments which have held that cross-examine of investigating officers was without basis as statements of such officers was never recorded or relied upon:

•Hon'ble CESTAT, Mumbai in the matter of **Everest Diamond Tools Versus Commissioner of C. Ex., Visakhapatnam - 2007 (211) E.L.T. 327 (Tri. - Mumbai)** has held that "Appellants contention that they were not allowed to cross-examine investigating officers without basis as statements of such officers never recorded". It is to be noted that the said case was further affirmed by the Hon'ble Supreme Court as reported in 2015 (321) E.L.T. A207 (S.C.).

•Hon'ble High Court of Kerala at Ernakulam in the matter of **N.S. Mahesh Vs. Commissioner of Customs, Cochin** as reported in 2016 (331) E.L.T. 402 (Ker.) has held that "the investigating unit has developed the case on the basis of documents recovered during investigation and other evidences and not relied on statements of any officers who examined/audited/assessed the consignment. Moreover, said officers have discharged these functions as part of their official duty, based on documents provided by the importer. Further noticee No. 2 has not given any reasons for examining the said officer, nor the evidences sought to be brought out from them. It is also learnt that the dockets of the bills of entry relied upon by investigation have already been supplied along with the show cause notice. However, if required, noticee No. 2 can obtain additional set of copies of documents from SIIB, under prior intimation to undersigned. Accordingly, the request for cross-examining all officers who assessed/audited/examined the impugned consignments cannot be acceded to."

•In the matter of **JSW Steels Ltd. Vs Commissioner of C. Ex., Belgaum** as reported in 2010 (254) E.L.T. 318 (Tri. - Bang.), the Hon'ble Tribunal has held that "the Commissioner adjudicated the classification dispute on the basis of relevant facts ascertained from the assessee. Further, it was held that denial of cross-examination of



*departmental officer has not violated natural justice as such officers do not contribute to judicial determination of classification Natural justice."*

*In addition to the above, denial of request for cross-examination has been held as not violating the principles of natural justice during quasi-judicial proceedings in following case laws:*

*•In the case of Kanungo & Co. Vs. Collector of Customs, Calcutta & Others [1993(13) E.L.T. 1486 (S.C.)], wherein it was unequivocally held that for proceedings under Customs Act, the right to compliance to the principles of natural justice does not cover the right to cross examination witnesses.*

*•In the case of Commissioner of Customs, Hyderabad V. Tallaja Impex reported in 2012(279) ELT 433 (Tri.), it was held that "In a quasi-judicial proceeding, strict rules of evidence need not to be followed. Cross examination cannot be claimed as a matter of right."*

*•In the case of Patel Engg. Ltd. vs UOI reported in 2014 (307) ELT 862 (Bom.) Hon'ble Bombay High Court has held that "right of cross-examination cannot be asserted in all inquiries and which rule or principle of natural justice must be followed depends upon several factors - Further, even if cross-examination is denied, by such denial alone, it cannot be concluded that principles of natural justice had been violated."*

*•Hon'ble Tribunal in its decision in Sridhar Paints v/s Commissioner of Central Excise, Hyderabad reported as 2006(198) ELT 514 (Tri-Bang) has held that "..... denial of cross-examination of witnesses/officers is not a violation of the principles of natural justice, we find that the Adjudicating Authority has reached his conclusions not only on the basis of the statements of the concerned persons but also the various incriminating records seized. We hold that the statements have been corroborated by the records seized"*

*Thus, I find that denial of cross examination of the investigating officer does not lead to violation of principles of natural justice in the present case, as discussed above.*

48. *Noticee no. 1 has relied upon the opinion dated 17.02.2022 of Shri A. R. Mohanty, Professor of Mechanical Engineering, Indian Institute of Technology, Kharagpur wherein he has concluded that Engine, Powertrain/Gearbox were imported as unassembled CKD units. I find that no reasoning has been provided in his report as to how the engine was in unassembled form. The Engine system as described in para 43 above, has not been taken into account by the said professor of IIT, Kharagpur. The documents supplied by the manufacturer itself states that Engine and Engine assembly are the 2 different products and engine is one of the assemblies of the engine system. The said professor in his observation in Sr. no. 1 has stated that air induction system, exhaust system, cooling system etc. are components/sub-systems which need to be present as a single integral unit to make it functional. There is no dispute that entire Engine System has to be integrated for the working of the system but the fact remains that engine itself is one of the assembly to create an entire Engine System. Thus, inferring that the engine is not pre-assembled is not correct and I find that the certificate submitted by the IIT professor has been prepared without taking into account all the documentary evidences submitted by the Noticee. The document submitted by the supplier itself proves that engine as imported was in a pre-assembled condition.*

49.1 *I find that the Show Cause Notices have alleged that the Banjo declared in the Packing List is Transmission Mechanism as single sub-assembly with specific serial nos. SCN has also relied upon statement dated 20.11.2020 of CE Shri M. Vairamohan which stated that Transmission Mechanism is in pre-assembled form. As stated earlier Sr. no. 10 of the Packing list has been declared as Banjo. The CE Shri Rajendra S. Tambi in his CE Report dated 09.11.2020 has also stated that Banjo at Sr. no. 8 and 9 of Packing List is a constituent of Transmission mechanism. Noticee no. 1*





in their reply has submitted that Transmission Mechanism plays the role for power transmission from engine to wheels through Drive Shaft. They submitted that as per letter dated 12.11.2020 of supplier, their supplier has clarified that 'at a high level the transmission works on the principle of hydraulic shift. The Hydraulic Pump provides power to transmission for its operation. The Banjo is the unit that houses the transmission, differential, final drives and brake groups. The hydraulic tank and pump are shipped separate not connected to Banjo'. In this case, they also relied upon the opinion of IIT, Kharagpur certifying that Transmission mechanism are imported in unassembled form.

49.2 Noticee no. 2 in their written submissions has argued as under:

i. The transmission mechanism is a mechanism to transmit power generated by the engine to the wheels in a controlled manner. Such is the definition in the Oxford Dictionary as also Merriam-Webster. "transmission" as defined in the Dictionary of Automotive Engineering (2nd ed.) by Don Goodsell is as follows:

"transmission (1) Mechanical unit containing a manual or automatic change-speed gear system and associated actuating machinery. (2) Collective term for the components such as clutch, gearbox, driveshaft, whereby power is transmitted from the engine to driven wheels"

The definition extracted above clearly shows that driveshaft is an integral component of a transmission mechanism and is integral to the same.

ii. Juxtaposing this against the facts, it is an undisputed fact that the drive shaft, which is an essential, integral part of the transmission mechanism failing which the mechanism is inoperable has been imported in a separate box and is not integrated/ connected/ mated to the BANJO, which has been said to be the transmission mechanism in the Notice.

iii. Shri Rajendra Tambi as well as Shri M. Vairmohan, the Chartered Engineers, during cross-examination admitted that BANJO is not a transmission mechanism and that transmission mechanism is not imported in a pre-assembled condition.

49.3 I find that the said Noticee no. 2 has provided the literature for Powertrain Installation and Commissioning. As per the said document, the parts for powertrain Installation & Commissioning includes as follows:

- i. Banjo Assembly (includes Differential/Transmission/Rear Axle).
- ii. Transmission Hydraulic Line Connection.
- iii. Rear Axle Lubrication Line Connection.
- iv. Transmission Harness Connection.
- v. Brake Oil Cooler Line Gp.
- vi. Hardware for Connection - Loose Parts.



Scanned Copy of the same is as below:

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### Power train & Commissioning: Part details

- Listed 2 packages include parts for Powertrain Installation & Commissioning

POWER TRAIN SYSTEM	Skid/Box Details	Package
Banjo Assembly (includes Differential/Transmission/Rear axle)	Banjo Skid	10
Transmission Hydraulic Line connection	Banjo Skid	10
Rear Axle lubrication Line connection	Banjo Skid	10
Transmission Harness Connection	Banjo Skid	10
Brake Oil Cooler Line Gp	Rear Axle box - Part Skid	4
Hardware for connection - Loose Parts	Hardware Box - Part Skid	4

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49.4 On perusal of the same, it is clear that Banjo Assembly includes differential/Transmission/Rear Axle which was packed in one of the package no. 10 called as 'Banjo' in the Packing List of the Bills of Entry. Further, the transmission hydraulic line connection, Rear Axle Lubrication Line Connection, Transmission Harness Connection was also attached to the Transmission Assembly. As per their literature as shipment package, it has been clarified that transmission comes mounted on Banjo Assembly. The scanned copy is as below:


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### Shipment Package

cont...



Transmission Assembly



**10 Banjo Skid**  
 (Transmission comes mounted on Banjo Assembly)

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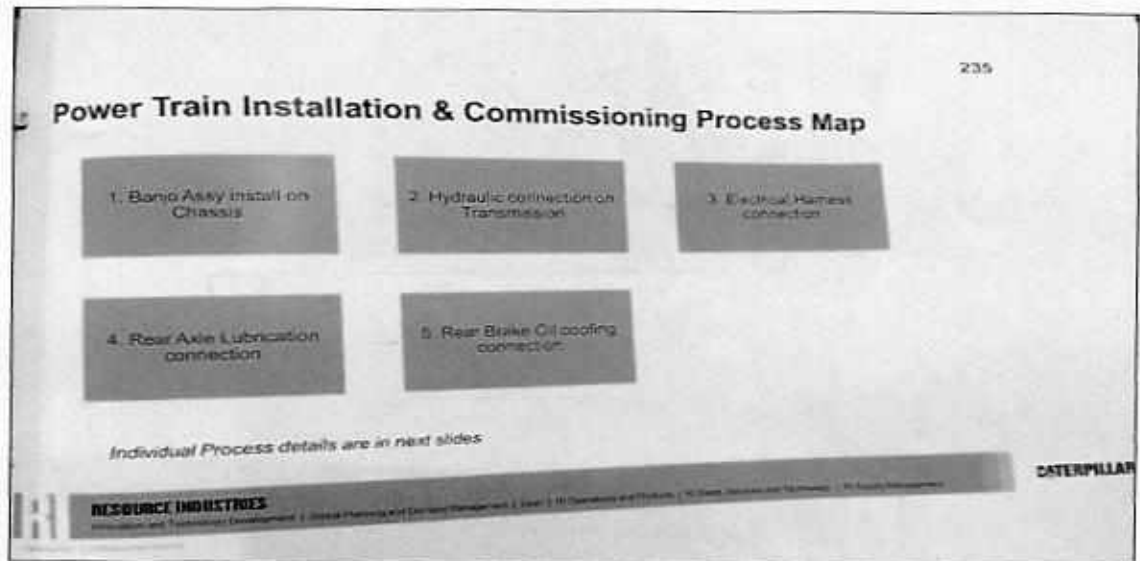
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As per the above photograph, the entire assembled part was known as transmission assembly.

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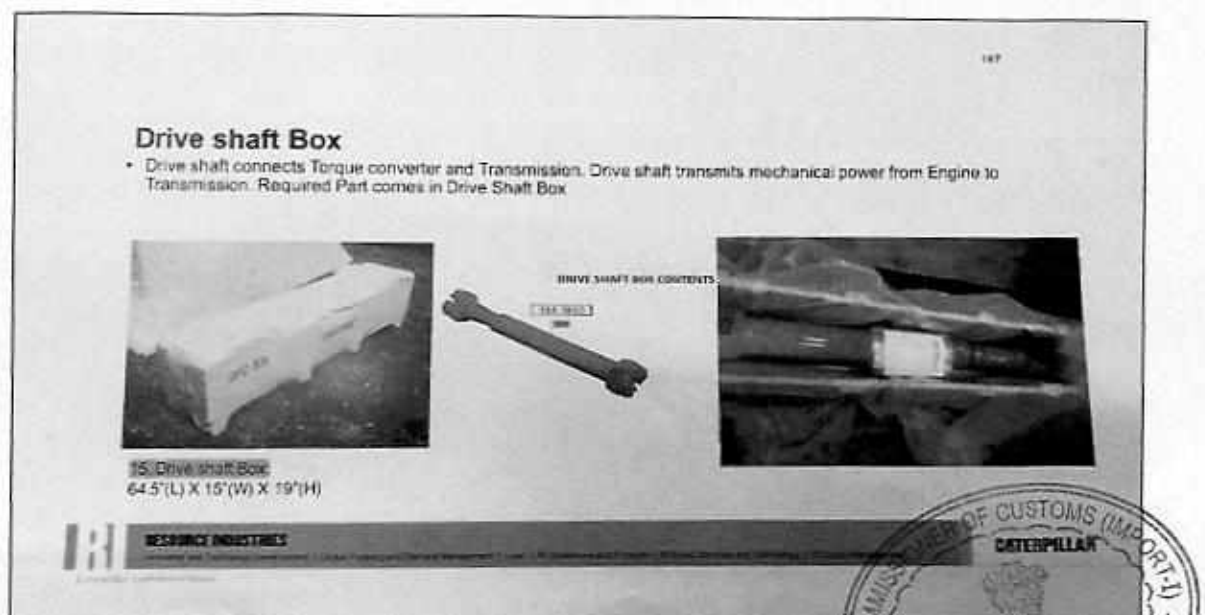


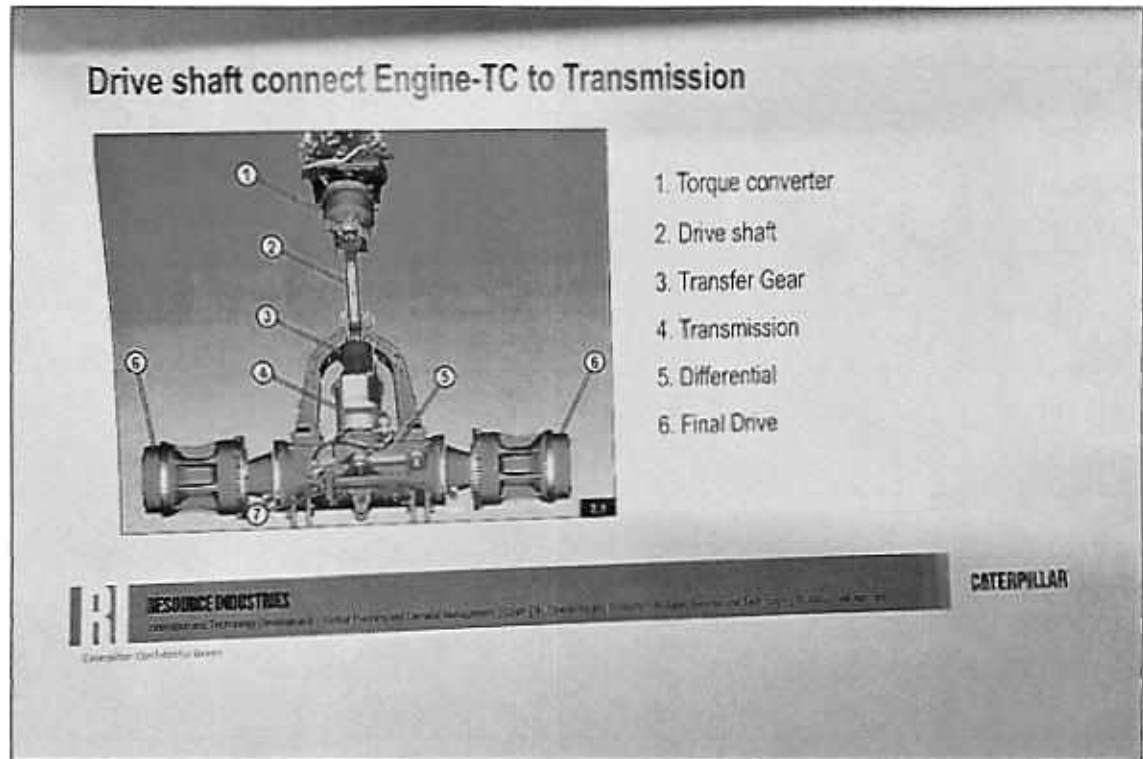
49.5 The flow chart for Power train installation and commissioning as supplied by supplier is as below:



On perusal of the flow chart, it is clear that Banjo Assembly has to be installed on Chassis. They have also certified as per scanned copy of the picture depicted in para 48.4 above, that transmission assembly is nothing but a Banjo Assembly. Therefore, on the basis of document supplied by the supplier, it is clear that Transmission assembly/mechanism were imported in a pre-assembled form. Further, when the Transmission Assembly has attained the essential characteristic of Transmission Mechanism, it has to be inferred that Transmission Mechanism were imported in pre-assembled form. I find that the transmission assembly i.e. Banjo was given specific Sr. No. in the packing list. I again re-iterate the judgment of Hon'ble CESTAT in the case of *BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V [(366) E.L.T.A28(Tri-Chennai)]*, wherein it was held that "since the imported goods i.e. engine assembly, transmission sub-assembly/gearbox of motor cars have been listed with their corresponding part numbers in the packing list and the manufacturer supplied these goods in the form of single product having Unique Identification Number engraved on it, the same are to be considered in pre-assembled form.". Therefore, once essential characteristic of Transmission Mechanism is achieved and ready for attachment through connections, same will be considered as Transmission Mechanism.

49.6 Noticee no. 2 has argued that drive shaft is the part of Transmission Mechanism and it is undisputed that drive shaft has been packed separately. In this regard, the scanned copy of the literature for drive shaft installation as provided by Noticee no. 2 with their written submissions is below:





Thus, it is clear that drive shaft connects torque convertor and Transmission. Further, drive shaft transmits mechanical power for Engine to Transmission. As per the above photograph bearing page no. 229, it is clear that transmission is separate from drive shaft. Thus, the argument of noticee no. 2 that drive shaft is part of Transmission Mechanism is not sustainable. As discussed above, Transmission Mechanism / Transmission Assembly has been imported as Banjo as discussed above in pre-assembled condition.

50.1 I find that Noticee no. 1 has stated that there was no question of mechanical gearbox in the 190 Tonnes rear dumpers. The transmission mechanism plays the role for power transmission from engine to wheels through driveshaft. Noticee no. 2 has stated as under:

- i. the drive shaft does not have gear and cannot be describes to be a gearbox.
- ii. A gear box is the part containing gears, i.e. the equipment that changes relation of the engine speed with the speed of the wheels. It is undisputed that the driveshaft does not have any gears and neither does it control any such relationship. A driveshaft is a simpliciter device that transfers the mechanical power of torque and rotation from the engine to the wheels. Hence, by no stretch of imagination can the same be termed as a gearbox.
- iii. **The imported dumper does not have any gear box. It is fitted with torque converter which works on hydro-mechanical transmission, that performs a function similar to that of a gearbox, i.e., to increase the torque while reducing the speed, but it is not a gearbox.**

50.2 I find that there is no allegation regarding gearbox in the Show Cause Notice, and it has not been identified as to which item in the Packing list is the gearbox.

51. As discussed above, Engine and Transmission Mechanism are in pre-assembled condition. As per Sr. no. 524 (1) (b) of the exemption notification no. 50/2017-Customs dated 30.06.2017, rate of BCD would be 25%, if either Engine or Gearbox or Transmission Mechanism would be in pre-assembled form but not mounted on a chassis or a body assembly. Thus, the condition is that if any out of the above three is in pre-assembled condition, then they should be eligible for BCD @ 25% as per Sr. no. 524 (1) (b) of Notification no. 50/2017-Customs dated 30.06.2017, and Sr. no. 524 (1) (a) of the said notification shall not be eligible for the importer. It is to be noted that for the benefit of Sr. no. 524 (1) (a) of the said exemption notification, all the



3 i.e. Engine, Transmission Mechanism and Gearbox should be in unassembled condition, which is not the case here. Therefore, it is held that Noticee is not eligible for Sr. no. 524 (1) (a) of the said notification and Notice has rightly charged that the importer shall be eligible for Sr. no. 524 (a) (b) of the said exemption Notification."(emphasis added )

41.2 In their written submissions dated 21.11.22 , Noticee-1 has argued that the Ld. Commissioner of Customs was not justified in relying upon **BMW India Pvt Ltd**<sup>7</sup> as the case pertains to a different Notification No. 21/2011 dated 01.03.2011 wherein an explanation defining the expression 'completely knocked down' was present; whereas no such explanation was present in the impugned Notification No.50/2017 as amended. Also that BMW India judgement should not have been applied , as it has been stayed by the Hon'ble Apex Court. That two terminologies 'CKD condition' and 'not in pre-assembled condition' represent totally distinct and separate conditions. The Ld. Commissioner is not justified in treating both the terminologies as referring to one and the same condition. That the Ld. Commissioner has also erred in ignoring the expert technical opinion rendered by IIT Kharagpur without the support of any other contrary technical expert opinion. The noticee-1 placed reliance on **Panama Chemical Works**<sup>8</sup> and **Unibourne Food Ingredients LLP**<sup>9</sup> in this regard . The Noticee-1 also argued that the previous OIO is not binding on the present Adjudicating Authority in this case. Rest of the points in their written submissions dated 21.11.22 were same as raised earlier .

41.3 I find that the above discussion from paras 30 to 33 and 36.1 to 51 of the OIO dated 25.05.22 is very elaborate and addresses all the points raised by the noticees in the present case . The packing list mentions item at serial number 2 as engine and item at serial number 3 as engine parts. The CE certificate dated 04.03.2021 mentions the engine parts as *pipes, hoses, hardware, seals, etc.* which are basically attachments to the engine . The contents of the packing list are undisputed. The engine has been declared in the packing list with an exclusive engine number. The supplier letter dated 12.11.20 only emphasises on the functional aspect . It states that the engine may not be functionally complete but still the engine number is engraved on the engine block at the time of casting. It has been stated that there are more than 9000 major and minor parts required to assemble the engine . In my view , even if one minor but vital part like a tube, nut or bolt is missing , it can create an accident or stop the functioning of the engine. So functionally an engine may not be complete even without a simple nut and bolt or a tube or coupling. The important question therefore in the context of the impugned notification is not the completeness or functionality of the engine being imported at serial number 2 of the packing list , but of essentiality of parts and preponderance of common belief that it is largely an engine assembly with some attachments and additional

<sup>7</sup> BMW India Pvt. Ltd. vs Commissioner-2019 (366) E.L.T. A28 (Tri. – Chennai)

<sup>8</sup> Panama Chemical Works vs. Union of India-1992(62) ELT 241(M.P)

<sup>9</sup> Unibourne Food Ingredients LLP vs. Commissioner of Customs(CESTAT-Ahmedabad)- In Customs Appeal No. 10680/2020



parts missing here and there. This is because the intent of the Legislature behind the impugned notification is to promote manufacture in India by putting higher tax on an imported item with greater degree of assembly. Lesser the degree of assembly in that imported item, more would be the degree of manufacture or value addition required in India. In other words, to appreciate the issue in this case, it is important to distinguish between engine as a functional system and engine as a mechanical assembly. A radiator is surely necessary for proper functioning of the engine system, but so are many other parts which are conventionally not considered as parts of an engine assembly. The Hon'ble Apex Court in the case of **JBA Printing Ink**<sup>10</sup> relied upon by the noticees, had to decide the classification of radiator assembly between 8409 (parts suitable for use solely and principally with IC engine) and 8479 (machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter) and it decided that an engine cannot function without a radiator assembly, hence correct classification of radiator assembly would be 8409. Here the reference to engine was to the complete functional IC engine system. This judgement does not help this case because the Hon'ble Supreme Court there was not dealing with the difference between the engine system and engine assembly. In the present case, the question is whether an engine assembly without a radiator attached to it would cease to be an assembly or not. Similarly, the opinion dated 17.02.2022 of Sh. A.R. Mohanty, Professor of IIT Kharagpur emphasising only on the functionality of the engine is therefore not relevant in the context of this case. The Professor's opinion is also not reliable because it is completely silent on the documents of the supplier which themselves differentiate between an engine assembly and engine system, and are a critical evidence in the case.

**41.4** Moreover, even in a normal car, it is a commonly known fact that the radiator is located separately from the engine assembly. Any car mechanic can tell you this. The basic principles of science behind the IC (internal combustion engine) engine whether it is the engine of a rear dumper or a car is the same. The engine assembly essentially consists of piston-cylinder mechanism inside which fuel is burnt and converted to mechanical power and transferred to the wheels through the transmission assembly. The radiator with coolant, fan and fins uses the principles of convection and radiation to take away the excess heat from the engine system. From this perspective also, the radiator can be said to be a part of the IC engine system but not of the engine assembly.

**41.5** In the **Panama Chemical case (supra)** relied upon by the noticee, the ratio was "35. *The Central Excise Authorities, after filing of the report of the Director Food and Drugs, in favour of the petitioner discharging the notice issued to them have filed a rejoinder wherein it has been stated that the opinion of the Director is erroneous and should not be acted upon. We fail to understand as to how the opinion of the Experts and that of the Drug Controller can be held to be erroneous in absence of any contrary opinion of Experts being on record.*" The

<sup>10</sup> J.B.A. Printing Inks Ltd. vs Collector of Central Excise [2000 (115) ELT 24(SC)]



Department had obtained the technical opinion and later filed a rejoinder stating it to be erroneous. In the present case, the noticee have obtained an opinion from Professor of IIT Kharagpur behind the back of the Department without any physical inspection of goods and there is no mention of relevant documents in the Professor's opinion and it is not a speaking document. In the **Unibourne Food(supra) relied upon by the noticee, the ratio given in para 11.3** - "11.3 It is settled law that the Expert Opinion given by technical qualified person from a reputed Institute like IIT cannot be brushed aside unless such technical opinion is displaced by specific and cogent evidence." - is not applicable to the present case where the technical opinion has been obtained by the importer unilaterally in a non-transparent manner without involving the Customs Department in the process and without getting the goods physically inspected by the technical expert and critical documents/catalogue of the supplier were also not examined by the said technical expert.

**41.6** Further, as already elaborated above, the functional test is not the correct test to decide whether the item at serial number 2 is an engine assembly or not. Among all the arguments from either side, one most critical point to note is that the supplier has himself treated the radiator assembly as separate from engine assembly. An engine assembly has been shown as different from an engine system. The document of the supplier titled "*Shipping Configuration and Engine Installation & Commissioning :Part Details*" shows engine assembly as one of the assemblies of the engine system and radiator assembly is shown as a separate assembly of the engine system. In the present case, the manufacturer has assembled hundreds of various parts and created an item at serial number 2 and itself named it as an "engine". Thus, it has to be inferred that the engine is pre-assembled. As per GRI 2(a) of the Customs Tariff Act, if the essential characteristic of an article is achieved, it shall get the name of the finished article only. The entire nine assemblies consist of the engine system and engine is one of the assembly. The exemption notification talks about the engine and not the engine system. Most of the conclusions of the Commissioner are based on documentary evidence rather than statements or opinion of chartered engineer or IIT Professor. Hence, conclusions drawn on documentary evidence carry more weight. In not allowing cross-examination of the investigating officer, the Commissioner has rightly drawn support from the case laws of **Everest Diamond Tools<sup>11</sup>, NS Mahesh<sup>12</sup> and JSW Steels<sup>13</sup>**. Further denial of request for cross-examination has been held as not violating the principle of natural justice in **Kanungo and Co.<sup>14</sup>, Tallaja Impex<sup>15</sup>, Patel Engineering Limited<sup>16</sup> and Sridhar Paints<sup>17</sup>**. Further, I find that the Banjo declared in the packing list is transmission mechanism as single sub-assembly with specific serial numbers. The literature for powertrain installation and commissioning shows that banjo assembly includes differential/transmission/rear axle which

<sup>11</sup> Everest Diamond Tools Versus Commissioner of C. Ex., Visakhapatnam - 2007 (211) E.L.T. 327 (Tri-Mumbai)

<sup>12</sup> N.S. Mahesh Vs. Commissioner of Customs, Cochin as reported in 2016 (331) E.L.T. 402 (Kerala)

<sup>13</sup> JSW Steels Ltd. Vs Commissioner of C. Ex., Belgaum as reported in 2010 (254) E.L.T. 318 (Tri-Bang.)

<sup>14</sup> Kanungo & Co. Vs. Collector of Customs, Calcutta & Others [1993(13) E.L.T. 1486 (S.C.)]

<sup>15</sup> Commissioner of Customs, Hyderabad V. Tallaja Impex reported in 2012(279) ELT 433 (Tri.)

<sup>16</sup> Patel Engg. Ltd. vs UOI-2014 (307) ELT 862 (Bom.)

<sup>17</sup> Sridhar Paints v/s Commissioner of Central Excise, Hyderabad-2006(198) ELT 514 (Tri-Bang)



was packed in one of the package number 10 called as "banjo" in the packing list of the bills of entry. The transmission comes mounted on banjo assembly as per the photograph of the *banjo assembly shipment package*. It becomes clear that the entire single part was known as transmission assembly. As per **BMW India(supra)** case law, when the manufacturer supplies engine assembly, transmission sub-assembly/gearbox of motor cars in the form of single product, having unique identification number engraved on them, the same are to be considered in pre-assembled form. Further, transmission is separate from driveshaft. All the three items that is engine, transmission mechanism and gearbox should be in an assembled condition which is not the case here.

41.7 I find that the Ld. Commissioner's reliance on BMW India as correct because both the notifications 21/2011 and 50/2017 are similarly worded and on the same items and therefore the ratio is applicable in the present case. The Commissioner has not specifically relied upon the definition of "completely knocked down condition" given in the explanation at sl no. 344 of the old /earlier Notification No. 21/2011 dated 01.03.2011. I also note that the recovery of duty or implementation of the BMW India Order has been stayed by the Hon'ble Supreme Court and not its ratio decidendi which still exists. I also find that the Ld. Commissioner has not treated the terminologies "completely knocked down condition" & "not in pre-assembled condition" as one and the same. The Ld. Commissioner on the basis of various documents discussed above, has only concluded that the engine mentioned in serial no. 2 of the packing list is in pre-assembled condition even without the radiator being attached to it. Nowhere in the Order, has he tried to prove that the engine is not in completely knocked down condition. So the objection of the noticees on this count is misplaced.

Thus, misdeclaration by the importer in the invoice and bills of entry is established on three counts:

- (i) engine is in pre-assembled condition (engine assembly being different from engine system as per records of the supplier and engine number being engraved on the engine assembly)
- (ii) transmission mechanism is in pre-assembled condition (declared as banjo in the packing list with specific serial number).
- (iii) gearbox is not there contrary to the declaration made.

41.8 In the light of the above discussion, I conclude that the Noticee-1 is not eligible for lower rate of 15% BCD at sr. no. 524 (1) (a) of the exemption notification no. 50/2017-Customs dated 30.06.2017 as amended and customs duty has to be paid by them at the higher rate of 25% BCD on the imported goods as per sr. no. 524 (1) (b) of the said exemption notification.





42. Whether erection and commissions charges of Rs. 30 Lakhs per unit shall be included in the declared assessable value for calculating the Customs duty?

42.1 On this issue, the findings of my predecessor Commissioner in the OIO dated 25.05.22 are reproduced below :

*" 52.1 Show Cause Notice has alleged that Rs.30,00,000/- per equipment would be paid by Noticee no. 1 to Noticee no. 2, towards the technical assistance for assembling and commissioning of dumpers on behalf of manufacturer i.e. Caterpillar Inc. USA. It is alleged that m/s Caterpillar Inc. USA has supplied the goods on the condition that technical assistance or technical knowledge for assembling the dumper would be provided by M/s GMMCO (Supply of goods against payment). Such erection and commissioning charges were not included in declared Assessable Value as per contract. It further alleged that the payment of cost of erection and commissioning appears to be the condition of sale of the goods by the buyer to the third party to satisfy an obligation to the seller. The SCN alleged that such payment would fall under the ambit of condition of sales in terms of Rule 10 (e) of the CVR, 2007 and are liable to be added to the declared value after rejecting the value in terms of Rule 12 of the CVR, 2007.*

52.2 Notice no. 1 in their written reply stated as under:

*i. The goods have been imported pursuant to a Tripartite Contract dated 02.12.2019 executed by and between M/s. Coal India Ltd., M/s. Caterpillar Inc., U.S.A and its authorized dealer in India, M/s. GMMCO Ltd. As per the said Carriage and Insurance Paid to (CIP) Contract, the goods will be shipped by the manufacturer, M/s. Caterpillar Inc., U.S.A. and the same will be installed at the site of the Importer by the Supplier-M/s. GMMCO Ltd. and for that post-importation service/activity rendered by them M/s. GMMCO Ltd. would charge a sum of Rs.30,00,000/- per unit of dumper.*

*ii. The Show Cause Notice blissfully ignores the fact that the erection and commissioning of the goods in the Dumpers in CKD condition are post importation activities and the charges for such erection and commissioning have been paid to M/s. GMMCO Ltd. in India subsequent to import of the goods. These charges have no bearing on the transaction value of the goods and which is genuine. Therefore, the proposed addition of the cost of erection and commissioning to the transaction value of the goods is incorrect and thus deserves to be rejected outright. Even the plethora of decided cases by the Hon'ble Supreme Court, High Courts and CESTAT clearly do not support the Department's case herein. Some of the important authorities are referred to and reproduced here below for the kind perusal of the Hon'ble Commissioner.*

*iii. To put forth their point as above, they relied on the below mentioned judgements:*

- *Bharat Aluminum Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri) decided on 23.04.2019.*

- *Tata Iron & Steel Company Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneshwar - 2000 (116) ELT 422 (SC)*

52.3 Further, Notice no. 2 in their written reply dated 12.04.2022 stated as under:

*i. The proposal of the Notice to include the cost of Rs.30,00,000/- incurred per dumper to the assessable value of the imported goods under Rule 10 of the CVR, 2007 is ex-facie illegal and bad in law. The cost of erection and commissioning is in relation to post-import expenses incurred in India and is therefore, not directly connected to the imported goods at all.*



ii. It is settled law that no additions of post-import expenses can be done to the assessable value. Reliance in this regard is placed on the judgment of the Hon'ble CESTAT in **NCL Industries Limited vs Collector of Customs, Bombay** [2005 (189) ELT 193 (Tri.-Mumbai)] as affirmed by the Hon'ble Supreme Court at 2015 (322) ELT A91 (SC). Hence, the proposal for redetermination of the value is unsustainable in law.

52.4 I find that there is a tripartite agreement among purchase, M/s CIL, manufacturer M/s Caterpillar Inc. USA and M/s GMMCO (authorised Indian Agent of M/s Caterpillar Inc. USA), referred as supplier. The entire agreement was for supply, installation and commissioning of 102 nos. of 190 Tonne Rear Dumpers along with consumables spares and consumables for 12 months of warranty period from the date of commissioning of the equipment and thereafter spares & consumables for a period of 84 months to various projects of NCL. Therefore, it was a turnkey where agreement was for supply of fully commissioned dumpers. Even after commissioning of dumpers, spares and consumables were also to be supplied. The Sr. no. 10 of the said contract is reproduced below:

"The contract is concluded among the Purchaser, the manufacturer and the supplier for supply, installation and commission of 102 nos. of 190 Ton Rear Dumpers along with Consumable Spares and Consumables for 12 months of warranty period from the date of Commissioning of the Equipment and thereafter, spares and consumables for a period of 84 months.

The Equipment shall be supplied by the manufacturer – M/s Caterpillar Inc., 100N E Adams Street, Peoria, Illinois – 61629-3350, USA in USD.

The items sourced in INR required for fitting in the equipment during commissioning of the equipment, consumable spares and consumables for 12 months of warranty period and thereafter spares and consumables for a period of 84 months will be supplied by M/s GMMCO Ltd. in INR.

Separate letter of credit(s) shall be established by NCL and ECL on M/s Caterpillar S. A. R. L., Singapore branch, 7 tractor road, Singapore – 627968 for the set CIF Amount of equipment after deducting Indian Agency commission for equipment in USD for a total value of USD 126, 957,480.36 (US Dollars One Hundred Twenty-six million nine hundred fifty seven thousand four hundred eighty and Point thirty six only). Payment for foreign currency, INR, Indian Agency Commission and Customs Duty etc. shall be made as per provisions contained in clause-7, SCC of the Contract."

52.5 Thus, I find that the entire contract price was bifurcated into the following parts:

- i. CIF value of the equipment.
- ii. Erection and commissioning charges per equipment.
- iii. Price of all items sourced in India required for fitting in equipment during commissioning of equipment.
- iv. Price of consumables to be supplied after commissioning.

On perusal of the same it can be inferred that Noticee no. 1 had not ordered for the goods in the condition as imported. They had ordered for supply, installation and commissioning of 102 nos. of 190 Tonnes rear dumpers along with consumables thereafter. Thus, installation and commissioning was integral to the goods imported unless installation and commissioning of goods imported was done, the condition of the contract is not fulfilled. Erection and commissioning is done for all the goods imported by the Noticee no. 1. Therefore, erection & commissioning is related to imported goods.



52.6 As per the definition given in the contractual agreement, 'Service' is defined in 1 (d) which is reproduced below:

*"The "Services" means those services ancillary to the supply of the Goods, such as transportation and insurance, and any other incidental services, such as installation, commissioning, and provisioning of technical assistance, training and other such obligations of the Manufacturer/Supplier covered under the Contract."*

*It clearly states that Services means those services ancillary to **Supply of Goods** such as installation, commissioning, and provisioning of technical assistance etc. Thus, it is very clear that post importation services like erection and commissioning was a **Condition of Sale** of goods as imported.*

52.7 Condition no. 8 of General Conditions of Contract (GCC) is reproduced below:

**"8. Inspections and Tests**

8.1 *The Purchaser or its representative shall have the right to inspect and/or to test the Goods to confirm their conformity to the Contract Specifications at no extra cost to the Purchaser. SCC and the Technical Specifications shall specify what inspections and tests the Purchaser requires and where they are to be conducted. The Purchaser shall notify the Supplier in writing, in a timely manner, of the identity of any representatives retained for these purposes. Sufficient time, at least 30 days in advance should be given for inspection.*

8.2 *The inspections and tests may be conducted on the premises of the Supplier, at point of delivery and/or at the Goods' final destination. If conducted on the premises of the Supplier, all reasonable facilities and assistance, including access to drawings and production data, shall be furnished to the inspectors at no charge to the Purchaser. However, any drawing and proprietary information provided for this purpose shall remain in control of the supplier.*

8.3 *Should any inspected or tested Goods fail to conform to the Specifications, the Purchaser may reject the Goods, and the Supplier shall either replace the rejected Goods or make alterations necessary to meet specification requirements free of cost to the Purchaser.*

8.4 *The Purchaser's right to inspect, test and, where necessary, reject the Goods after the Goods' arrival in the Purchaser's country shall in no way be limited or waived by reason of the Goods having previously been inspected, tested and passed by the Purchaser or its representative prior to the Goods' shipment from the country of origin.*

8.5 *Nothing in GCC Clause 8 shall in any way relieve the Supplier of any warranty or other obligations under this Contract."*

*On perusal of the same, it is clear that the inspection and tests was to be conducted on the premises of supplier to the point of delivery and/or at final destination of goods after delivery. The goods which were ordered were for the complete 190 Tonne Rear dumpers in working condition. As per the above condition, it is also stated that if tested goods fail to confirm to the specification, purchaser may reject the goods. Thus, as per the agreement, the goods are actually handed over to the Noticee no. 1 only after the erection and commissioning of the imported goods. If service of erection and commissioning of goods is not provided by the supplier of the goods, the Noticee no. 1 is bound to reject the goods.*



52.8 Condition no. 5.1 of the Special conditions of Contract (SCC) is reproduced below:

"5.1 The following Services, pursuant to Clause-13 of the GCC, shall be provided by the Supplier:

**(a) Erection, Testing and Commissioning**

*Erection, testing and commissioning of the Equipment as detailed in the Schedule of Requirements and the Technical Specifications.*

*The supplier shall be responsible for the erection and commissioning within 30 days from the receipt of equipment at site.*

*The purchaser will provide necessary cranes, electricity and fuel required for testing only. All other erection tools & tackles including manpower will be arranged by the supplier. Any substantial delay in providing cranes from purchaser side will be recorded jointly for calculation purpose of erection & commissioning time.*

*If the supplier fails to commission the equipment within the specified period as mentioned above, Liquidated damages will be recovered @ 0.5% of the landed price of the equipment along with accessories per week or part thereof for the delayed period subject to a maximum of 5% of the landed price of equipment along with accessories.*

**(b) Tools**

*Furnishing of tools required for assembly and maintenance of the supplied Goods as detailed in the Schedule of Requirements and the Technical Specifications. A complete list as per clause – A.2 of Technical Specifications is enclosed as Annexure –4(f).*

**(c) Manuals**

*Furnishing of detailed operating, repair, maintenance and spare parts manuals as detailed in the Technical Specifications.*

**(d) Training**

*Training of the Purchaser's personnel as detailed in the Schedule of Requirements and the Technical Specifications. The cost of such Services are included in the Contract Price. The details of training charges are indicated in Price Schedule which shall be used for deduction purposes only, in case of any default in training as per the given schedule.*

*The Supplier shall be responsible for arranging and the cost of all necessary tickets, visas, permits, foreign exchange and any other matter or facility for visits of the Supplier's personnel for the purposes of Erection, Testing and Commissioning the Equipment and/or Training of the Purchaser's personnel – the Purchaser shall have no responsibility in this regard except in respect of issuance of letters supporting visa applications as may reasonably be requested by the Supplier. The Supplier shall be responsible for paying taxes, if any, including personal income tax and surcharge on income tax, for which it or its personnel may become liable.*

*For visit of Purchaser's personnel to manufacturer's works/venue of training, the Purchaser shall arrange all necessary tickets, conveyance, lodging and boarding and any other matter or facility for visits of Purchaser's personnel."*

*It clearly states that if supplier fails to commission the equipment within the specified period, liquidity damage may be recovered. This further proves that erection and commissioning was a Condition of Sale.*



52.9 Point no. 7.2 (ii) and 7.2 (iii) for payment of equipment is reproduced below:

"(ii) 80% payment of the net CIF value will be made against submission of shipping documents and copy of Performance Bank Guarantees) and original copies of acceptance of these PBG(s) and receipted challan / consignment note of all the consignments, through unconfirmed, irrevocable letter of credit.

(iii) Balance 20% of the net CIF value will also be paid through the same unconfirmed irrevocable, letter of credit against submission of successful commissioning certificate, signed by the concerned officials of the Project and counter-signed by the Area General Manager and HOD of Excavation Deptt. of the subsidiary company, where the equipment has been deployed and confirmation of receipt of DRR/SRV in respect of spares and consumables. for first 12 months of warranty period from the date of commissioning of the equipment by the paying authority."

**From the perusal of the above, it is clear that the payment which is related to the imported goods i.e. net CIF value is not paid on receipt of goods. Only 80 % of payment of net CIF value is made on shipping of document. Rest 20% of net CIF value is being paid upon submission of Erection and Commissioning of the equipment. Thus, even the payment with regard to imported goods is conditioned on the Erection and Commissioning of the imported 190 T rear dumpers.**

52.10 I am reproducing certain provision of the scope of supply as specified in Technical specification of Contract:

"A1 Equipment Package:

The supplier is required to provide a complete package of equipment for the supply of 190 T Rear Dumper [Payload – 214 T (195MT)] to opencast (surface) coal mining projects as per the Technical Specifications provided in Part D.

The supplier is required to supply the equipment along with accessories, consumables, training, installation, commissioning and testing at the coal mining project.

...

...

A.4 Erection/Assembly, Commissioning and Performance Testing:

The supplier shall provide the Services of Specialist Technicians (refer Part – C.3) and required manpower (skilled/semi-skilled/un-skilled) to undertake the installation/erection/assembly, commissioning and any performance testing of the Equipment and accessories supplied.

The technicians shall remain at site following commissioning until all necessary personnel are fully conversant with the maintenance and operation of the equipment.

**On perusal of the above, the entire responsibility of supply of the imported goods was given to the supplier M/s GMMCO on behalf of the manufacturer M/s Caterpillar Inc. USA. Supply was for the 190 Tonnes Rear Dumper and it was the supplier which was supposed to provide specialized Technicians and manpower to undertake the installation/erection/assembly, commissioning and any performance testing of the Equipment and accessories supplied.**



52.11.1 I am reproducing Rule 10 of the CVR, 2007 for the sake of brevity:

**" 10. Cost and services. -**

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

...

...

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

*Explanation - Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.*

...

...

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

52.11.2 Rule 10 comes into the picture in determining the transaction value when there shall be a price in addition to the price actually paid or payable for the imported goods. Thus, as per Rule 10 of the CVR, 2007, certain value needs to be added to the price actually paid or payable. In the present case, the price paid for erection and commissioning @ 30 lakhs per equipment is proposed to be added to the price actually paid or payable for the equipment as per Rule 10 (e) of the CVR, 2007. The above conclusion is validated by 1<sup>st</sup> proviso of Section 14 of the Customs Act, 1962 which states that "such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf."

52.11.3 As per Rule 10 (e) of the CVR, 2007, all other payments actually made or to be made as a condition of Sale of imported goods by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable. Hence, I find that as discussed above, it is well proven that payment of erection and commissioning @ 30 lakhs was a condition of sale of the imported goods made by the buyer to the 3<sup>rd</sup> party to satisfy the obligation of the seller and such payment was not actually added in the price actually paid/payable. Explanation to Rule 10 clearly states that if other payments are included in terms of Rule 10 (e) of CVR, 2007, same shall be added notwithstanding the fact that such goods may be subjected to the said process after importation of such goods. So even if the services related to the importation of goods was provided after importation of goods, the same should be added as per explanation to Rule 10 (e) of the CVR, 2007. Therefore, the argument of both the noticees that charges of erection and commissioning cannot be added being post importation charges is not sustainable. Thus, I find that erection and commissioning need to be added in terms of Rule 10 (e) of the CVR, 2007 read with Section 14 of the Customs Act, 1962.



52.11.4 I find that Noticee no. 1 has relied upon decision of Hon'ble Tribunal in the case of **Bharat Aluminium Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri)**. I find that the said CESTAT judgment is not applicable in the present case as in this case, the FOB value included the supply of equipment including commissioning and mandatory spares on which Customs duty is already paid. Moreover, there was no evidence in this case that extra cost for supervision for erection and commissioning was a condition of sale of the imported goods.

52.11.5 I find that the Noticee no. 1 has also relied upon Hon'ble Supreme Court Judgment in **Tata Iron Steel Company Limited Vs Commissioner of Central Excise Cus 2000(116) ELT 422 (SC)**. The same case is not applicable in the present case as it was held in the said case that no payment was made as a condition of sale of imported goods. Therefore, in both the judgment payment of erection and commissioning was not present as a condition of sale. However, in present case, payment of post importation charges was undisputedly proven as a condition of sale of imported goods. In this regard, I rely upon the judgment of Hon'ble Tribunal, Mumbai, in the case of **Mukund limited Vs Commissioner of Customs, ACC** as reported in 1999 (112) E.L.T. 479 (Tribunal), wherein it was held that

*"Providing of basic design and drawing of the gas cleaning plant and supervision of detail engineering and drawing form an inseparable item as per the contract to be performed by Davy Mckee. The payment of \$ 6,57,900 in the price schedule is towards the supervision during design, erection, commissioning and performance guarantee tests and which is a necessary concomitant to the supply of Design and Engineering drawings for the gas cleaning plant made by Davy Mckee and imported by the appellants. The appellants have been entrusted with the setting up of gas cleaning plant, and this could only be achieved not only by purchasing the basic design and engineering drawings imported from Davy Mckee but also the whole engineering package of supervision of detail drawing, erection, commissioning and performance guarantee tests. The payment made in foreign exchange towards supervision charges during design, erection and commissioning will necessarily have to form part of the assessable value of the imported goods and the value thereof will include not only the price paid for design and engineering but also the supervision charges.*

I find that above judgement has been given relying on Hon'ble Supreme Court Judgement in the matter of **Collector of Customs (Prev.), Ahmedabad Vs Essar Gujarat Ltd.** as reported in 1996 (88) E.L.T. 609 (S.C.) wherein the Hon'ble Apex has held that "Condition of obtaining a license from Midrex is a pre-condition of sale of the plant; hence Process license fees and cost of technical services for transfer of technology paid to third party includible in the price of the plant since plant cannot be made operational without them.

Further, in a similar matter of **Otto India Pvt. Ltd.** [2003 (158) E.L.T. A331 (S.C.)], the Hon'ble Apex Court had held that if technical know-how supplied is relatable to the equipment supplied, the consideration paid for the same can be included in the assessable value of the equipment.

Thus, I find that the payment for erection, testing and commissioning charges have to form part of assessable value of imported goods in terms of Rule 10(1)(e) of the CVR, 2007 read with Section 14 of Customs Act, 1962.

52.11.6 I find that various judicial pronouncements as detailed below where it has been held that for adding the post importation services in the value of the imported goods it is necessary that activities of post importation stage should be linked to imported equipment as a condition of sale. As long as there is a condition of sale the post importation of services of goods should be added to Assessable Value of goods. In this regard, I rely upon below mentioned judgments of the Hon'ble Supreme Court



• 2020 (237) ELT478 (SC)- **Commissioner of Customs, Kolkata Vs Steel Authority of India Limited;**

• Hon'ble Supreme Court in case 2011 (271) ELT 3 (SC)- **Commissioner of Customs, New Delhi Vs Living Media India Limited** has held that-

*"In all these cases, there is no dispute that the cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement existing in all the matters that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. Counsel appearing for the Respondent relied upon the commentary on the GATT Customs Valuation Code. We failed to see as to how the aforesaid commentary on the GATT Customs Valuation Code could be said to be applicable to the facts of the present case. The specific sections and the rules quoted hereinbefore are themselves very clear and unambiguous. We are required only to give interpretation of the same and apply the same to the facts of the present case."*

• Hon'ble Supreme Court in 2008 (224) ELT 23 (SC) – **Commissioner of Customs Vs Feredo India Pvt. Ltd.** has held that-

*"Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the wording of the imported goods then such payment was not includible in the price of the imported goods."*

• Hon'ble Supreme Court in 2007 (213) ELT 4 (SC)- **Commissioner of Customs (Port), Chennai Vs Toyota Kirloskar** has held that- *"The transactional value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exists between an amount payable as a condition of import and an amount payable in respect of the matters governing the manufacturing activities, which may not have anything to do with the import of the capital goods."*

52.11.7 Thus, as long as a post importation charge in terms of Rule 10(1) (e) of CVR, 2007 is a condition of sale of imported goods, same shall be added to assessable value of the goods. I find that in the case of **Jai Balaji Industry Limited Vs Commissioner of Customs & Service tax, Vishakhapatnam** as reported in 2015 (319) ELT 149 (Tri-Bang.), it has been held that:

*"As regards technical supervision also, the nature of technical supervision has not been given clearly and even otherwise it is part of design and engineering cost and therefore we do not propose that this can be excluded. Further, it has also been noted that, in our opinion, in this case, it can be said that design and engineering charges have to constitute part of the assessable value since it is a condition of sale. There is no indication that appellants had the liberty to get the erection, commissioning and installation done by someone else. This is part of the same contract and there are no separate contracts for these activities. There is also no indication that appellants made enquiries or conducted their own verification to find that the two items of work can be separated. In such a situation, we have to take a view that design and engineering work was a condition of sale. On this ground also, appellants have no case. In view of the above discussions, we find that appellants are liable to pay customs duty on design and engineering and technical supervision charges and therefore demand for customs*





*duty with interest and the amount paid and appropriated are in order and need no interference."*

*52.11.8 I find that as discussed above, the services of erection and Commissioning was a condition of sale for the imported goods. The contract was for supply of the assembled goods which was transferred to M/s. NCL only after completion of erection, Commissioning and testing process. Since the technology was only with the supplier of goods, no other person was in a position to do erection and commissioning for the said imported goods. All these evidences completely prove that the supply of the said goods after erection and commissioning was a condition of sale of the imported goods. Therefore, the value of the erection and commissioning shall be added to the Assessable value to the imported goods for the purpose of determination Customs duty in terms of Rule 10(1) (e) of the CVR, 2007 read with Section 14 of the Customs Act, 1962.*

*52.11.9 I find that as per explanation (1) (i) of Rule 12 of the CVR, 2007, it has been stated that where the declared value is rejected, the value shall be determined sequentially in accordance with Rule 1 to 9 of CVR, 2007. In the present case, there is no dispute regarding the declared value. Therefore, there is no need to reject the declared value, and question does not arise in determination of value in terms of Rule 1 to Rule 9 of the CVR, 2007."(emphasis added)*

**42.2** The noticee-1 in their written submissions dated 21.11.2022 stated that the Ld. Commissioner has erred by adding the erection and commissioning charges in the assessable value of imported goods without evidence of contemporary imports of similar or identical goods at a higher value or about the same time. Rest of the points raised by the noticees were same as earlier.

**42.3** I find that the above mentioned observations /conclusions contained in paras 52 to 52.11.9 of the OIO dated 25.05.2022 in relation to 84 Bills of Entry, are directly applicable in the present case covering 18 Bills of Entry of identical goods with identical documentation covered by the same tripartite contract. Caterpillar Inc., USA had supplied the goods to M/s CIL, on the condition that technical assistance or technical knowledge for assembling the said dumpers would be provided by Caterpillar to GCPL only. Such erection commissioning charges were not included in the declared assessable value as per contract. On perusal of the bifurcation of the entire contract price into its various elements, it can be inferred that noticee-1 had not ordered for the goods in the condition as imported, they had ordered for supply, installation and commissioning of 102 numbers of 190 tonnes rear dumpers along with consumables thereafter. Thus, installation commissioning was integral to the goods imported. Unless installation and commissioning of imported goods was done, the condition of the contract was not fulfilled. The contract stated clearly that if the supplier of imported goods failed to commission the equipment within the specified period, liquidity damage may be recovered. Further the payment for imported goods was also conditional upon completion of erection and commissioning of the equipment . The entire responsibility of the supply of the imported goods was given to the supplier GCPL on behalf of the manufacturer Caterpillar Inc, USA. Supply was for the 190 tonnes rear dumper and it was the supplier who was supposed to provide specialised technicians and manpower to undertake the installation/directions/assembly, commissioning and any performance testing of the equipment and accessories supplied. Rule 10 (1)(e) of the CVR,2007 clearly states that all



other payments actually made ought to be made as a condition of sale of imported goods by the buyer to the seller or by the buyer to a third party to satisfy and obligation of the seller to the extent that such payments are not included in the price actually paid or payable. The case laws of **Bharat Aluminium**<sup>18</sup> and **Tata Iron and Steel Company**<sup>19</sup> relied upon by the noticees have been rightly distinguished by the Commissioner above . I also agree with the ratio of **Mukund Limited**<sup>20</sup> where it has been held that the payment towards supervision charges during design, erection and commissioning will naturally have to form part of the assessable value of the imported goods. I also find that the ratio of **Otto India**<sup>21</sup>, **Steel Authority**<sup>22</sup>, **Ferodo India**<sup>23</sup>, **Toyota Kirloskar**<sup>24</sup> and **Jai Balaji Industry**<sup>25</sup> discussed by the Commissioner above are applicable in the present case.

**42.4** Thus, I conclude that since erection and commissioning charges are condition of sale for the imported goods in the present case, their value shall be added to the assessable value of these imported goods for the purpose of determination of the custom duty in terms of rule 10 (1) (e) of the CVR,2007 read with section 14 of the Customs Act, 1962. Sequential application of valuation rules or production of contemporaneous import data is not relevant here as it is only a case of addition to the transaction value .

**43. Whether the imported goods are liable for confiscation under Section 111(m) of the Customs Act, 1962?**

**43.1** On this issue, the findings of my predecessor Commissioner in the OIO dated 25.05.22 are reproduced below :

*"53.1 I find that there is proposal for confiscation of the imported goods in the Customs Act, 1962. Section 111(m) of the Customs Act, 1962 is reproduced below:*

*"Section 111. Confiscation of improperly imported goods, etc. –*

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

-

...

...

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

*As per 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 in this Act, they shall be liable for confiscation. I find that erection and commissioning charges was supposed to be added to arrive at the Assessable Value of the goods and the same has not been added*

<sup>18</sup> Bharat Aluminum Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri)

<sup>19</sup> Tata Iron & Steel Company Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar - 2000 (116) ELT 422 (SC)

<sup>20</sup> Mukund limited Vs Commissioner of Customs, ACC-1999 (112) ELT 479 (Tribunal)

<sup>21</sup> Otto India Pvt. Ltd. [2002 (149) E.L.T. 477 (Tri. - Kolkata)]

<sup>22</sup> Commissioner of Customs, Kolkata Vs Steel Authority of India Limited-2020 (237) ELT478 (SC)

<sup>23</sup> Commissioner of Customs Vs Ferodo India Pvt. Ltd.- 2008 (224) ELT 23 (SC)

<sup>24</sup> Commissioner of Customs (Port), Chennai Vs Toyota Kirloskar 2007 (213) ELT 4 (SC)

<sup>25</sup> Jai Balaji Industry Limited Vs Commissioner of Customs & Service tax, Visakhapatnam- 2015 (319) ELT 149 (Tri-Bang)



in the Bill of Entry, and therefore, there has been a mis-declaration of value of the imported goods.

53.2 I find that Noticee no. 2 has argued that **there was no mis-declaration of goods in the Bill of Entry. They have also relied upon the definition of 'entry' as defined in Section 2(16) of the Customs Act, 1962 which states as below:**

**"'entry' in relation to goods means an entry made in the Bill of Entry, Shipping Bill or Bill of Export and includes the entry made under the Regulations made under Section 84."**

53.3 I find that the description of goods as given in the invoice pertaining to a sample Bill of Entry is as described below:

**"CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT.HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION."**

However, the description given in a sample Bill of Entry was as below:

**"CATERPILLAR 190T REAR DUMPER MODEL 789D SR.NO.SPD00830(CKD) WITH ALL NECESSCOMPONENTS FOR ASEMBLING A COMPLET VEHICLE"**

I find that the entire description of goods was not written in Bill of Entry due to space constraints, as only 120 characters could have been entered in the Bill of Entry (total characters required for the description of the invoice was 234). In such a situation where complete details cannot be entered in a Bill of Entry due to space constraints, then the **description given in invoice will be considered as description given in the Bill of Entry.** As discussed above, it is already proved that the description in invoice has been wrongly declared as not in pre-assembled condition, as Engine and Transmission Mechanism were in pre-assembled condition. I also find that in the invoice it has been explicitly declared by the importer/supplier that among other parts/assemblies of dumpers, the Gearbox was not in a pre-assembled condition whereas **there is no mention of gearbox in the corresponding packing list or in the contract.** Further, both the noticees have clearly mentioned in their submissions that there was no specific gearbox in 190T dumpers imported by them. Yet, the invoice wrongly mentions the "Gearbox not in a pre-assembled condition". **This appears to be a deliberate attempt of the supplier/importer with malafide intentions to align the description of the imported goods in the invoices with the wordings of the said Notification only to misguide the Customs authorities and wrongly avail the benefits of the Notification,** which further unfailingly proves the mis-declaration in description of the goods. In the present case, the wrong exemption has been claimed by mis-declaration of description of goods and therefore, confiscation under Section 111(m) of the Customs Act, 1962 is applicable. There is plethora of judgements in various judicial forums that if there is a mis-declaration of description of goods and value, confiscation of the said goods is applicable in such cases. I rely on a few of the said judgments which are squarely applicable in the present case:

- **Parshav Alloys vs Commissioner of Customs(I), Nhava Sheva, Raigad - 2020 (374) ELT 117 (Tri-Mum)**
- **Om Hemrajani vs Commissioner of Customs, CSIA, Mumbai - 2019 (370) ELT 466 (Tri-Mum)**
- **R.V. Manoj Kumar vs Commissioner of Cus., C. Ex. & S.T., Cochin - 2019 (369) ELT 1304 (Tri.-Mum)**
- **Commissioner v. R.R. Enterprises - 2015 (318) ELT A263 (AP)**



54. I find that noticee no. 1 has imported 84 dumpers, out of which 50 dumpers were already released without seizure, while the remaining 34 dumpers were provisionally released after seizure of the same. I find that in terms of Section 125 of the Customs Act, 1962 there is an option to pay fine in lieu of confiscation. Section 125 is reproduced below for the sake of brevity:

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

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

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

*I also find that as per the judgment in the case of Visteon Automotive Systems India Limited Vs CESTAT, Chennai, the Hon'ble High Court of Chennai has held that availability of goods is not necessary for imposing redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act." (emphasis added)*

43.2 Noticee-3 in their submission dated 17.08.2022 has submitted that they sought 'first check assessment' for the goods covered under ten (10) Bills of Entry so it cannot be said they have subscribed to declaration as to the truth of the contents of such Bills of Entry as required under Section 46(4) of the Act. In absence of declaration to truth or accuracy of the particulars of the goods, charge of mis-declaration under Section 111(m) of the Customs Act, 1962 cannot be sustained. Rest of the points raised by the noticees in their written submissions dated 28.10.2022, 21.11.2022 and 17.08.2022 respectively, are same as submitted before the earlier Adjudicating Authority.

43.3 I find that the above discussion from paras 53.1 to 54 of the OIO dated 25.05.22 addresses the objections raised by the noticees on this issue. I find that erection and commissioning charges were supposed to be added to arrive at the assessable value of the goods and the same has not been added in the Bill of Entry, and therefore, there has been a mis-declaration of value of the imported goods. The description in the invoice has been wrongly declared as not in pre-assembled condition, as Engine and Transmission Mechanism were in pre-assembled condition. I also find that in the invoice, it has been explicitly declared by the importer/supplier that among other parts/assemblies of dumpers, the gearbox was not in a pre-assembled condition whereas there is no mention of gearbox in the corresponding



packing list or in the contract. This appears to be a deliberate attempt of the supplier/importer with *malafide* intention to align the description of the imported goods in the invoices with the wordings of the said exemption notification to wrongly avail the benefits of the same. In this regard, the Ld. Commissioner has drawn support from the case laws of **Parshav Alloys**<sup>26</sup>, **Om Hemrajani**<sup>27</sup>, **R.V. Manoj Kumar**<sup>28</sup> and **R.R. Enterprises**<sup>29</sup>. I find that in the subject matter, M/s Coal India Limited entered into an agreement with M/s Caterpillar Inc and M/s GMMCO Ltd. for the import of a total 102 nos. of 190T dumpers. Out of these 102 dumpers, 84 nos. of dumpers were to be imported by M/s NCL and remaining 18 nos. were to be imported by M/s ECL. First check sought by importer i.e., M/s ECL is after importation of around 66 identical dumpers already imported by M/s NCL of this contract and after initiation of investigation started by SIIB (I) in respect of the subject dumpers. Also no explanation has been provided by the noticee as to why such a request was not made at the import of the first dumper of this contract. In this regard, the ratio decided in the **Drunkey Exports(P) Ltd.**<sup>30</sup> is squarely applicable in the present case. In **Drunkey Exports** the importer had tried to revise the invoices for the misdeclared quantity after the start of the DRI's investigation and Hon'ble CESTAT Kolkata held that this was an afterthought and upheld the charge of misdeclaration and penalty. Hence, I find that first check sought by importer was an afterthought after initiation of investigation by SIIB(I); therefore noticees' argument that they have not subscribed to a declaration as to the truth of the contents of some Bills of Entry filed later, as required under Section 46(4) of the Act, is not correct. Thus, I conclude that the impugned goods do not correspond in respect of description and value as per the invoice; hence, they are liable for confiscation under Section 111(m) of the Act.

**44. Whether the demand under Section 28(4) of the Act is sustainable? Whether pre-notice consultation was required? Whether penalty is imposable under Section 114A/112 (a) and Section 114AA of the Act on M/s ECL?**

**44.1** On this issue, the findings of the Ld. Commissioner in the OIO dated 25.05.22 are reproduced below :

*"55.1 I find that the entire demand has been raised, of the Customs Act, 1962. The Show Cause Notice has alleged that the importer, supplier and manufacturer were in absolute collusion to submit wilful misstatement by suppressing the facts about the form and nature of the goods and thereby claimed undue Notification benefit. It is also alleged that the manufacturer of the goods M/s Caterpillar Inc., USA in all its invoices has declared that Engine, Gearbox and Transmission Mechanism are not in pre-assembled condition. However, the packing list issued by the manufacturer clearly identify the engine and banjo as a pre-assembled unit. Thus, it is alleged that manufacturer has manipulated the invoice with intention to avoid Customs Duty. It is further alleged that the manufacturer of the goods had categorically stated in the Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 that dumpers*

<sup>26</sup> Parshav Alloys vs Commissioner of Customs(I), Nhava Sheva, Raigad - 2020 (374) ELT 117 (Tri-Mum)

<sup>27</sup> Om Hemrajani vs Commissioner of Customs, CSIA, Mumbai - 2019 (370) ELT 466 (Tri-Mum)

<sup>28</sup> R.V. Manoj Kumar vs Commissioner of Cus., C. Ex. & S.T., Cochin - 2019 (369) ELT 1304 (Tri-Mum)

<sup>29</sup> Commissioner v. R.R. Enterprises - 2015 (318) ELT A263 (AP)

<sup>30</sup> Drunkey Exports(P) Ltd vs Commissioner of Customs, Kolkata- 2004 (165) E.L.T. 417 (Tri. - Kolkata)



would be supplied in a completely knock down condition with engine, gearbox and transmission mechanism not in a pre-assembled condition but still instead of complying with agreement, the manufacturer have contravened the conditions of contract and mis-declared the description of goods in their invoices. It is further alleged that the manufacturer, M/s Caterpillar INC., USA vide their letter No: CIL/190T/price Justification/18-19 dated 19.04.2019, submitted that the machines shall be shipped in completely disassembled condition in 20-25 packages. But such condition was found to be in contravention to respective Packing lists which contained 15 packages only.

55.2 Noticee no. 1 has submitted the following arguments for non-applicability Section 28 (4) the Customs Act, 1962:

i. Reliance placed by the Customs Department on Clause 7.5 of the Contract is misplaced. In the present case, global tender was invited by CIL for supply of 102 numbers of 190T Rear Dumpers, to which Caterpillar Inc. USA (Manufacturer) responded and became the successful bidder, by offering to supply the same in CKD condition, that too by making the clear cut representation before the CIL that the said three parts thereof – Engine, Gearbox and Transmission Mechanism would be supplied in unassembled condition only and not in pre-assembled condition so as to attract only the lower rate of Customs Duty at 15% BCD as provided in the Exemption Notification. During processing of tender, a representation was received from the L-2 bidder to the effect that such dumpers cannot be imported having 3 parts not in pre-assembled condition. Therefore, the manufacturer and their authorised dealer - GMMCO Ltd were requested to confirm the condition of shipment of the dumpers in line with relevant Customs Notification qualifying for the lower rate of BCD, i.e. 15%. When the manufacturer and its local representative - GMMCO Ltd. (Supplier) confirmed to CIL that they are in a position inter-alia, definitely to supply the said 3 Parts of the Dumpers in Unassembled CKD condition, it was made known to them that if it is found by the Customs Authorities that the 3 parts of the Dumpers are in Pre-assembled condition attracting higher rate of duty, then apart from paying differential duty of 10% BCD, fine and penalties would also have to be paid/borne by them without any demur. Both the Manufacturer and Supplier were confident that the three parts of the Dumpers to be supplied by them were in unassembled condition and if they fail, then the Supplier who is the representative of the Manufacturer would be liable and make good the differential duty, fine and penalties, etc. Accordingly, after obtaining the 2 written Justification Letters from each of them, as stated herein below, the said Clause 7.5 was inserted in the Tripartite Contract. As per the said clause, the declarations to be made in the Bills of Entry that were to be filed by the CIL, would be based on the declarations made/furnished by the Manufacturer and the Supplier and in case such declarations were found to be incorrect, then the entire differential duty, fine and penalties, etc. imposable by the Customs had to be borne by the Supplier. This fact clearly reflects that if there was any collusion on the part of CIL, then such an express clause would not have been inserted at all in the contract by creating civil as well as criminal liabilities on the part of both the Manufacturer and the Suppliers. In fact, insertion of the said Clause 7.5 in the contract, unequivocally establishes the transparency of the entire transactions entered into by the CIL and its bona fides, which stood the scrutiny of even Independent External Monitors' Certificates/Minutes, as mandated by the Central Vigilance Commission, Government of India.

ii. The Clause 7.5 was inserted in the Contract as a matter of abundant caution, because, the goods were to be supplied subsequent to the contract and if the goods supplied were found to be contrary to the Representations and/or Declarations made by the Manufacturer and the Supplier, then the CIL may face serious difficulty. To obviate such unwarranted and uncalled for liability, if any, the said Clause 7.5 was inserted in the Contract with the avowed object of protecting the CIL's interest. It is because of the complexity of the matter and to safeguard the interest of CIL, in case of failure of the L1/Successful Bidder to comply with the requirement to qualify for BCD @15% during the actual shipments, the said Clause No. 7.5 was incorporated. In such a case, the customs authority is not justified in misreading, misinterpreting and



*misconstruing the said Clause 7.5 of the Contract and treating or holding that the said clause was inserted in furtherance of the alleged collusion. Further, it is because of the said provision of the Contract, the CIL has proceeded to deposit the entire demand of Customs Duty differential amounting to about Rs.136 crores covered under these 2 and the other one SCN issued to ECL, as stated herein above.*

iii. *It is relevant to note that all the Bills of Entry were filed after obtaining report of the Chartered Engineer Mr. M. Vairamohan to the effect that the said three parts of the Dumpers were in unassembled condition. Merely because the said Chartered Engineer has subsequently given a contrary statement, cannot be a ground to hold that CIL has colluded, suppressed and mis-declared the goods. As noted earlier, even the recently obtained report of IIT Kharagpur falsifies the subsequent statement made by the said Chartered Engineer and supports the case of CIL.*

iv. *The CIL being a Government Company, payment of Customs Duty at the lower rate or at the higher rate would be inconsequential, because in such a case payer and the recipient of the customs duty would only be the Central Government. It is not the case of the Customs Authorities that any of the officers of CIL were to be benefitted either directly or indirectly, by paying lower rate of duty. In such a case, allegation in the Show Cause Notices that CIL has suppressed, mis-declared and colluded with the Manufacturer and the Supplier is completely unwarranted and untenable.*

v. *50 bills of Entry at 6 different stages were assessed by the department and no doubt was raised by the assessing officer during clearance. Although, under the extant provisions of the Customs Act, it is the liability of the Importer to file Bill of Entry by making proper and truthful declarations before the Customs Authorities and to pay the proper amount of duty, etc., in this case, however, CIL acted on the advice of the Bidders who promised under the Contract to deliver the Dumpers at the agreed price, which is exclusive of Customs Duty only at 15% BCD. Thus, the CIL in this case is totally an innocent party, for it has not made any willful mis-statements or false statements before the Customs Authorities in its Bs/E and even not suppressed any fact from the Customs Authorities, while clearing the goods. The second aspect involved herein is, there was no need for the CIL to indulge in any type of acts of misfeasance and malfeasance for gaining by way of clearance of the Dumpers at the Concessional rate of Customs Duty. It is so because the CIL is a Government of India owned Company and all the profits registered by the Company would go to the Government of India itself. However, the Customs officers have completely ignored this aspect while foisting this false case on the CIL in outright illegal manner, without any legally sustainable evidence whatsoever.*

vi. *It is, therefore submitted that for the mere reason that the aforesaid specific Clause No. 7.5 contained in the contract dated 02.12.2019, it would be improper to hold that the CIL has connived with the supplier and the manufacturer, especially when ---*

- a) *CIL being a Government Company, it is legally obliged for it to accept the L-1 bid as to save the Government money and avoid wastage of public money. In this case, Caterpillar being the successful bidders, CIL had no choice, but to accept their bid.*
- b) *If the representations made by the supplier/manufacturer in their bid are found to be incorrect, then the entire differential duty along with interest and penalty, if any, were to be borne by the Supplier/Caterpillar themselves.*
- c) *In such a case, where M/s. Caterpillar Inc is the World Renowned Manufacturer of Heavy Duty Dumpers and further that their local agent GMMCO-Supplier is seriously contesting the show cause notices, how anyone can hold that the CIL has connived with said the supplier and manufacturer.*

d) *A copy of the contract was made available to the customs authorities during the clearance of goods and investigations stage itself. Hence nothing has been suppressed by the CIL from the customs.*



vii. While stoutly denying and disputing the allegation of involvement of our clients in the acts of connivance and collusion with Caterpillar Inc., USA, or GMMCO, without prejudice to all other grounds as set out here in this reply, Our Clients respectfully state and submit that if at all any such collusion or connivance existed in this case which has resulted in making any wilful mis-statement while describing the nature of manufacture of the goods, it is only by and between the Manufacturer – Caterpillar Inc., USA and their local agents GMMCO - Supplier, but definitely not the CIL. It is further submitted that the Customs Department, however, has failed to charge the said manufacturer, though they have their local office in India. If at all any type of collusion and connivance in this case which resulted in filing the Bills of Entry with the wilful wrong description of goods, the customs ought to have made the said manufacturer a co-noticee in the SCN along with the Supplier, both of whom were responsible for furnishing to CIL all the information and the duly filled in Bills of Entry by them, as agreed in the contract. Unfortunately, however, Caterpillar has not been made the necessary party in the Show Cause Notices, despite the fact that the entire evidence/records of the case, as built up by the Investigations conducted by the Customs Department, prima facie, indicate their (Caterpillar's) complicity in the alleged acts of Collusion and/or Connivance with their own local agents – GMMCO Ltd., but not the CIL, which is an innocent party in this entire deal.

viii. Without Prejudice to the afore stated grounds it is respectfully submitted that Customs cannot allege collusion, or making any wilful mis-statement or suppression of facts, without there being the mens-rea on the part of the importer—CIL/NCL. In this case, however, absolutely there is no such guilty intention attributable on the part of CIL, as it has never acted with the intention of causing any illegal gain unto itself and illegal loss to the customs. Thus, the element of mens-rea is conspicuously missing in this case from such falsely alleged collusion or connivance, etc.

ix. It is submitted that the nomenclatures used in Section 28(1) & (4) of the Customs Act, 1962, namely "Collusion", "Wilful mis-statement" and "Suppression of Facts" are the strong words having serious implications, thereby warranting to be construed strictly in the matter of Interpretation of Penal Statute like the Customs Act. When the Revenue invokes the extended period of limitation under section 28(4) of the Customs Act, 1962, the burden is invariably cast upon it to prove the acts of collusion, wilful mis-statement and/or suppression of facts.

55.3 For deciding whether Section 28 (4) of the Customs Act, 1962 is applicable in the present case or not, I am reproducing Section 28 (4) as below:

"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."

On perusal of the above, it is seen that the demand under Section 28 (4) of the Customs Act, 1962 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.





55.4 I find that in the present case, the importer, M/s NCL and their several employees were engaged for the purpose of importation of goods. On perusal of the contract, para 7.5 of Special Conditions of Contract (SCC) specifying conditions of payment of Customs Duty is reproduced as below:

**“7.5 Payment of Customs Duty**

The Purchaser will pay Customs Duties applicable to imported goods. The Purchaser's Port Consignee will undertake the above activity.

Payment in respect of Custom Duties properly levied on the CIF value of the imported goods shall be made in local currency in the following manner:

- a. The supplier shall submit Check List with appropriate Customs Code (H. S. Code) along with a copy each of the supplier's invoice, freight bill and insurance bill well in advance to the C&F Deptt., CIL,
- b. After examination, the C&F Deptt.,CIL will inform the supplier the correctness of leviable customs duties for preparation of Bill of Entry.
- c. Thereafter, the supplier will submit the final Bill of Entry to the C&F Deptt., CIL for payment of Customs Duties to Customs Authorities,
- d. C&F Deptt., CIL will pay Customs Duty directly to Commissioner, Customs by Account Payee Cheque / Electronic Fund Transfer,
- e. After payment of customs duty by CIL, the supplier will arrange clearance of goods at Port. After final clearance of goods at Port, the Supplier will submit customs cleared duplicate Bill of Entry to C&F Deptt., CIL.

**Special Note:** As per the offer of M/s GMMCO Ltd. and subsequent confirmation by M/s Caterpillar Inc. vide letter no. CIL/190T/Price Justification/18-19/ dated 19.04.2019, the import of dumpers will be "in completely knocked down condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition". As per Notification No. 50/2017-Customs dated 30.06.2017, subsequently amended vide Notification nos. 6/2018-Customs dated 02.02.2018 and 25/2019-Customs dated 06.07.2019 of Customs Authorities, the current rate of Basic Customs Duty (BCD) for the equipment for the above CKD condition of import of dumpers is 15% (fifteen percent). In case, at the time of importation or subsequently, if BCD for equipment is levied at the rate of more than 15% for the above CKD condition of import, the differential amount along with interest, penalty etc. will have to be paid by M/s GMMCO Ltd., failing which the same will be deducted from their pending / future bills in line with the undertaking furnished by M/s GMMCO Ltd. in their letter no. CIL/190T/Justification/19-20/14 dated 27.04.2019."

55.5 On perusal of the above special note, it has been confirmed by M/s. GMMCO and M/s. Caterpillar INC. USA, before execution of contract that Engine, final drive and transmission mechanism shall not be in pre-assembled condition and rate of duty will be 15%. On perusal of Para 8 of the Main contract regarding statutory duties and taxes and other levies, it has been stated that GST on erection and commissioning charges shall be payable to the supplier. Thus, as per the agreement, a decision was already taken that GST shall be payable on erection and commissioning charges and such charges shall not be included in Assessable value of the machines for the purpose of Customs duties.

55.6 I find that the entire contract is for supply of 190 Ton Rear Dumpers, thus, M/s. NCL wanted to receive the equipment in fully working condition, however, as per bids submitted by M/s. GMMCO, they were not importing the equipment in complete assembled form and they have certified vide their letter dated 27.04.2019 with confirmation from M/s. Caterpillar INC., USA vide Letter no. CIL/190T/Price justification/18-19/ dated 19.04.2019, that the import of dumpers will be in completely



knocked down condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition. The above letter of the manufacturer and the supplier was accepted by M/s. CIL on behalf of the importer. It is important to note that although they wanted complete working equipment but importation was taking place in completely CKD condition and on face value they accepted the offer of the supplier and manufacturer. However, M/s. CIL (parent company of the importer) took the responsibility to pay customs duty. Importer took the responsibility to file the Bill of Entry in their name, once the Bill of Entry has been filed by the Noticee No. 1, the responsibility of the correctness of filing Bill of Entry has been taken over by the Noticee No. 1. The para 7.5 of SCC specifies how the responsibility of correctness of filing the Bill of Entry shall be discharged by Noticee No. 1. For the sake of repetition such procedure detailed in Para 7.5 of SCC is reproduced again:

#### **"7.5 Payment of Customs Duty**

*The Purchaser will pay Customs Duties applicable to imported goods. The Purchaser's Port Consignee will undertake the above activity.*

*Payment in respect of Custom Duties properly levied on the CIF value of the imported goods shall be made in local currency in the following manner:*

- a. The supplier shall submit Check List with appropriate Customs Code (H. S. Code) along with a copy each of the supplier's invoice, freight bill and insurance bill well in advance to the C&F Deptt., CIL,*
- b. After examination, the C&F Deptt.,CIL will inform the supplier the correctness of leviable customs duties for preparation of Bill of Entry,*
- c. Thereafter, the supplier will submit the final Bill of Entry to the C&F Deptt., CIL for payment of Customs Duties to Customs Authorities,*
- d. C&F Deptt., CIL will pay Customs Duty directly to Commissioner, Customs by Account Payee Cheque / Electronic Fund Transfer,*
- e. After payment of customs duty by CIL, the supplier will arrange clearance of goods at Port. After final clearance of goods at Port, the Supplier will submit customs cleared duplicate Bill of Entry to C&F Deptt., CIL."*

*Thus, it says that the checklist for Bill of Entry shall be submitted initially by supplier along with all documents to C&F department of CIL. The second step is that the entire document and the correctness of the checklist shall be examined by the C&F department of CIL and they will inform the supplier the correctness of leviable Customs duties for preparation of Bill of Entry. Thus, as per the agreement, the entire responsibility for correctness of leviability of Customs duty lies on the C&F department of M/s. CIL. Thus, it has to be inferred that C&F department of CIL was satisfied regarding the correctness of leviability of Customs duty.*

*55.7 It is to be noted that as per the packing list there was specific mention of Engine in the packing list but still they did not raise the objection to the supplier. As per the agreement, the word BANJO was never used in the said agreement as per specification annexed to the agreement. As per M/s. Caterpillar letter dated 14.12.2020, BANJO is a unit housing the transmissions, differential, final drives. In spite of such name appearing in the packing list, the C&F department of the CIL cleared the checklist of Bill of Entry for filing the same. Further, there was a clarification for M/s. Caterpillar INC., USA vide Letter no. CIL/190T/Price justification/18-19/ dated 19.04.2019, that for the ease of handling the consignment during the transportation, the package would be shipped in 20-25 packages. I find that the packing list consisted of only 15 packages but still no objection was raised by CIL regarding the possibility of sending Engine/Transmission Mechanism in pre-assembled condition by reducing the no. of packages. Therefore, I find that M/s. CIL/NCE had wrongly certified the correctness of the Bill of Entry.*



55.8 I find that in the contract there is no mention as to in which form, the goods shall be imported into India. Thus, details of packing list items were not discussed and they have just accepted that Engine, transmission mechanism etc. shall be in pre-assembled condition. Once they have accepted that the same shall be in pre-assembled condition then it is the responsibility of the importer i.e. Noticee No. 1 to verify the correctness of the claim of the supplier. I find that in Para 28 and 29 of the reply dated 28.02.2022 submitted by NCL, they have stated that in response to the said global tender for CIL in procurement of 102 no. of 190T Rear Dumpers L2 bidder had quoted their price considering BCD@25% considering the Engine, gearbox and transmission mechanism in pre-assembled condition but not fitted on body or Chassis. Infact, L2 bidder had complained to CIL stating that the dumper of such huge capacity cannot be shipped in CKD condition having Engine, Gearbox and Transmission mechanism, not in a pre-assembled condition. Still, when such information was given by L2 bidder, CIL of their own without taking into account in the agreement to prove that these three will be coming not in pre-assembled condition, accepted the offer of the Noticee No. 2 and themselves certified in the Bill of Entry/Packing list as these three items were not in pre-assembled condition.

55.9 I am reproducing the relevant para of Section 46 of the Customs Act, 1962 as mentioned below:

**“Section 46. Entry of goods on importation. -**

(1) The importer of any goods, other than goods intended for transit or transhipment, 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.

...

...

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

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

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

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

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

On perusal of the same, it becomes the responsibility of the importer to ensure the accuracy and completeness of information in the Bill of Entry and truth of content of such Bill of Entry. I find that in the present case, truth of content of Bill of Entry has been wrongly certified by Noticee No. 1.

55.10 I am reproducing the Section 17(1) of the Customs Act, 1962 as below:

**“Section 17. Assessment of duty. -**

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.”



On perusal of the same read with Section 46 of the Customs Act, 1962 it is clear that the importer shall self-certify the correctness of the Bill of Entry and should self-assess the Bill of Entry. I find that in the present case, the importer has wrongly certified the Bill of Entry by suppressing the facts that Engine and transmission mechanism was in a pre-assembled condition.

55.11.1 I find that for invoking Section 28 (4) of the Customs Act, 1962, one of the 3 ingredients i.e. collusion or wilful mis-statement or suppression of facts is required to be established. I find that it has been already established that entire responsibility of filing the Bill of Entry has been taken over by the importer as per para 7.5 of Special conditions of Contract (SCC) and that responsibility of certifying the correctness of document in the Bill of Entry lies with the importer. **Mis-declaration of description of goods and value has been already proved as discussed above.** The importer has taken the argument that goods have already been examined by the department and therefore, suppression of facts cannot be invoked. I find that there is no evidence that the agreement copy was produced before the department. Moreover, payment of Erection and Commissioning charges as a condition of sale of imported goods was suppressed from the department. Therefore, the suppression of value of Erection and Commissioning charges is sustainable. I find that although goods were examined in front of Chartered Engineer but Banjo being the complete Transmission Mechanism was unearthed only during the investigation. By no stretch of imagination, Banjo being Transmission Mechanism can be detected during the examination. I find that the importer has argued that there cannot be mens-rea to evade duty in their case as they are Public Sector Company (PSU) under the Government of India. I find that as a PSU, it was their added responsibility to pay correct Customs duty, but, instead of paying the correct Customs duty, they took the recourse of confirmation from the supplier regarding the applicability of the exemption Notification and the responsibility of certifying the correctness of Customs duty on themselves. These two actions are contradictory in nature. Once they were responsible for certifying the correctness, it was their duty to verify the form of the goods shipped by the supplier and then self-assess the Bill of Entry. **Result of the entire event was to pay lower rate of Customs duty and therefore, the intention to pay lower rate of duty by the importer is established. Infact when the L2 bidder warned them that such goods i.e. engine/transmission mechanism cannot be imported in unassembled form, still they went ahead after clarification from the manufacturer/supplier just to save the Customs duty. Therefore, the intention to evade Customs duty is sustainable.** Hence, there is suppression of facts regarding value and importation of transmission mechanism as Banjo. There was wilful mis-statement regarding description of goods declaring Engine and transmission mechanism not in pre-assembled form. Further there was mis-declaration regarding Gearbox when there was no gearbox in the dumper as claimed by them. Therefore, the plea of the importer that extended period cannot be invoked as goods were examined earlier is not sustainable. The imported goods were in CKD condition with Engine and Transmission Mechanism in pre-assembled condition requiring technical expertise and any wrongful declaration by Chartered Engineer cannot absolve the responsibility of the importer to declare the facts before the department correctly. Therefore, the entire effect of the above said suppression of facts has resulted in the loss of revenue and therefore, demand has been rightly been raised under Section 28(4) of the Customs Act, 1962.

55.11.2 The noticee no. 1 has argued that Pre Consultation Notice has not been given to them as per Section 28 (1) of the Customs Act, 1962. I find that this is a case of Section 28 (4) of the Customs Act, 1962, where Pre Consultation Notice is not required. Provision of Pre Consultation Notice has been provided only in case of Section 28 (1) of the Customs Act, 1962 as provided in proviso to Section 28 (1) (a) of the Customs Act, 1962. Moreover, as per Section 28 (10B) of the Customs Act, 1962, a notice issued under sub-section (4) shall be deemed to have been issued under sub-section (1), if such notice demanding duty is held not sustainable in any proceeding under this Act, including at any stage of appeal, for reason that the charges of collusion or any wilful mis-statement or suppression of facts to evade duty



has not been established against any person. Thus, even if charges under Section 28 (4) of the Customs Act, 1962 is not established, demand under Section 28 (1) is sustainable. However, in the present case, for the reasons discussed here-in-above, demand under Section 28 (4) of the Customs Act, 1962 is upheld.

55.12 I find that since the demand under Section 28 (4) of the Customs Act, 1962 is sustainable, penalty under Section 114A of the Customs Act, 1962 is sustainable on the importer, M/s NCL for evading payment of applicable duty by resorting to suppression of facts and wilful mis-statement as discussed in paras supra. In terms of proviso to Section 114A of the Customs Act, 1962, penalty can only be levied either under Section 112 or Section 114A of the Customs Act, 1962. As I have already held that the importer is liable for penal action under Section 114A of the Customs Act, 1962 I refrain from imposing penalty under Section 112 (a) of the Customs Act, 1962.

56.1 I find that there is proposal for imposition of penalty under Section 114AA of the Customs Act, 1962 against the importer on the grounds that they have knowingly and intentionally made use of false and incorrect documents in the transaction of their business for import of the 190T dumpers. There is also proposal for imposition of penalty on the supplier M/s GMMCO under Section 114AA of the Customs Act, 1962 on the ground that they have intentionally made use of false and incorrect documents in collusion of importer to avail undue advantage BCD exemption by resorting to mis-declaration of goods.

56.2 M/s NCL in their reply and submission as detailed in para 26.1 (xxi) have stated that they are innocent party and they have not made any wilful mis-statement or false statements before the Customs Authorities in its Bills of Entry and not suppressed any facts from the Customs Authorities, while clearing the goods, and therefore, no pendency under Section 114AA of the Customs Act, 1962 should be imposed on them.

56.3 Noticee no. 2, M/s GMMCO in their reply stated that for imposing a penalty under Section 114AA of the Customs Act, 1962, knowledge of any declaration, statement or document that is being made or signed or used should be possessed by the person against whom the said section is being invoked. They further stated that they have not made any illegal statement intentionally or provided a false declaration or a statement or a document to invoke penalty under Section 114AA of the Customs Act, 1962.

56.4 I find that for imposing penalty under Section 114AA of the Customs Act, 1962, the evidence is required to prove that there was a false/incorrect document which has been used by them knowingly and intentionally to evade payment of appropriate Customs Duty. As discussed above, it has been well established that there was wilful mis-statement and suppression of facts regarding non-declaration of Erection and Commissioning charges, non-declaration of Banjo as Transmission Mechanism and mis-declaration of Engine and Transmission Mechanism as not in pre-assembled condition. For imposing penalty under Section 114AA of the Customs Act, 1962 initially it has to be proved that the importation was done using a false/incorrect document. I find that the declaration in the document i.e. the invoice has been challenged in the present case. I find that mis-declaration of the goods as established above confirms that used document was incorrect document as the same document is used for the clearing of the goods and raising demand in the present case. In this regard, I rely on the judgment of Hon'ble Tribunal in case of **Commr. of Cus., New Delhi vs Ashwini Kumar alias Amanullah** as reported in 2021 (376) ELT 321 Tri-Delhi, wherein it was held that if there is a mis-declaration of names of importer or nature of goods, penalty was imposable under Section 114AA of the Customs Act, 1962. It was also held that penalty under Section 114A and 114AA of the Customs Act, 1962 is mutually exclusively. Further, in para 55.11.1 above the mens-rea on the part of the importer is already established. Importer knowingly took the risk of paying lesser rate of duty and in the event of detection by Customs, they took the recourse of payment of such differential duty from the supplier. They were also alerted for the



*possibility of payment of lesser duty by the L2 bidder, but, they knowingly chose to lower rate of duty by taking the clarification from the manufacturer/supplier who manipulated the documents. Therefore, I find that the penalty under Section 114AA is imposable on the importer. In this regard, I rely upon the judgment of Hon'ble CESTAT, Chennai in the case of Sree Ayyanar Spinning & Weaving Mills Ltd. Vs C.C., Tuticorin as reported in 2019 (370) ELT 1681 wherein it was held that for imposing penalty under Section 114 AA of the Customs Act, 1962, it has to be proved that the person knowingly or intentionally implicated himself in use of false or incorrect document." (emphasis added)*

**44.2** In their written submissions dated 21.11.22, Noticee-1 has argued that the Ld. Commissioner has erred in making charge of collusion, wilful misstatement and suppression of facts on a Maharatna company of the Government of India. The Ld. Commissioner has ignored the fact that the very object of incorporation of the said clause 7.5 in the tripartite contract by the CIL was totally in due compliance with the clear-cut directions given by the Central Vigilance Commission mandated Independent External Monitors and not with any ill motives or mala fide intention to mis-declare the goods for evading customs duty. Rest of the points in their written submissions dated 21.11.22 and 28.10.2022 and the submissions of the noticee-3, were same as raised before the earlier Adjudicating Authority .

**44.3** I find that as per the agreement, the entire responsibility for correctness of leviability of Customs duty was on the C&F department of M/s. CIL. The word BANJO was never used in the said agreement as per specification annexed to the agreement. In spite of any such name appearing in the packing list, the C&F department of the CIL cleared the checklist of Bill of Entry for filing the same. In the contract, it was mentioned that the consignment would be shipped in 20-25 packages. However, the packing list consisted of only 15 packages but still no objection was raised by CIL regarding the possibility of sending Engine/Transmission Mechanism in pre-assembled condition by reducing the no. of packages. Therefore, I find that M/s CIL/ECL had wrongly certified the correctness of the Bill of Entry. The truth of content of Bill of Entry has been wrongly certified by Noticee-1. In the present case, there was wilful mis-statement regarding description of goods declaring engine and transmission mechanism not in pre-assembled form, suppression of facts regarding value and importation of transmission mechanism as Banjo, also there was mis-declaration regarding gearbox when there was no gearbox in the dumper. Therefore, I find that the demand has rightly been raised under Section 28(4) of the Customs Act, 1962. I find that, in the present case, pre-notice consultation rightly has not been given to noticees as notice has been issued under Section 28 (4) of the Customs Act, 1962, where Pre Consultation Notice is not prescribed. Noticee-1 in this regard rely upon **Victory Electric Vehicles**<sup>31</sup>, where notice was issued under Section 28(1); whereas in the present case notice has been issued under Section 28(4) and scope of both the sections is different. Therefore, the said case law is not applicable in the present case. I find that the penalty under Section 114A of Act is sustainable on the noticee-1 for evading payment of applicable duty by resorting to wilful mis-statement regarding description of

<sup>31</sup> Victory Electric Vehicles International Pvt. Ltd. vs. Union of India and Anr- W.P. (C) 12425/2022 decided on 20.09.2022



goods declaring engine and transmission mechanism not in pre-assembled form and suppression of value of erection and commissioning charges in the declared assessable value of the goods . Further, I find that noticees in the present case used an incorrect document i.e. invoice for clearance of the goods as in the invoice goods were mentioned as not in pre-assembled condition however it is very clear that the imported goods i.e. engine and transmission mechanism, were in pre-assembled condition. The mens rea or the intention to evade becomes more apparent in view of the fact that the L2 bidder had alerted the noticees by complaining that import of large dumper in such condition is not possible . Thus, I conclude that as false and incorrect statement regarding the nature of goods has been knowingly mentioned by the noticee-1 in the invoice and other import documents in spite of being alerted by the L-2 bidder , therefore, noticee-1 is liable for penalty under Section 114AA of the Act. Reliance in this regard is placed upon the case laws of **Ashwini Kumar alias Amanullah<sup>32</sup>** and **Sree Ayyanar Spinning & Weaving Mills Ltd<sup>33</sup>**.

**45. Whether the penalty is imposable under Section 112(a) and Section 114AA of the Customs Act, 1962 on M/s. GCPL?**

**45.1** The role of GCPL is identical to the role of GMMCO in the earlier SCNs already adjudicated. On this issue , the findings of the Ld. Commissioner in the OIO dated 25.05.22 are reproduced below :

*"56.5.1 Role of M/s GMMCO: I find that it has been alleged in the Show Cause Notices that supplier M/s GMMCO has not supplied the goods in terms of condition of the contract that Engine and Transmission Mechanism will not be in pre-assembled condition. However, they supplied Engine and Transmission Mechanism in pre-assembled condition. This mis-declaration of the goods led to undue exemption benefit and therefore, they are liable for penal action under Section 112 (a) of the Customs Act, 1962 for abetting in omission and commissioning in collusion with the importer and they have used false and incorrect documents to avail undue advantage of BCD exemption and therefore, they are liable for penal action under Section 114AA of the Customs Act, 1962.*

*56.5.2 I find that the agreement was executed between manufacturer, M/s Caterpillar Inc. USA, supplier M/s GMMCO and the importer (M/s CIL on behalf of its subsidiary). I find that the supplier was acting on behalf of its manufacturer in India and all services related to the imported goods in India was to be executed by the supplier. I find that in the entire service part of the contract and agency commission, the monetary benefit derived out of the contract has accrued to the supplier. He was getting agency commission for supply of goods and payments for several services to be provided and payment for other components during the warranty period. Therefore, it was in the interest of the supplier to bag the contract. Further, the Tender was quoted by the supplier on behalf of the manufacturer. It is pertinent to mention that the risk factor for demand by customs was taken over by supplier only to cover for the differential quotation for bid between L1 and L2 highlighting the different view on the exemption notification, with sole intention to bag the contract. As they were constantly having knowledge of the suppression of facts, they undertook the risk factor for differential duty as possibility of demand was always there but knowing they influenced manufacturer to manipulate invoice.*

<sup>32</sup> Commr. of Cus., New Delhi vs Ashwini Kumar alias Amanullah-2021 (376) ELT 321 Tri-Delhi

<sup>33</sup> Sree Ayyanar Spinning & Weaving Mills Ltd. Vs C.C., Tuticorin-2019 (370) ELT 1681



56.5.3 Further, I find that despite being aware that the gearbox was not there in the dumpers, they went ahead and declared that the gearbox along with Engine and Transmission mechanism was not in pre-assembled condition in invoice, with the sole intention to align the same with the wordings of the exemption notification. Therefore, the entire beneficiary of manipulation of invoice is supplier in getting their tender as lowest. Moreover, importer has also stated that if any manipulation has been done, then it is manufacturer and manufacturer has worked through their agent supplier in India, i.e. M/s GMMCO.

56.5.4 Further, the supplier was entrusted with the delivery of the copy of the invoices, Bill of Lading, packing list, COO, Insurance one week before the arrival of goods and if not, received the supplier would be responsible for the expenses. Thus, it was the supplier who was the person responsible for the goods as being the representative of the manufacturer for all purposes in India, and it was the supplier who was handling the import documents such as invoice and packing list delivering the same to NCL in India. Thus, I find that they had helped the manufacturer in manipulating the invoice and were fully aware that the description was incorrect in the document. As they were the ones who would finally assemble the goods before delivery to the importer, they were fully aware of the form of the goods, and yet were fully involved in manipulating the description of the invoice. Further, being aware of the form of the goods imported and the manipulation of the invoice, they had prepared checklist for the Bill of Entry, which was in turn used for filing Bill of Entry for custom purpose. **Therefore, I find that the supplier in agreement with the manufacturer provided wrong information in the import documents mis-declaring the form/nature of imported goods to fit into the claimed notification.**

56.5.5 As discussed above, it has been well established that there was a mis-declaration of the nature of the goods in the invoice, and suppression of addition of values of erection and commissioning charges, and therefore, goods are liable for confiscation. The supplier has abetted the clearance of the goods which rendered the goods liable for confiscation under Section 111(m) of the Customs Act, 1962. Therefore, I find that penalty under Section 112 (a) of the Customs Act, 1962 is imposable on the importer.

56.5.6 I find that the incorrect documents were supplied by the supplier to the importer after obtaining the same from the manufacturer as discussed above, with the sole intention to get the goods cleared from Customs by paying lower rate of duty. Therefore, the supplier knowingly used incorrect documents i.e. invoice in preparation of the checklist and forwarding the same to the importer for confirmation. **The final beneficiary of the clearance of the goods by payment of lower rate of duty was the supplier only.** Therefore, the supplier i.e. Noticee no. 2 knowingly and intentionally used incorrect documents to clear the goods. **The supplier manipulated the manufacturer in preparation of the invoice to include even the gearbox in line with the exemption notification which was not even the part of the dumpers.** As the direct beneficiary of manipulation of the invoice and clearance of goods was the supplier and therefore, the penalty under Section 114AA is imposable on the supplier." (emphasis added)

45.2 I find that M/s CIL, entered into an agreement with Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 with M/s Caterpillar Inc and M/s GMMCO Ltd. for the import of **total 102 nos. of 190T dumpers** to be imported by M/s NCL and M/s ECL, both subsidiaries of M/s CIL. I find that M/s GMMCO was the supplier in the case of M/s NCL however in the present case M/s GCPL was the supplier. As per Clause 11 of the Contract and Clause 20 of the GCC of the Contract 'the supplier may assign the execution of contract for 18 nos. of the 190T Dumpers for Rajmahal Area of ECL to M/s Tractors India Pvt. Ltd.(TIPL).' Thus as per agreement 'TIPL' became the supplier for 18 nos. of Dumpers to be imported by M/s ECL. Further, CIL vide letter Ref No: CIL/C2D/190T





Dumper/R-66/17-18/A-479 dated 28.07.2020 made following amendment in the contract in respect of assignment for supply of 18 nos. Dumpers to Rajmahal project of ECL.

(i) **Name of supplier, M/s Tractors India Pvt. Ltd(TIPL) was changed to M/s Gainwell Commosales Private Limited (GCPL).**

(ii) In the context of the Supplier- M/s GMMCO Ltd. mentioned in the Contract, it shall include the permitted assign of M/s Gainwell Commosales Private Limited, wherever applicable, for supply, installation and commissioning of 18 nos of 190T Rear Dumpers, Make Caterpillar, Model 7890, along with consumable spares and consumables for 12 months of warranty period from the date of commissioning of the equipment and thereafter Spares & Consumables for a period of 84 months to Rajmahal Area, ECL, and payment thereof.

(iii) Payment to M/s Gainwell Commosales Private Limited. Kolkata shall be made as per Bank Details enclosed as Annexure.

(iv) The Indian Agency Commission @ 2% of FOB Value of the equipment included in the FOB price of the equipment along with GST as legally leviable in India, for supplies to Rajmahal Area, ECL, shall be invoiced to ECL by M/s Gainwell Commosales Private Limited, Kolkata in equivalent INR and shall be payable to M/s Gainwell Commosales Private Limited by ECL.

(v) Supplies shall be made by M/s Gainwell Commosales Pvt. Ltd to Rajmahal Area, ECL and invoices raised by them for the indigenously sourced items for fitting in the equipment during erection and commissioning of the equipment, erection and commissioning charges, inland transportation and insurance charges during commissioning of the equipment, spares and consumables for 12 months of warranty period and thereafter spares and consumables for a period of 84 months payable in INR, along with GST as legally leviable in India and accordingly, payment will be made to M/s Gainwell Commosales Private Limited.

**45.3** In view of the above amendments in the contract, I find that the role of supplier, M/s GMMCO and M/s GCPL were identical as per the contract. Therefore, I find that the findings and discussion of the earlier Adjudicating Authority in respect of supplier, M/s GMMCO, are also valid in respect of supplier in the present case i.e. M/s GCPL.

**45.4** Noticee-3(GCPL) in their written submission dated 17.08.2021, have also raised the same points as submitted by GMMCO before the earlier Adjudicating Authority. After due examination of all points, I find that there was a mis-declaration of the nature of the goods in the invoice, and suppression of addition of values of erection and commissioning charges, and therefore, goods are liable for confiscation. The supplier has abetted the clearance of the goods which rendered the goods liable for confiscation under Section 112(m) of the Customs Act, 1962. Therefore, I find that the penalty under Section 112 (a) of the Customs Act, 1962 is imposable on the Noticee-3.



45.5 The defence of noticee-3 that no penalty can be imposed on the Noticee as an agent for faults of Caterpillar, the principal supplier in the present case as per ratio of **Sea Bridge Maritime Agencies Pvt. Ltd.**<sup>34</sup> is not correct legally. Section 230 of the Indian Contract Act, 1872 makes it very clear that when an agent(GCPL) has entered into a contract for the sale or purchase of goods on behalf of a principal resident abroad (Caterpillar Inc. USA), the presumption is that the agent undertakes to be personally liable in India for the performances of such contract. The Hon'ble CESTAT Judgement in **Sea Bridge Maritime Agencies Pvt. Ltd(supra)** is distinguishable as it has not taken section 230 of the Indian Contract Act into account and also the facts of the case are entirely different.

45.6 Further, I find that the supplier, Noticee-3, was taking all actions in India on behalf of its manufacturer and all services related to the imported goods in India were to be executed by the supplier. Also, they were getting agency commission for supply of goods and payments for several services to be provided. As per contract, it was the responsibility of the supplier to submit checklist with appropriate Customs Code (H. S. Code) along with a copy of each of the supplier's invoice, freight bill and insurance bill well in advance to the C&F Deptt., CIL. I find that they had helped the manufacturer in manipulating the invoice and were fully aware that the description was incorrect in the document. As they were the ones who would finally assemble the goods before delivery to the importer therefore they were fully aware of the form of the goods. Despite being fully aware they manipulated the description in the invoice, declaring engine, gearbox and transmission mechanism not in pre-assembled condition against engine and transmission mechanism being in pre-assembled condition and gearbox not present in the dumpers at all. The supplier knowingly used incorrect documents i.e. invoice in preparation of the checklist and forward the same to the importer for confirmation. Therefore, I find that the Noticee-3 is liable for penalty under **Section 114AA** of the Act.

46. **'Proper Officer' to issue Show Cause Notice under Section 28 of Customs Act, 1962.**

46.1 On this issue, the findings of the Ld. Commissioner in the OIO dated 25.05.22 are reproduced below :

*"57. I find that both the noticees have argued that the demand under Section 28 of the Customs Act, 1962 can only be raised by the same officer who had cause assessment of the Bill of Entry i. e. Assistant/Deputy Commissioner of Customs as held by the Hon'ble Supreme Court in Cannon India case. They have further stated that assessments under Section 17 of Section 18 are to be exercised by the proper officer in terms of Notification no. 50/2020-Customs (NT) dated 05.06.2020 and Commissioner of Customs (Import-I) is not the proper officer under the said Notification. I find that as per Section 5(2) of the Customs Act, 1962, an officer of Customs may exercise the power and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him. Accordingly, even if the arguments of the noticees are taken into consideration that the demand was to be raised by the*

<sup>34</sup> Sea Bridge Maritime Agencies Pvt. Ltd. Vs Commissioner Of Customs, Mumbai 1999 (108) E.L.T. 250 (Tribunal)



*Assistant/Deputy Commissioner of Customs who had assessed the Bills of Entry, I find that the Commissioner of Customs (Import-I), NCH, Mumbai being the senior officer to the said Assistant/Deputy Commissioner of Customs was the proper officer in this case and the demand would be considered raised properly in terms of Section 5(2) of the Customs Act, 1962. I find that Circular no. 24/2011-Customs dated 31.05.2011 issued by the CBIC talks about the powers of the adjudication of the officers of Customs. In the said circular, it has been explicitly made clear that the cases where the amount of duty involved is above 50 Lakhs in the SCNs issued under Section 28 of the Customs Act, 1962, the proper authority to adjudicate the said cases would be Jurisdictional Commissioner of Customs. Further, subsequent to the order passed by the Hon'ble Supreme Court in case of Cannon India, amendments had been made in the Customs Act, 1962 vide Finance Act, 2022. Pursuance to these amendments in the act, Notification no. 29/2022-Customs dated 31.03.2022 was issued by CBIC with regard to the powers of adjudication. In this notification also, it has been mentioned that for cases where the duty is more than 50 Lakhs, the same may be adjudicated by the Principal Commissioner/Commissioner of Customs to whom the Assistant/Deputy Commissioner of Customs (who has been assigned the functions of assessment of duty) is the subordinate officer, in terms of Section 5(2) of the Customs Act, 1962. Hence, I find that the arguments of the Noticees that the SCN is without jurisdiction and unsustainable in law, does not hold any ground." (emphasis added)*

46.2 Noticees in their submissions did not raise any new points on the issue as submitted before the earlier Adjudicating Authority.

46.3 I find that the above discussion in para 57 of the OIO dated 25.05.22 fully addresses the points raised by the noticees on this issue . I find that as per Section 5(2) of the Customs Act, 1962, an officer of Customs may exercise the power and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him. I find that the Commissioner of Customs (Import-I), NCH, Mumbai being the senior officer to the Assistant/Deputy Commissioner of Customs, was the proper officer in this case and the demand would be considered raised properly in terms of Section 5(2) of the Customs Act, 1962. Further, subsequent to the order passed by the Hon'ble Supreme Court in case of Canon India, amendments had been made in the Customs Act, 1962 vide Finance Act, 2022 in respect of jurisdiction. Therefore, I find no merit in the argument made by the noticees on the ground of Canon India.

47. Further , I find that the Show Cause Notice has not levelled any charge against M/s. CIL , though they are listed as Noticee-2 on the last page of the SCN. They have participated in the personal hearing also. Since no charge preferred , I refrain from giving any finding on their role in the case.

48. I also note that the importer, M/s ECL vide their letter no. SIIB-NCH-MUM/190t/1206 dated 24.09.2021 has informed the payment of differential duty of Rs. 23,76,73,616/- 18 nos. of 190 T dumpers in respect of M/s ECL vide Demand Draft nos. 931721 dated 27.09.2021, which has been deposited in government treasury vide Challan no. 54 dated 27.09.2021. Scanned copy of the Challan is reproduced below.





OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT II),  
SPECIAL INTELLIGENCE & INVESTIGATION BRANCH (IMPORT)  
10<sup>th</sup> FLOOR, NEW CUSTOM HOUSE,  
BALLARD ESTATE, MUMBAI - 400 001. TEL. NO. 2275 7439.

**ANNEXURE**

**CHALLAN FORM FOR MAKING PAYMENT OF DUTY**

NAME & FULL ADDRESS OF THE IMPORTER : M/s. Eastern Coalfields Ltd  
IEC No. : AAACE7590E  
IGM NUMBER AND DATE : 2282209 dated 08.05.2021  
DESCRIPTION OF GOODS : Caterpillar Make 190T Rear Dumper Model 789D IN CKD Condition.  
AMOUNT RECOVERED : **Rs. 23,76,73,616/-** (Rupees Twenty three Crore Seventy Six lakh seventy three thousand Six hundred and sixteen) **partial differential duty amount only vide Demand Draft No. 931721 dated 24.09.2021 issued by State Bank of India. With no payment towards interest, fine & penalty.**

F. NO. : CUS/SIB/INT/18/2021-SIB-O/O-COMMR CUS IMP-I-ZONE I MUMBAI  
Dated : 27.09.2021

To,  
The Cashier,  
Cash Section,  
NCH, Mumbai - 400001..



**Subject: - Recovery of partial differential duty- reg.**

Please deposit the above mentioned Demand Draft of M/s Eastern Coalfield Ltd in the Government Treasury towards the recovery of partial differential duty only of Rs. 23,76,73,616/- in import of Caterpillar make 190T Rear Dumper Model 789D in CKD Condition.

54

*Hindanshu Kumar Dubey*  
Hindanshu Kumar Dubey  
IO/SIB(Import)  
NCH, Mumbai

*O/C*

49. I find that on the request of the importer competent adjudicating authority granted the permission for provisional release of 18 numbers, 190T dumpers imported vide 18 Bills of Entry, seized by the investigating agency, after submission of indemnity bond equal to the value of the seized goods and Bank Guarantee amounting to Rs. 23,76,73,618/-. The details of the Bank Guarantees are as tabulated below:

Sr. No.	Bill of Entry no. and date	Bank Guarantee amount (in Rs.)
1.	2201377 and 2201454 both dated 01.01.2021	2,64,90,728/-
2.	3012551/04.03.2021,3012552/04.03.2021,3012514/04.03.2021, 3008225/04.03.2021,3427195/03.04.2021,3427247/03.04.2021, 3427248/03.04.2021,3427250/03.04.2021,3896691/10.05.2021, 3896695/10.05.2021,3896698/10.05.2021,3896702/10.05.2021, 4142519/31.05.2021,4144448/31.05.2021,4144526/31.05.2021, 4145502/31.05.2021	21,11,82,890
	<b>Total</b>	<b>23,76,73,618/-</b>



**ORDER**

50. In view of the above, I pass the following Order:

50.1 I reject the benefit claimed @15% BCD under Serial No. 524 (1) (a) Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019, for the goods covered under 18 Bills of Entry (provisionally released as per Annexure-I of SCN dated 26.11.2021 & also listed at table-I and table-II above) and order for assessment of the said 18 Bills of Entry at higher rate of BCD @ 25% under Serial No. 524 (1) (b) of Notification No. 50/2017 dated 30.06.2017 as amended by Notification No. 25/2019 dated 06.07.2019.

50.2 I order that erection and commissioning charges of Rs.30,00,000/- per unit is to be included in the declared assessable value of the said 18 Bills of Entry in line with Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.

50.3 I order for re-determination of the declared assessable value of Rs.1,68,80,22,839/- in respect of the said 18 Bills of Entry to Rs.1,74,20,22,839/-, under Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.

50.4 I confirm the demand and order for recovery of the differential duty of total Rs. 26,42,17,615/-, for the goods covered under the said 18 Bills of Entry under Section 28(8) of the Customs Act, 1962 along with applicable interest under Section 28AA of the said Act. I appropriate the duty of Rs. 23,76,73,616/- for 18 nos. of 190 T dumpers already paid by the importer during investigation towards the differential duty.

50.5 I order for confiscation of the goods covered under the said 18 Bills of Entry, having re-determined assessable value of Rs. 1,74,20,22,839/-, under Section 111(m) of the Customs Act, 1962. However, I give an option to the importer to redeem the above said goods on payment of Redemption Fine of Rs. 2,00,00,000/- (Rupees Two Crore Only) under Section 125 of the Customs Act, 1962.

50.6 I impose a penalty equal to the short paid duty and interest upon the importer, M/s ECL, under Section 114A of the Customs Act, 1962, provided that where such duty and interest, 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 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.

50.7 I impose a penalty of Rs. 3,00,00,000/- (Rupees Three Crore Only) on M/s. Eastern Coalfields Limited under Section 114AA of the Customs Act, 1962.



*Vinod*  
17.01.23

50.8 I order for encashment of the Bank Guarantees deposited for the total amount of Rs. 23,76,73,618/- submitted at the time of provisional release of the goods covered under the said 18 Bills of Entry towards the duty, interest, redemption fine and penalty imposed on the importer, M/s ECL.

50.9 I impose penalty of Rs. 1,00,00,000/-(Rupees One Crore Only) on M/s GCPL Ltd, Kolkata under Section 112 (a) of the Customs Act, 1962 for their act of omission and commission in mis-declaring the goods, rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962.

50.10 I impose a penalty of Rs. 3,00,00,000/-(Rupees Three crore Only) on M/s GCPL, Kolkata under Section 114AA of the Customs Act, 1962.

51. 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  
17.01.2023  
(Vivek Pandey)

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

To,

1. M/s. Eastern Coalfields Limited PR3H V2J,  
Post Dishergarh, District Burdwan, Jhalbagan,  
Sanctoria, West Bengal 7133332.
2. M/s Coal India Limited, Coal Bhawan,  
Premise-No:04 MAR, Plot-No-AF-III, Action Area-1A,  
Newtown, Rajarhat, Kolkata-700156.
3. M/s. Gainwell Commosales Pvt. Ltd, 705,  
Godrej Waterside, 7<sup>th</sup> Floor, Tower-II,  
Block-DP, Sector-V, Salt Lake City, Kolkata – 700091.

Copy to:

1. The Pr. Chief Commissioner of Customs, Mumbai Zone-1, New Custom House, Mumbai.
2. Deputy Commissioner of Customs, SIIB (I), New Custom House, Mumbai.



3. ADG(CEIB) ,Central Economic Intelligence Bureau, Janpath Bhavan, B-Wing, 6th Floor, New Delhi -110001.
4. Deputy Commissioner of Customs, Group VB, New Custom House, Mumbai.
5. Office copy.

