

A	File No.	S/10-106/Adjn/2013-14
B	Order-in-Original No.	KDL/COMMR/PVRR/09/2015-16
C	Passed by	SHRI P.V.R. REDDY Principal Commissioner of Customs, Kandla.
D	Date of order	31.08.2015
E	Date of issue	03.09.2015
F	SCN No. & Date	S/43-22/2012-13/SIIB dated 08.01.2014
G	Noticee	M/s TPL Plastech Limited Office No. 102, First Floor, VTM Building No.2, C. Mehra, Industrial Estate, Saki Naka, Mumbai-400 072.

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

"Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,
O-20, Meghaninagar, New Mental Hospital Compound, Ahmedabad-380 016."

3. Appeal shall be filed within three months from the date of communication of this order.

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

5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

Brief facts of the case

M/s TPL Plastech Limited Office No. 102, First Floor, VTM Building No.2, C. Mehra, Industrial Estate, Saki Naka, Mumbai-400 072 (herein after referred to as the importer) holding IEC No.0393025586 is a Limited company engaged in the manufacture of industrial packaging goods made of plastics and having different manufacturing units located all over India. It is a group company of M/s Time Technoplast Limited, Mumbai. They had imported various grades of HDPE at Kandla port.

2. An intelligence was received to the effect that the importer had imported "HDPE- Marlex HXM TR-571" by wrongly availing the benefit of exemption Notification No.12/2012-Cus dated 17.03.2012, by classifying their product at SI No.237 which attracted duty @ 5% of basic customs duty. However intelligence and the certificate of analysis of the product revealed that the said product was "Compound HDPE" and required to be classified at SI No.236 of the Notification No.12/2012-Cus attracting duty @ 7.5% of basic customs duty. Scrutiny of the data revealed that M/s TPL Plastech Limited, Mumbai were importing "HDPE - Marlex HXM TR-571". A reference was made to the Chemical Examiner, Customs House Laboratory, Kandla seeking opinion on the basis of product catalogue, whether the said product was compounded / chemically modified or otherwise. The Chemical Examiner, GR-I Custom House Laboratory, Kandla vide his letter dated 20.12.2012 reported that the subject goods i.e. HDPE Marlex HXM TR-571 was a copolymer of polyethylene with Hexane and it was other than Homo polymer of Polyethylene i.e. HDPE, LDPE, LLDPE, LMDPE, LHDPE etc.

3. Live consignments of 336 MTs of HDPE stuffed in 21 containers covered by eight B/Es (including six W/H B/Es) of importer were detained. These consignments were comprising of HDPE of two different grades and therefore representative samples were drawn from the said imported consignments under regular Panchnama dated 03.01.2013 for two different grades i.e. HDPE Marlex HHM 3802 pertaining to B/E No.W8893991 and HDPE Marlex HXM TR-571 pertaining to B/E No.8907794 and were sent to the Customs House Laboratory, Kandla for testing vide Test Memo No.15/2012-13 & 16/2012-13 both dtd.03.01.2013. The Chemical Examiner, vide reports No.400 & 401 both dated 10.01.2013 reported that:

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is a chemically modified polyethylene."

4. In light of the test reports of the Custom House Kandla laboratory, it was established that the importer had imported compounded / chemically modified various grades of HDPE. Thus the exemption benefit of the Notification No. 12/2012-Cus dated 17.03.2012 at Sr.No.237 claimed by the importer was not correct and not admissible to them. Therefore, the said goods detained earlier under Panchnama dtd.03.01.2013 i.e.336 MTs of HDPE valued at Rs.2,61,18,822/- were placed under seizure under the provisions of Section 110 of the Customs Act, 1962 under Panchnama dtd.11.01.2013. and were handed over to the Manager of CWC CFS, Gandhidham for safe custody under Supratnama dtd.11.01.2013.

5. The Superintendent (SIIB), CH, Kandla vide detention memo dtd.11.01.2013 detained the imported HDPE 49.50 MTs contained in two containers at CWC CFS, Gandhidham covered by B/E No.8907792 dtd.31.12.2012 and 48 MTs lying in the private bonded warehouse at CWC CFS, Gandhidham covered by two B/E Nos.8989175 & 8989177 both dtd.10.01.2013.

6. The Superintendent (SIIB), CH, Kandla vide separate detention memo dtd.11.01.2013 detained imported HDPE 49.50 MTs covered by B/E No.9031281 dtd.15.01.2013 contained in two containers at CONCOR CFS, Gandhidham for further detailed enquiry with respect to the ongoing investigation.

7. During investigation, statements of Shri George Eapen, Authorized Person of M/s.TPL Plastech Limited was recorded under Section 108 of the Customs Act, 1962, on 07.01.2013 & 10.01.2013 who, inter alia, stated that he had been authorized to give statement on behalf of M/s TPL Plastech Limited, Mumbai; that the importer was a Limited company and Shri Kamlesh Joshier was Director of the company. The importer was engaged in the manufacture of industrial packaging goods made of plastics and having different manufacturing units located all over India; that it was a group company of M/s Time Technoplast Limited, Mumbai; that they had imported various grades of HDPE at Kandla port; that they had claimed the benefit of exemption notification no. 12/2012-Cus dated 17.03.2012 by classifying their imported product 'HDPE Marlex HXM TR-571' mentioned at "(iii) High Density Polyethylene (HDPE). After perusing the test report no. 399, 400 & 401 all dated 10.01.2013 of the Custom House Kandla laboratory in respect of the goods imported vide Bills of Entry No. 8899908, 8907794 and 8893991, he confirmed that the goods imported by them were composed of polyethylene modified with hexane, was chemically modified. That he also confirmed that various grades of HDPE & LLDPE purchased from M/s Q.chem Distribution company Limited, Qatar were chemically

modified/compounded; that from the Year 2010 onwards, M/s. TPL Plastech Limited, Mumbai had started importing various grades of HDPE and LLDPE at Kandla / Mundra Port; that on going through the Test Reports No.399, 400 & 401 dated 10.01.2013 issued by Chief Chemical Examiner, Gr.I, CHL, Kandla in respect of the goods imported vide Bills of Entry No.8899908, 8907794 and 8893991 respectively he confirmed that the said test report was applicable to all the three grades of HDPE imported vide said detained 23 containers. That on the basis of above said test reports he confirmed that the goods imported vide Bills of Entry No.8899908, 8907794 and 8893991 were composed of polyethylene modified with hexane was chemically modified. He confirmed that in case of chemically modified or compounded HDPE of various grades, benefit of exemption notification of 5% basic customs duty would not apply. That on being asked to confirm that various grades of HDPE and LLDPE imported by M/s. Time Technoplast Limited, Mumbai and M/s. TPL Plastech Limited, Mumbai from the beginning till date, were chemically modified / compounded, he stated that he had already stated that their main overseas supplier was M/s. Q. Chem Distribution Company Limited, Qatar and accordingly he confirmed that various grades of HDPE and LLDPE imported by M/s. Time Technoplast Limited, Mumbai and M/s. TPL Plastech Limited, Mumbai from the beginning till date, were chemically modified/ compounded, from the said supplier. Hence, the benefit of exemption notification availed by those two importer companies was actually not admissible.

8. The importer vide their letter dtd.11.01.2013 requested for release of the seized / detained consignments covered by nine B/Es. M/s.TPL Plastech Ltd vide their letter dtd.14.01.2013 informed that they wished to make payment for the additional 2.5% BCD under protest and clear against three B/Es No.8907797, 8907794 & 8907792 all dtd.31.12.2012 (these B/Es cover a part of seized / detained goods). They enclosed a Demand Draft for Rs.2,28,112/- towards additional 2.5% BCD stating that the payment of additional 2.5% BCD was being made under provisional assessment.

9. The importer vide their letter dated 16.01.2013 submitted that they were agreed to make payment of differential duty under protest before the clearance of the goods and that the B/Es may be assessed provisionally. Value of the seized goods was Rs.37,37,493/- (covered by two Home Consumption B/Es - three containers) and the value of the detained goods was Rs.76,24,697/- (covered by two Home Consumption B/Es - four containers). Total value of these goods was Rs.1,13,62,190/- and the differential duty involved was Rs.3,40,933/-. The seized / detained imported goods contained in seven containers totally valued at Rs.1,13,62,190/- were

provisionally released on execution of Bond for the full value of the goods and Bank Guarantee to the tune of 15% of the value of the goods and payment of applicable duty (including differential duty) vide letter dtd.17.01.2013. M/s.TPL Plastech Ltd vide their letter dtd.28.01.2013 requested for permission for taking such released empty containers to empty yard, which was granted vide letters dtd.29.01.2013. M/s.TPL Plastech Ltd vide their letter dtd.07.02.2013 informed that they had furnished Provisional Bond & Bank Guarantee and took acceptance and also paid differential duty @ 2.5% in respect of goods detained on 11.01.2013 pertaining to W/H B/E No.8242514 dtd.17.10.2012 and cleared against Ex-Bond B/E No.8989175 & 8989177 both dtd.10.01.2013 (48 MT v/a Rs.35,36,895/-). They also requested to grant permission for release of consignment covered by these B/Es, which was granted vide letter dtd.14.02.2013.

10. M/s.TPL Plastech Ltd vide their letter dated 18.01.2013 requested for grant of permission for allowing the goods seized and covered by six W/H B/Es totally 288 MTs valued at Rs.2,23,81,330/- to be bonded with the existing bills of entry passed with 5% BCD. They also confirmed that while ex-bonding the said B/Es, they were agreed to pay additional 2.5% BCD and other formalities such as Bond & Bank Guarantee. The DC (SIIB), CH, Kandla vide letter dtd.22.01.2013 granted permission for bonding of the goods covered by said six W/H B/Es in Customs Bonded Warehouse subject to importer paying additional 2.5% BCD and furnishing necessary Bond & Bank Guarantee. However, ex-bonding in these entire warehouse B/Es was done after 08.05.2013 i.e. the date on or after which there was no dispute.

11. Representative samples were drawn from the imported consignments of the goods detained vide Panchnama dated 11.01.2013 for a grade (B/E No.8907792 dtd.31.12.2012 for HDPE EMDA 6147) under Panchnama dtd.17.01.2013. The samples were sent to the Customs House Laboratory, Kandla for testing vide Test Memo No.19/2012-13 dtd.04.02.2013. The Chemical Examiner, vide report dated No.405 dtd.08.02.2013 reported that:

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is having extra high molecular weight with bimodal distribution of molecular weight and it is chemically modified polyethylene."

12. The importer vide their letter dated 22.01.2013 requested for conducting further tests of different grades of HDPE imported by them from any of well equipped, reputed labs. Since the Central Revenues Control Laboratory (CRCL), New Delhi is an appellate authority for the Customs House Laboratory, Kandla, the samples of different grades of HDPE were

forwarded for re-test vide this office letter dated 19.03.2013 to the Central Revenues Control Laboratory (CRCL), New Delhi. The charges for the Re-test were deposited vide Challan dated 13.05.2013 by the importer. The Challan was forwarded to the CRCL, New Delhi vide this office letter dated 13.05.2013.

13. The test report from the CRCL, New Delhi was received from the Director (Revenue Laboratories) vide letter C.No.50-Cus/C-17/12-13 dated 22.08.2013 and letter F.No.5-Cus/C-17/12-13 dated 05.09.2013. Values of the physico-chemical parameters i.e. Density, Melting point, Hexane extractability and Xylene solubility were reported vide test report dated 22.08.2013. The scanned image of the Test report dated 22.08.2013 is produced hereunder for ease of reference:-

Scanned image of the Test report dated 22.08.2013

Central Revenues Control Laboratory

Hillside Road, Pusa, New Delhi-110012
(Tel.-01125847926/3494;Telefax-01125843495)

C.No.50-Cus/C-17/12-13

Dated, the 22nd August, 2013

To

✓ Shri Satyajit Singh,
Additional Commissioner (SIIB),
New Kandla Custom House,
Near Balaji Temple, Kandla – 370 210 (Gujrat).

Sir,

Subject:- **Inquiry against M/s. TPL Plastech Ltd. And M/s. Time Technoplast Ltd.,
Mumbai – regarding.**

Please refer to your office letter F.No.S/43-22/SIIB/2012-13 dated 19.03.2013 forwarding therewith six samples as mentioned there in for retesting.

Each of the six received sample has been registered here under CLR. No.11 to CLR No.16 dated 04.07.2013 and has been analysed, the test report is as below.

TEST REPORT :

Each of the six sample is in the form of translucent Granules, Each sample is organic in nature, answering test for presence of polyethylene and hexene, IR spectrum of each sample also confirms the presence of Polyethylene and Hexene. Values of following physico-chemical parameters i.e Density, Melting Point, Hexane extractability and Xylene solubility are as below.

CRCL Regn. No.	B.E.No. & Description	Kandla Lab. Regn. No.	Density	Melting Point	n-Hexane extractable fraction at 50 °C	Xylene soluble fraction 25 °C
CLR-11/ 04.07.13	8899908/ 29.12.12 HDPE MARLEX HXMTR- 144	399/ 31.12.12 SIIB/KANDLA	0.9490	132° C	2.6%	29.7%
CLR-12/ 04.07.13	8907794/ 31.12.12 HDPE MARLEX HXMTR- 571	400/ 31.12.12 SIIB/ KANDLA	0.9540	132° C	2.55%	29.8%
CLR-13/ 04.07.13	8893991/ 29.12.12 HDPE MARLEX HHM-3802	401/ 31.12.12 SIIB/KANDLA	0.9410	132° C	2.58%	30.0%
CLR-14/ 04.07.13	9032434/ 15.01.13 HDPE MARLEX HXM-50100	403/ 08.02.13 SIIB/ KANDLA	0.9490	131° C	2.6%	29.9%
CLR-15/ 04.07.13	9031926/ 15.01.13 HDPE EGDA -6888	404/ 08.02.13 SIIB/ KANDLA	0.9540	132° C	2.6%	29.8%
CLR-16/ 04.07.13	8907792/ 31.12.12 HDPE EMDA-6147	405/ 08.02.13 SIIB/ KANDLA	0.9548	132° C	2.6%	29.8%

Chemical tests, IR Spectrum and values of Density and Melting Point indicates that each sample u/r is a Copolymer of Ethylene and Hexene. Further values of n-Hexane extractable fraction at 50 °C and Xylene soluble fraction at 25 °C confirms that each of the six samples u/r is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(2) for olefin based copolymers manufactured by the copolymerisation of ethylene and hexene wherein polymer units derived from ethylene are not more than 90%.

Sealed remnant of each sample is being returned separately.

Yours faithfully,


(Dr. Y.K.S. Rathore)
Director (Revenue Laboratories)

Copy to : The Joint Director, Custom House Laboratory, Kandla w.r.t. their letter dated 09.04.13

14. On being specifically requested to confirm whether the sample under reference was chemically modified or otherwise and whether it was compounded or pure HDPE. The Director (Revenue Laboratories) vide letter

F.No.5-Cus/C-17/12-13 dated 05.09.2013 informed that "the sample under reference is compounded preparation of polyethylene and hexene, polyethylene units are not more than 90%. It is also clarified that, it is not pure HDPE." The scanned image of the communication dated 05.09.2013 is produced hereunder for ease of reference:-

Scanned image of the communication dated 05.09.2013

भारत सरकार
वित्त मन्त्रालय, राजस्व विभाग
केन्द्रीय उत्पाद शुल्क एवं सीमा शुल्क बोर्ड
केन्द्रीय राजस्व नियन्त्रण प्रयोगशाला
हिल साइड रोड, पूसा, नई दिल्ली - 110012
दूरभाष- 01125847926/25843494/25843499



Government of India
Ministry of Finance, Department of Revenue
Central Board of Excise & Customs
Central Revenues Control Laboratory
Hillside Road, Pusa, New Delhi-110012
Tel. -01125847926/25843494/25843499;
Telefax- 01125843495

F.No. 5-Cus/C-17/12-13

Dated: 05.09.13

To

The Additional Commissioner (SIIB),
Office of the Commissioner of Customs,
Special Intelligence and Investigation Branch,
Custom House Kandla,
New Customs Building, Near Balaji Temple,
Kandla, District: Kachcha
GUJRAT - 370 210

Sir,

Subject- Inquiry against M/s TPL Plastech Ltd., and M/s Time Technoplast Ltd. Mumbai - regarding.

Please refer to your office letter F. No. S/43-22/SIIB/2012-13 Dated 30.08.13, requested therein to confirm whether sample under reference is compounded or Pure HDPE.

In this regard, it is to inform that the sample under reference is compounded preparation of Polyethylene and hexene, polyethylene units are not more than 90%. It is also clarified that, it is not pure HDPE.

Yours faithfully,



(DR. Y.K.S. RATHORE)
Director (Revenue Laboratories)

(SIIB)

15. In light of the test report of the Custom House Kandla Laboratory and CRCL, New Delhi it was evident that the goods imported by the importer were not pure HDPE and hence were classifiable under Sl. No. 236 of the Notification No.12/2012-Cus attracting duty @ 7.5% of basic customs duty.

16. Statement of Shri Naveen Kumar Jain, Director of M/s.Time Technoplast Limited and Authorized Representative of M/s.TPL Plastech Limited was recorded under Section 108 of the Customs Act, 1962 on

21.11.2013, wherein on perusal of the Test Reports No.399, 400 & 401 all dtd.10.01.2013 and 403 to 405 all dtd.08.02.2013 of CHL, Kandla he clarified that they understood that reports were confirming that density was more than 0.94 and it was polyethelene and that they would further study and submit their comments within four weeks time. On perusal of the test Report F.No.C.No.50-Cus/C-17/12-13 dtd.22.08.2013 and letter F.No.5-Cus/C-17/12-13 dtd.05.09.2013 of the CRCL, New Delhi he clarified that they understood that reports were confirming that density was more than 0.94 and it was polyethelene derived from ethylene and that they would further study and submit their comments within four weeks time. He further stated that M/s. Q. Chem Distribution Company Ltd, Doha, Qatar was the major overseas supplier in respect of imported consignments for both the importers viz. M/s.Time Technoplast Ltd and M/s.TPL Plastech Ltd; that they would submit the details of import and clearance of the goods by both these importers upto 07.05.2013 within four weeks.

17. M/s.Time Technoplast Ltd vide their letter dtd.20.12.2013, for both M/s.Time Technoplast Ltd and M/s.TPL Plastech Ltd, informed that the findings of the test reports were not scientifically applied and was a manifestation of just clauses of Food Drug Act (FDA) classification to prove that the subject material was compounded; that they were in the process of getting the material tested from an independent laboratory which they felt would substantiate that the HDPE granules imported by them were indeed in its primary form; that the process / methods followed by the customs laboratories in drawing their inferences to conclude that the subject HDPE granules were in compounded form be shared with them; that in their opinion, test reports should classify HDPE granules under FDA regulation ref. no. 21 CFR 177.1520 (c) 3.2(a)(1); that this classification clearly provided that the ethylene content was more than 90% wherein their claim was that the ethylene content was more than 95%; that they wished to make their observations contesting the findings of the customs accredited laboratory reports :

Custom House Laboratory, Kandla (Ref.No.KCL/20/TO/11-12/494 dtd.20.12.2012 :

The finds of this report merely was based on the technical literature and technical specification forwarded by Kandla Customs to the laboratory. It was important to note that there was no chemical analysis and / or scientific approach applied in drawing the reports conclusions.

**Custom House Laboratory, Kandla – 3 test reports dtd.10.01.2013
and 3 test reports dtd.07.03.2013:**

It was mentioned in the report that the findings were made on the basis of technical literature available for different material. Here also, there was no chemical analysis nor scientific explanation on how the findings had been arrived and it appeared that the findings were the personal views of the chemical examiner. They, however, submitted their views on this report as under :

- a) In the report it was mentioned that the material was chemically modified polyethylene. The polyethylene was manufactured by chemical process using hexane or isobutene as a comonomer along with ethene in presence of catalysts and this process was a chemical reaction to manufacture polyethylene hence there was no term as chemically modified polyethylene in this case.*
- b) The specific gravity was confirmed as more than 0.94 which confirmed that it was high density polyethylene. Reports also said that material was having excellent dart impact and Elmendorf tear strength which confirmed that it was high density polyethylene.*
- c) in all the reports it was clear that samples were colourless translucent granules which indicated it was in primary form.*

It was evident that efforts were being made somehow to prove that the HDPE granules imported by them were chemically modified without a proper and scientific chemical analysis / explanation.

Central Revenues Control Laboratory, New Delhi – Ref.No.50-Cus/C-17/12-13 dtd.22.08.2013 – Ref.No.5-Cus/C-17/12-13 dtd.05.09.2013 :

- a) For all the 6 grades of HDPE granules tested by these laboratories, the density was more than 0.94 which clearly indicated that the subject material was HDPE.*
- b) All of these 6 grades tested confirmed to be translucent in nature which clearly indicated them to be in its primary form. If these material were compounded they would never have acquired the translucent nature.*
- c) The presence of hexane confirmed that these materials were manufactured using slurry process where hexane as a comonomer with ethylene which was a well known process for manufacture of polyethylene materials.*
- d) From the values of n-hexane extractable fraction it was clear that hexane content was not more than 2.6%. As per chemical process for High Density materials, hexane was used in the range of 2-4% this further confirmed that material under reference were High Density Poly Ethylene.*

With no other material added it was clear that the Ethylene content in HDPE granules was more than 95%.

- e) *The reports were giving reference of FDA regulation 21 CFR 177.1520(a)(3)(i)(a)(2)*
- *The description of (a) said "For the purpose of this section, olefin polymers are basic polymers manufactured as described in this paragraph, so as to meet the specifications prescribed in paragraph (c) of this section, when tested by the methods described in paragraph (d) of this section".*
 - *The paragraph (a)(3) said "Olefin basic copolymers consist of basic copolymers manufactured by the catalytic copolymerization of :*
 - *The paragraph (a)(3)(i)(a)(i) said "Olefin basic copolymers manufactured by the catalytic copolymerization of ethylene and hexane-1 or ethylene and isobutene-1 shall contain not less than 90 weight percent of polymer units derived from ethylene."*

If all these descriptions of FDA regulation mentioned in the report were specifying that this was a basic copolymer of ethylene and hexane, they did not understand how it was interpreted that subject materials were compounded preparation of ethylene and hexane.

They had reasons to believe from these findings of the test reports that again the process / methodology followed for chemical analysis was not correct and was a mere reproduction based on various technical literatures.

18. They further stated that subject to acceptance of their submissions it was fully established that HDPE granules imported by them was HDPE in primary form and fell within the definition of HS Code 3901 2000 as claimed.

19. The observation of the importer that the test reports were not scientifically applied and was a manifestation of just clauses of Food Drug Act (FDA) classification to prove that the subject material was compounded, is not correct inasmuch as the test report of CRCL, New Delhi clearly says that :

"each of the six sample is in the form of translucent granules, each sample is organic in nature, answering test for presence of polyethylene and hexene, IR spectrum of each sample also confirms the presence of Polytehylene and Hexene.

Chemical tests, IR spectrum and value of density and melting point indicates that each sample u/r is a copolymer of ethylene and hexene. Further values of n-hexane extractable fraction at 50°C and Xylene soluble fraction at 25°C confirms that each of the six samples u/r is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(2) for olefin based copolymers manufactured by the

copolymerization of ethylene and hexene wherein polymer units derived from ethylene are not more than 90%.”

20. It is observed by the importer that the process / methods followed by the customs laboratories in drawing their inferences to conclude that the subject HDPE granules were in compounded form be shared with them. From the CRCL, New Delhi’s report mentioned above, it is clear that the process / methods followed are clearly mentioned therein along with the values of various physico-chemical parameters i.e. Density, Melting Point, Hexane extractability and Xylene solubility etc.

21. It is their opinion that test reports should classify HDPE granules under FDA regulation ref. no. 21 CFR 177.1520 (c) 3.2(a)(1); that this classification clearly provided that the ethylene content was more than 90% wherein their claim was that the ethylene content was more than 95%. The test report of CRCL, New Delhi has clearly revealed that each of the six samples u/r is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(2) for olefin based copolymers manufactured by the copolymerization of ethylene and hexene wherein polymer units derived from ethylene are not more than 90%. Thus, their claim that the ethylene content was more than 95% does not conform to the test results.

22. With regard to six test reports of Custom House Laboratory, Kandla they have observed that there was no chemical analysis nor scientific explanation on how the findings had been arrived and it appeared that the findings were the personal views of the chemical examiner; that the polyethylene was manufactured by chemical process using hexane or isobutene as a co-monomer along with ethene in presence of catalysts and this process was a chemical reaction to manufacture polyethylene hence there was no term as chemically modified polyethylene in this case. Their this contention is not acceptable in view of the fact that the test results given by the Chemical Examiner are not his personal views but are the results of the tests conducted on the samples. Further, the importer have themselves stated that the polyethylene was manufactured by chemical process using hexane or isobutene as a co-monomer along with ethene in presence of catalysts and this process was a chemical reaction to manufacture polyethylene.

23. With regard to the CRCL, New Delhi’s reports they have observed that with no other material added it was clear that the Ehylene content in HDPE granules was more than 95%, while CRCL’s report clearly indicates that the polymer units derived from ethylene are not more than 90%.

24. RELEVANT LEGAL PROVISIONS:

NOTIFICATION NO.21/2002-CUS DTD.01.03.2002 :

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supercession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.17/2001-Customs, dated the 1st March, 2001[G.S.R. 116(E) dated the 1st March, 2001], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

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

(b) from so much of the additional duty leviable thereon under sub-section(1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of the said Table:

Provided that nothing contained in this notification shall apply to -

a) the goods specified against serial Nos. 239, 240, 241 and 242 of the said Table on or after the 1st day of April, 2003 ;

b) the goods specified against serial Nos. 250, 251 , 252 and 415 of the said Table on or after the 1st day of March, 2005 .

Explanation.- For the purposes of this notification, the rate specified in column (4) or column (5) is ad valorem rate, unless otherwise specified.

Table

S. No.	Chapter or Heading or sub-heading or tariff item	Description of goods	Stand ard rate	Additio nal duty rate	Conditio on No.
477	3901	The following polymers of ethylene, namely:- (i) Low density polyethylene (LDPE), (ii) Linear low density polyethylene (LLDPE), (iii) High density polyethylene (HDPE),	5%	-	-

		(iv) Linear medium density polyethylene (LMDPE), (v) Linear high density polyethylene (LHDPE)			
559	3901 to 3915 (except 3908)	All goods	7.5%	-	-

NOTIFICATION NO.12/2012-CUS DTD.17.03.2012 :

[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
Notification
No.12 /2012 -Customs

New Delhi, dated the 17th March, 2012

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 Published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 118(E) dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

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

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of the said Table:

Table

S. No.	Chapter or Heading or sub-heading or tariff	Description of goods	Standard rate	Additional duty rate	Condition No.
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	item				
236.	3901 to 3915 (except 3903 & 3908)	All goods	7.5%	-	-
237.	3901	The following polymers of ethylene, namely:- (i) Low density polyethylene (LDPE), (ii) Linear low density polyethylene (LLDPE), (iii) High density polyethylene (HDPE), (iv) Linear medium density polyethylene (LMDPE), (v) Linear high density polyethylene (LHDPE)	5%	-	-

The Customs Act, 1962

i) SECTION 28- Recovery of duties not levied or short –levied or erroneously refunded – Section 28(4):

(4) Where any duty has not been levied or has been short-levied 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 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.

ii) 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.....;

iii) SECTION 112. Penalty for improper importation of goods, etc. –

Any person,-

- a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing omission of such an act, or
- b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111.

iv) SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. -

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

25. DISCUSSION OF EVIDENCES :

25.1 Live consignments of 336 MTs of HDPE stuffed in 21 containers covered by eight B/Es (including six W/H B/Es) of M/s.TPL Plastech Limited were detained. These consignments were comprising of HDPE of two different grades and therefore representative samples were drawn from the said imported consignments under regular Panchnama dated 03.01.2013 for two different grades i.e. HDPE Marlex HHM 3802 pertaining to B/E No.W8893991 and HDPE Marlex HXM TR-571 pertaining to B/E No.8907794. The samples were sent to the Customs House Laboratory, Kandla for testing vide Test Memo No.15/2012-13, 16/2012-13 both dtd.03.01.2013 and Test Memo No.19/2012-13 dtd.04.02.2013. The Chemical Examiner, vide reports No.400 & 401 all dated 10.01.2013 & 405 dtd.08.02.2013 reported that:

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is a chemically modified polyethylene."

25.2 The Technical Data Sheet as available on the official website of the supplier M/s.Q. Chem clearly depicts that all the grades of HDPE imported by

M/s.TPL Plastech Limited are co-polymers of polyethylene with hexene. This clearly shows that all these grades of HDPE imported by them are other than homopolymer of Polyethelene i.e. compounded and not in primary form.

25.3 The importer vide their letter dated 22.01.2013 requested for conducting further tests of different grades of HDPE imported by them from any of well equipped, reputed labs. Since the Central Revenues Control Laboratory (CRCL), New Delhi is an appellate authority for the Customs House Laboratory, Kandla, therefore the samples of different grades of HDPE were forwarded for re-test vide this office letter dated 19.03.2013 to the Central Revenues Control Laboratory (CRCL), New Delhi. The charges for the Re-test were deposited vide Challan dated 13.05.2013 by the importer. The Challan was forwarded to the CRCL, New Delhi vide this office letter dated 13.05.2013. The test report from the CRCL, New Delhi was received form the Director (Revenue Laboratories) vide letter C.No.50-Cus/C-17/12-13 dated 22.08.2013 and letter F.No.5-Cus/C-17/12-13 dated 05.09.2013. Values of the physico-chemical parameters i.e. Density, Melting point, Hexane extractability and Xylene solubility were reported vide the test report dated 22.08.2013. On being specifically requested to confirm whether the sample under reference was chemically modified or otherwise and whether it was compounded or pure HDPE, the Director (Revenue Laboratories) vide letter F.No.5-Cus/C-17/12-13 dated 05.09.2013 informed that *"the sample under reference is compounded preparation of polyethylene and hexene, polyethylene units are not more than 90%. It is also clarified that, it is not pure HDPE."*

25.4 From the foregoing paras, it appears that SIIB launched investigations into the imports made by the importer on the basis of information received to the effect that the importer had evaded duty by deceptively describing the goods as "HDPE- Marlex HXM TR-571" availing the benefit of exemption notification no.12/2012-Cus dated 17.03.2012, and wrongly classifying their product at SI No.237 which attracted duty @ 5% of basic customs duty with intent to pay duty at lesser rate than what was applicable to "Compound HDPE" and was required to be classified at SI No.236 of the notification no.12/2012-Cus attracting duty @ 7.5% of basic customs duty. During the course of investigations, statements of the authorized representatives of the importer were recorded under Section 108 of the Customs Act.

25.5 During the investigation, Shri George Eapen, authorized representative of the importer, interalia, in his statements recorded under Section 108 of the Customs Act, 1962, confirmed that the goods imported by them were composed of polyethylene modified with hexane was chemically modified and their main overseas supplier was M/s. Q.Chem Distribution Company

Limited, Qatar and accordingly he confirmed that various grades of HDPE and LLDPE imported by M/s.Time Technoplast Limited, Mumbai and M/s. TPL Plastech Limited, Mumbai from the beginning till date, were chemically modified / compounded, from the said supplier. Hence, the benefit of exemption notification availed by those two importer companies was actually not admissible.

From the statement of Shri George Eapen, Authorized Representative of M/s.TPL Plastech Limited it appears that M/s.TPL Plastech Ltd has been importing HDPE and LLDPE from the beginning till date which have been chemically modified / compounded and their main overseas supplier was M/s. Q.Chem Distribution Company Limited, Qatar. Hence, the benefit of exemption notification availed by M/s.TPL Plastech Ltd was actually not admissible. On the basis of the data retrieved from the ICES, it has been found that M/s.TPL Plastech Limited has been importing HDPE from July, 2011, and as such, in view of the statement made by Shri George Eapen, all these HDPE consignments were chemically modified / compounded and not actually admissible to exemption available from time to time.

25.6 It appears that M/s. TPL Plastech Limited, Mumbai indulged in willful mis-statement of facts with an intention to evade customs duty inasmuch as the benefit of exemption from Basic Customs Duty under Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 was not available to the said imported HDPE. Upto 16.03.2012 they availed the benefit of Sr.No.477 of Notification No.21/2002-Cus dtd.01.03.2002 attracting BCD @ 5%, which was not available to the imported HDPE. Thus, the very claim of the exemption under Sr.No.477 of Notification No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) attracting BCD @ 5% instead of Sr.No.559 of Noti.No.21/2002-Cus dtd.01.03.2002 attracting BCD @ 7.5% and under Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 (From 17.03.2012) attracting BCD @ 5% instead of Sr.No.236 of Noti.No.12/2012-Cus dtd.17.03.2012 attracting BCD @ 7.5%, was a willful mis-statement to avail duty exemption and evade the payment of appropriate duty. Further, there was intentional suppression of facts on their part in as much as they are the regular importer of the HDPE and they did not disclose before the Customs Department that the HDPE being imported by them was compounded and not pure (in primary form). If their intention was bonafide, they could have come forward and disclosed the facts before the Department, which they did not do. This clearly shows that they suppressed these facts from the Department with malafide intention to evade payment of appropriate customs duties.

25.7 As per Section 17(1) of the Customs Act, 1962, an importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall, save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods. The importer / exporter is responsible for self-assessment of duty on imported / export goods and for filing all declarations and related documents and confirming these are true, correct and complete. However, in the instant case, the importer has not made correct declarations and self-assessed the duty wrongly. Thus, the element of willful mis-statement cannot be ruled out in the instant case.

25.8 The importer had cleared the consignments of different grades of HDPE from the Kandla Port as detailed in Annexure-A to this SCN. The importer had cleared the goods wrongly classifying the same against Sr.No.477 of Noti.No.21/2002-Cus dtd.01.03.2002 attracting BCD @ 5% instead of Sr.No.559 attracting BCD @ 7.5% (upto 16.03.2012) and against Sr.No.237 of Noti.No.12/2012-Cus dtd.17.03.2012 attracting BCD @ 5% instead of Sr.No.236 attracting BCD @ 7.5% (From 17.03.2012). The importer had willfully suppressed the fact that the imported goods were not pure HDPE to evade the duty to the tune of 2.5% and made the goods liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962 and rendered themselves liable to the penal action under the provisions of Section 112(a) and / or 114A of the Customs Act, 1962.

25.9 From the evidences gathered during investigations and the legal provisions, as discussed above, it appears that the importer filed bills of entry for clearance of imported goods during the period from 08.07.2011 to 07.10.2013 (As detailed in Annexure-A attached), wherein they claimed the benefit of exemption at Sr.No.477 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012). It is observed that some of these bills of entry have been assessed provisionally for pending test report. The benefit of said exemption was not available to the said imported goods and is required to be denied to them by classifying the said goods at Sr.No.559 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.236 of Noti.No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) and differential duty is required to be demanded. The importer has cleared 2870.25 MT v/a Rs.21,12,94,155/- against home consumption Bills of Entry, wherein differential duty payable works out to be Rs.55,36,881/-, which includes differential duty of Rs.7,71,771/- already paid @ 2.5% under protest. The importer has also filed various warehouse Bills of Entry for warehousing of the goods and later on filed Ex-Bond Bills of Entry for clearance to home

consumption. The importer has cleared 697 MT v/a Rs.5,10,05,628/- against such Ex-Bond Bills of Entry, wherein differential duty payable works out to be Rs.13,02,959/-, which includes differential duty of Rs.1,06,087/- already paid @ 2.5% under protest. It appears that the importer wrongly claimed the benefit of exemption at the time of import at Sr.No.477 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) by resorting to suppression of facts and willful mis-statement, which they were not entitled to resulting in evasion of payment of duty. The differential duty of Rs.68,39,840/- along with interest is therefore liable to be recovered from them under Section 28(4) of the Customs Act, 1962 and Section 28AB (till 07.04.2011) / 28AA (w.e.f. 08.04.2011) of the Customs Act, 1962 respectively. The importer has paid an amount of Rs.8,77,858/- towards the differential duty liability under protest. The differential duty so paid is required to be appropriated towards the differential duty demand. The imported goods total 336 MT v/a Rs.2,63,42,635/- (covered by six W/H B/Es & two HC B/Es) were under seizure and the imported goods total 147 MT v/a Rs.1,11,61,593/- (covered by one W/H B/E & two HC B/Es) were under detention. The said goods under seizure / detention and later on provisionally released totally 483 MT v/a Rs.3,75,04,228/-, as detailed in Annexure-B, are liable for confiscation under Section 111(m) for wrongly entering the claim of exemption in Bills of Entry. The other imported goods (i.e. other than seized / detained) totally 3084.25 MT v/a Rs.22,47,95,555/- are also liable for confiscation under Section 111(m) for wrongly entering the claim of exemption in Bills of Entry. The Bonds and Bank Guarantee furnished at the time of provisional release of the goods / provisional assessment of the goods are liable to be enforced for recovery of duty / interest / fine / penalty etc.

The details given above in this para are summarized as below :

			Quantity in MT	Value	Diff. duty demandable	Diff. duty paid under protest @ 2.5% out of (c)
			(a)	(b)	(c)	(d)
A		Clearance made against Home	2870.25	211294155	5536881	771771

		consumption B/Es				
B		clearance made against Warehousing B/Es followed by Ex-Bond B/Es for clearance to home consumption	697	51005628	1302959	106087
C	TOTAL OF A+B i.e. TOTAL GOODS IMPORTED AND CLEARED		3567.25	262299783	6839840	877858
D		Goods under seizure covered by six W/H B/Es and two HC B/Es	336	26342635		
E		Goods under detention covered by one W/H B/E and two HC B/Es	147	11161593		
F	TOTAL OF D+E i.e. GOODS UNDER SEIZURE / DETENTION		483	37504228		
G	GOODS OTHER THAN SEIZED / DETAINED GOODS I.E. C - F		3084.25	224795555		

26. Further, for the above acts and omission, the importer have rendered themselves liable for penal action under Section 112(a) and / or 114A of the Customs Act, 1962.

27. In view of the above an SCN bearing No F.No. S/43-22/2012-13/SIIB dated 08.01.2014 was issued to M/s.TPL Plastech Limited

Office No. 102, First Floor, VTM Building No.2, C. Mehra, Industrial Estate, Saki Naka, Mumbai-400 072 asking them to show cause in writing to the Commissioner of Customs, Kandla having his office situated at New Custom House, Near Balaji Temple, Kandla within thirty days from the date of receipt of this notice, as to why :

- a. The Bills of Entry as mentioned in Annexure-A attached to this notice and which have been assessed provisionally should not be assessed finally under Section 18(2) of the Customs Act, 1962 based on the test reports.
- b. The benefit of duty exemption as claimed at Sr.No.477 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) should not be denied to them and the said goods should not be classified at Sr.No.559 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.236 of Noti.No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) @ 7.5% of Basic Customs duty and differential duty amounting to Rs.68,39,840/- on imported goods, should not be demanded under Section 28(4) of the Customs Act, 1962. The amount of Rs.8,77,858/- already paid / deposited by the importer during investigation should not be appropriated against the demand of the differential duty.
- c. The interest should not be demanded and recovered at the appropriate rate under Section 28AB (till 07.04.2011) / 28AA (w.e.f. 08.04.2011) of the Customs Act, 1962 on the duty demand at (b) above.
- d. The imported goods which were under seizure / detention totally 483 MT v/a Rs.3,75,04,228/- should not be confiscated under Section 111(m) of the Customs Act, 1962. Since the seized / detained goods have been provisionally released to the importer, why fine in lieu of confiscation should not be imposed upon them under Section 125 of the Customs Act, 1962 and why the Bonds executed by them should not be enforced and Bank Guarantees furnished by them at the time of provisional release of seized / detained goods should not be encashed against their above liabilities towards duty, interest, fine and penalty etc.
- e. The other imported goods (i.e. other than seized / detained) totally 3084.25 MT v/a Rs.22,47,95,555/- should not be confiscated under Section 111(m) of the Customs Act, 1962.
- f. The Bonds and Bank Guarantee furnished at the time of provisional release of the goods / provisional assessment of the goods are liable to be enforced for recovery of duty / interest / fine / penalty etc.

g. Penalty should not be imposed on them under Section 112(a) and / or 114A of the Customs Act, 1962.

28. Reply to the Show Cause Notice bearing F.No .S/43-22/2012-13/SIIB dated 08.01.2014 was filed by the importer as under:-

I N D E X

S.NO	EXHIBIT	PARTICULARS OF THE DOCUMENTS	PAGE NOS
01		Reply to Show Cause Notice	01 – 46
02	EXH-"A"	Copies of Bills of Entry W8893991, W8893993, W8893994, W8894094, W8894096 & W8894098 all dated 29.12.2012 and 8907794 & 8907797 both dated 31.12.2012 for import of HDPE Resins.	
03	EXH-"B"	Copies of overseas exporter's invoices, packing lists, catalogues, etc. for the HDPE imported	
04	EXH-"C"	Copies of relevant pages of Notn.No.21/2002-Cus dated 1.3.2002 (Sr.No.477 & 559) and Notn. No.12/2012-Cus dated 17.3.2012 (Sr.No.236 & 237).	
05	EXH-"D"	Copy of Test Memo Nos.15/20-12 & 16/2012-13 both dated 3.01.2013 of the Chemical Examiner, Kandla Custom House	
06	EXH-"E"	Copies of statements dated 7.1.2013 & 10.1.2013 of Mr.George Eapen and statement dated 21.11.2013 of Mr.Navin Kumar Jain, authorized persons of Noticee-company	
07	EXH-"F"	Copy of TPL's letter dated 22.1.2013, along with enclosures thereto, addressed to Commissioner of Customs, Kandla	
08	EXH-"G"	Copies Test Memo Nos.19/2012-13 dated 4.2.2013 and Test Report No.405 dated 7.3.2013 sent by Supdt. of Customs, Kandla, to Chemical Examiner for further test	
09	EXH-"H"	Copies of two test report Nos.400 & 401 both dated 10.1.2013 of Chemical Examiner, Kandla Custom House	
10	EXH-"I"	Copy challan dated 19.3.2013 towards payment of retesting charges of CRCL	
11	EXH-"J"	Copy of letter dated 9.7.2013 addressed to the Commissioner requesting to resubmit the samples to some other reputed laboratory for test and also to disclose the name and address of the laboratory where samples have been sent for test.	
12	EXH-"K"	Copy of letter/test report dated 22.8.2013 of the Director-CRCL, addressed to Addl. Commissioner of Customs (SIIB), Kandla	
13	EXH-"L"	Copy of application dated 17.10.2013 made by TTL to Kandla Customs Dept. under RTI Act requesting for copies of correspondence exchanged between the Customs Dept. and	

		Chemical Examiner/CRCL and test reports, etc.	
14	EXH-"M"	Copy of letter dated 19.11.2013 from CPIO/DCC declining to disclose the information asked for on the ground that the same is exempted under Section 8(1)(h) of RTI, 2005.	
15	EXH-"N"	Copy of letter dated 20.12.2013 written to SIIB of Kandla Customs contesting the test reports/ results of Chemical Examiner/Director-CRCL	
16	EXH-"O"	Copies of TPL's letters dated 11.2.2014 and 19.2.2014 to the Commissioner of Customs requesting for certain documents referred to/ relied upon in the SCN, copies of which have not been provided along with SCN.	
17	EXH-"P"	Test Report of HDPE Granule from the supplier Chevron Phillips (QChem)	
18	EXH-"Q"	Copies of relevant pages from technical books (Para 1.2 Polyethylene Resins) "Polyolefin Reaction Engineering", First Edition; (Table 1 on Page 16) "Hand Book of Polyethylene by Andrew J. Peacock" and (Para 1.7 on Page 14) of "A Guide to Polymeric Geomembranes" by John Scheirs.	
19	EXH-"R"	Copies of relevant pages from "Method 1664, Revision B: n-Hexane Extractable Material - February 2010 Edition" issued by United States Environmental Protection Agency.	
20	EXH-"S"	Copies of letters/certificates from manufacturers, dealers, distributors, actual users, etc. to support the contention that the product imported is high density polyethylene (HDPE) in primary form	
21	EXH-"T"	Illustrative copies of Bills of Entry filed by other importers for the very same product declaring the same as HDPE Granules and claiming concessional rate of BCD under Notn.No. 12/2012-Cus.	
21	EXH-"U"	Copy of TPL's letter dated 22.01.2013 addressed to the Commissioner enclosing certificates from the overseas manufacturer-exporter certifying that the disputed products are HDPE having specific gravity more than 0.95	
22	EXH-"V"	Copies of relevant pages (Reference point 4.1 page 77) from Alpha Olefins Applications Handbook edited by George R. Lappin and Joe D. Sauer	
22.	EXH-"W"	Copies of Test Reports of each of the disputed products from the Institute of Chemical Technology, Mumbai.	
23	EXH-"X"	Copies of the technical data sheets/catalogues of all disputed grades of	

		HPDE imported by TPL to evidence that products were declared as per the description given in such data sheets/catalogues	
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29. The importer while submitting the reply had relied upon a large number documents which are listed in the index given above, and in their defence reply, inter alia, submitted that:-

The issues involved in the instant case are:- (Same as given under para 27 supra, therefore, not repeated here for the sake of brevity).

II The issues involved in the instant case are:

- (a) whether HDPE Granules imported by the Noticees from M/s.Q.Chem Distribution Company Ltd., Qatar (QChem, for short) is chargeable to concessional rate of basic customs duty at the rate of 5% under Notn. No.21/02-Cus dated 1.3.2002 (for the period upto 16.03.2012) under Sr.No.477 and succeeding Notn.No.12/12-Cus dated 17.3.2012 (at Sr.No.237) w.e.f. 17.3.2012 as claimed by the Noticees or is chargeable to higher rate of basic customs duty of 7.5% under Sr.No.559 and 236 under Notn.Nos.21/02-Cus and 12/12-Cus, respectively.
- (b) whether HDPE imported from QChem can be considered as chemically modified/compounded ones for denying concessional rate of duty of 5% available to Polymers to Ethylene, namely LDPE, LLDPE, HDPE, LMDEE, LSDPE, etc.
- (c) whether test result by the Chemical Examiner, vide test reports dated 20.12.2012, 10.01.2013 & 07.03.2013 and CRCL's test reports dated 22.8.2013 and 05.09.2013 were conducted as per the right methodology and procedure prescribed for analyzing the basic polymer structure and for identifying the monomer in the Polymer, melting behavior and density of Polymer, chemical composition of polymer
- (d) assuming that those test results are correct, but not admitting, whether based on such test reports the disputed HDPE Resins imported can be considered as other than Polymer of Ethylene.
- (e) whether there was any suppression of facts or mis-declaration of description for invoking extended period of limitation and penal provisions, in a case where the products imported are known in commercial parlance as HDPE granules/resins and under the broad category of Polymers of Ethylene.

III **Brief facts of the case** is that they are engaged in manufacture of various Plastic moulded articles falling under Chapter 39 of the First Schedule to CETA and for their factories in Gujarat and Northern India, the

major portion of the imports is being done through Kandla Port, since October 2010. One of the major raw materials used for manufacture of moulded articles is HDPE/LDPE Resins of various grades which they import as well as procure locally. The same is classified under Tariff Item 3901 20 00 under the head "Polyethylene", having a specific gravity of 0.94 or more. The HDPE Resins are classified by the suppliers (overseas and indigenous suppliers) under Tariff Item 3901 20 00, therefore, they were also claiming classification under Tariff Item 3901 20 00 and have been claiming concessional rate of BCD @ 5% under Notn.No.21/2002-Cus dated 1.3.2002. Based on the aforesaid prevalent practice, during the month of December 2012, they have imported 336 MTs of Marlex brand HDPE Resins and filed eight Bills of Entry, as detailed below.

S.No.	B/E No. & Date	Qty.	Description in B/E
01	W8893991/29.12.2012	48 MT	HDPE Marlex HHM 3802
02	W8893993/29.12.2012	48 MT	HDPE Marlex HHM 3802
03	W8893994/29.12.2012	48 MT	HDPE Marlex HHM 3802
04	W8894094/29.12.2012	48 MT	HDPE Marlex HHM 3802
05	W8894096/29.12.2012	48 MT	HDPE Marlex HHM 3802
06	W8894098/29.12.2012	48 MT	HDPE Marlex HHM 3802
07	8907794/31.12.2012	16 MT	HDPE Marlex HXM TR-571
08	8907797/31.12.2012	32 MT	HDPE Marlex HXM TR-571

The copies of eight Bills of Entry Nos.W8893991, W8893993, W8893994, W8894094, W8894096 & W8894098 all dated 29.12.2012 and 8907794 & 8907797 both dated 31.12.2012 are annexed and marked as **EXHIBIT-"A"** .

It is their submission that the description mentioned in the Bills of Entry is based on the description appearing in the overseas supplier's export documents and their catalogues. The copies of overseas exporter's invoice, packing list, catalogues, etc. annexed and collectively marked as **EXHIBIT-"B"**

It is submitted that under the aforesaid factual position, based on contention that they are not eligible for concessional rate of BCD for the HDPE imported, summons proceedings were initiated against them. The contention of the Dept. is that the HDPE imported by them during the said period is chargeable to basic customs duty @ 7.5% under Sr.No.559 of Notn.No.21/02-Cus and Sr.No.235 of succeeding Notn.No.12/12-Cus.

It is submitted by them that it appears that in response to the letter issued from F.No. S/43-22/SIIB/2012-13 dated 19.12.2012 from the Supdt. of Customs (SIIB), Kandla Custom House, Ld.Chemical Examiner informed the test result dated 20.12.2012 to the Supdt. mentioning inter alia, that "it is **other than Homopolymer of Polyethylene i.e. HDPE, LDPE, LLDPE, LMDPE, LHDPE, etc.**"

That it is also not known to them as to what technical literature and technical specification-sheet was sent to the Chemical Examiner for his technical opinion.

Thereafter, under regular Panchnama dated 03.01.2013, the Supdt. of Customs (SIIB) withdrew representative samples, under Test Memos Nos.15/2012-13 and 16/2012-13 both dated 3.1.2013 and 19/2012-13 dated 4.2.13 and requested for providing clarification on the following queries:

- i) Whether the said product is pure HDPE or not?
- ii) Whether the same is chemically modified/compounded or otherwise?
- iii) Nature and composition of the product.

And the Chemical Examiner, vide Test Report No. 400 & 401 dated 10.1.2013, and 405 dated 7.3.2013 informed the test result, inter alia as "**the sample under reference is a chemically modified polyethylene**"

Copy of Test Memo Nos.15/2012-13 and 16/2012-13 both dated 3.1.2013 are annexed and marked as **EXHIBIT-"D"**. Copies of the test report Nos.400 & 401, both dated 10.01.2013 are annexed and marked as **EXHIBIT-"H"**

That the statements Mr. George Eapen, Authorized Person of the Noticees were recorded, thereafter, on 07.01.2013 and 10.1.2013. Similarly statements of Mr. Naveen Kumar Jain, Authorized Representative of the Noticees was also recorded on 21.11.2013, wherein they have explained the factual position and stated that since the density is more than 0.94, the goods imported goods are polyethylene derived from ethylene. The copies of statements dated 7.1.2013 & 10.1.2013 of Mr. George Eapen and statement dated 21.11.2013 of Mr. Naveen Kumar Jain, the authorized persons of the Noticee-company annexed and marked as **EXHIBIT-"E"**

That they vide their letter dated 22.1.2013, informed Ld. Commissioner of Customs that:

- i) HDPE imported is truly in primary form (granules)

- ii) that imported material falls well within the meaning of High Density 'Poly' Ethylene as constituent monomer (Ethylene) contributes 95% or more by weight of the total polymer content.
- iii) from the representative certificates from QChem in respect of HDPE grades Marlex HXM 50100 and Marlex HHM TR 144, it is clear that the ethylene content is well over 95% and that the product is in pellet form.
- iv) that the material imported by the Noticees is polymer of ethylene in primary form and falls within the definition of HS Code 3901 20 00 as claimed.

With the above, it was requested to get the materials tested from any of well equipped reputed labs, like Central Institute of Plastics Engineering and Technology (CIPET from any location), Institute of Chemical Technology (ICT-Mumbai) Geo-Chem Laboratories Pvt. Ltd. (Mumbai), asking them to confirm that the representative samples are of High Density Poly Ethylene, i.e. Polymers of Ethylene in primary form and content of ethylene contributes 95% or more by weight of the total polymer; that it was further informed that they were buying similar HDPE locally, as a substitute to imported material, from Reliance, IOCL, Haldia Petrochemicals, etc., who were/are classifying the same under Tariff Item 3901 20 00 and paying excise duty accordingly. Copy of their letter dated 22.1.2013 along with enclosures thereto are annexed and marked as **EXHIBIT-"F"**

That it is presumed by them that based on their request vide their letter dated 22.01.2013, for retest of the samples, the Customs Dept. forwarded six samples of HDPE Resins to CRCL, New Delhi, vide its letter dated 19.3.2013.

That by their letter dated 9.7.2013 (copy enclosed along with all enclosures, duly as **EXHIBIT-"J"**), they requested Ld. Commissioner to send the sample of HDPE resin of same grade to some other reputed laboratories for testing and also to disclose the name and address of such laboratory where the samples have been sent for test.

That the Director (Revenue Laboratories), CRCL, vide letter dated 22.8.2013, addressed to the Additional Commissioner of Customs (SIIB), Kandla, intimated the test results as given at para 19 supra. Copy of letter/test report dated 22.8.2013 of the Director (Revenue Laboratories), CRCL, are annexed and marked as **EXHIBIT-"K"**

That the Additional Commissioner of Customs (SIIB), Kandla, vide letter dated 30.8.2013, requested the Director-CRCL, to confirm as to whether the sample under reference is compounded or pure HDPE and in

response to the said letter Director (Revenue Laboratories), CRCL, vide his letter dated 5.9.2013 informed the Additional Commissioner as under:

"In this regard, it is to inform that the sample under reference is compounded preparation of Polyethylene and hexene, polyethylene units are not more than 90%. It is also clarified that it is not pure HDPE."

That the correspondence exchanged between the Customs Dept. and Chemical Examiner/CRCL and/or the rest reports were not made available to them they made an application dated 17.10.2013 under RTI Act, requesting copies for correspondence exchanged between the Customs Dept. and Chemical Examiner/CRCL and/or the rest reports are annexed and marked as **EXHIBIT-"L"**

The CPIO-cum-Deputy Commissioner of Customs, through his letter dated 19.11.2013 (copy enclosed as **EXHIBIT-"M"**), declined to disclose the information sought for, on the ground that the same is exempted under Section 8(1)(h) of RTI, 2005.

That they by their letter dated 20.12.2013, claimed that each of the test reports is erroneous and technically unsustainable inasmuch as:

- (i) that test reports dated 20.12.2012, 10.01.2013 and 07.03.2013 by the Chemical Examiner were solely based on technical literature and specifications without carrying out chemical analysis of the sampled;
- (ii) that specific gravity is confirmed as more than 0.94, which confirms that it is high density polyethylene;
- (iii) that samples are colourless translucent granules, which indicate that the same are in primary form;
- (iv) that presence of hexene confirms that these materials are manufactured using slurry process, wherein hexene is a co-monomer alongwith ethylene, which is a well known process for manufacture of polyethylene materials.
- (v) that from the values of n-hexane extractable fraction, it is clear that hexene content is not more than 2.6%. As per chemical process for High Density materials, hexene is used in the range of 2% to 4%. This further confirms that material under reference is High Density Poly Ethylene.
- (vi) that paragraph 21 CFR 177.1520 (a)(3)(i)(a)(2) of FDA regulation is not relevant to the present case;
- (vii) that HDPE granules imported by them is HDPE in primary form;
- (viii) that, in view of the above, it was once again requested to get these materials tested once again from an independent reputed laboratory

with proper chemical analysis. The Noticees expressed their willingness to provide any additional clarification/support that might be needed by the Customs Dept. with regard to classification dispute.

Hereto annexed and marked as **EXHIBIT-"N"** is the copy of letter dated 20.12.2013 written by the Noticees to SIIB of Kandla Customs.

That based on the aforesaid test reports and statements of the Executives of them impugned Show Cause Notice dated 08.01.2014 has been issued proposing to deny concessional rate of BCD @ 5% under the aforesaid Notifications; to invoke higher rate of BCD @ 7.5%; to invoke extended period of limitation and also to invoke penal provisions, based on the following allegations:

- i) that CRCL's test report dated 22.08.2013 mentions presence of polyethylene and hexene, hence, it is a co-polymer of ethylene and hexene and, therefore, it is compounded preparation of polyethylene and hexene;
- ii) that the Noticees' comments, vide their letter dated 20.12.2013, are not acceptable in view of CRCL's test reports;
- iii) that no further re-test is required, as CRCL is an accredited laboratory;
- iv) that duty has been evaded by deceptively describing the goods as "HDPE-Marlex HXM TR-571";
- v) that wrongly claimed benefit under Sr.No.237 of Notn.No.12/012-Cus (chargeable to BCD @ 5%) instead of claiming benefit under Sr.No.236 (chargeable to BCD @ 7.5%);
- vi) that duty liability has been accepted by Shri George Eapen, Manager of the importer;
- vii) that the Noticees have indulged in willful mis-statement and there was intentional suppression of facts by not declaring of HDPE imported by them as compounded and not pure (in primary form) and claimed concessional rate of BCD of 5% at Sr.Nos.477 & 237 under 21/2002-Cus dated 1.3.2002 and Notn.No. 12/2012-Cus dated 17.3.2012, respectively, instead of claiming BCD @ 7.5% at Sr.Nos.559 & 236 under the aforesaid Notifications, respectively.
- viii) that in view of the above, goods are liable to confiscation and penal provisions are also invocable.

That in this connection they make the submissions as set forth hereinafter, in their defence, which are without prejudice to one another:

IV **Submissions in support defence:**

(A) Complete relied upon documents not provided – Unable to file proper and complete defence reply:

(The required documents were supplied to the noticee at material time and therefore, these are not repeated here for the sake of brevity.)

(B) About the Product – High Density Polyethylene (HDPE):

1. Polyethylene is a thermoplastic polymer consisting of long hydrocarbon chains of ethylene monomer. The most important industrial polyethylene grades are HDPE, LLDPE and LDPE. High Density Polyethylene (HDPE) is produced by polymerization of ethylene in presence of co-monomer by slurry, solution or gas phase reactor technologies. Polymerization is a process in which small molecules, called monomers (alkenes), are joined together to form a large macro molecules consisting of repeating units of monomers to form a polymer. Three components required for polymerization are monomer/ co-monomer, catalyst/initiator system and polymerization reactor. A monomer like ethylene (or ethene) is a gaseous hydrocarbon derived from the cracking of natural gas feed stock or petroleum byproducts, which can be viewed as a pair of methylene groups connected to each other. These are unsaturated hydrocarbons, due to double bond structure and are highly reactive. Ethylene is usually produced from petrochemical and natural gas sources, but also generated by dehydration of ethanol. The co-monomers normally used for production of HDPE & LLDPE are alpha-olefins (1-hexene, 1-octene and 1-butene). Therefore, it is clear that polymerization of ethylene with one or more co-monomers is a technical necessity for production of primary form of high density polyethylene (HDPE). In the present case, marginal amount of 1-hexene i.e. 0.35% to 3.5% has been used as against maximum permissible limit of upto 4% to regulate the density of polyethylene. To evidence the same test report details of HDPE Granule from supplier Chevron Phillips (QChem) is annexed hereto as **EXHIBIT-“P”**.

And addition of such a negligible quantity of hexene to polyethylene cannot be considered as chemical modification of polyethylene.

(C) Support of factual position:

The impugned Show Cause Notice accepts that the product imported is copolymer of polyethylene and hexene. The Chemical Examiner's test report dated 20.12.2012 also confirms that subject goods, i.e. HDPE Marlex HXM TR-571, is a copolymer of polyethylene and hexene. It is other than homopolymer of polyethylene, i.e. HDPE, LDPE, LLDPE, LMDPE, LHDPE, etc.

From the above, it is clear that although the Chemical Examiner is stating that it is other than homopolymer, he is confirming that it is a copolymer of polyethylene and hexane. Although the product is a copolymer, since ethylene contained therein is more than 95%, it would be treated as polymer of ethylene, by invoking Note 4 to Chapter 39.

The samples of HDPE were drawn by the Dept. on 03.01.2013 and were sent to the Chemical Examiner, under Test Memo Nos.15/2012-13 and 16/2012-13 both dated 3.1.2013, who vide his Test Report dated 10.1.2013, informed the test result as under:

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94.

As per the technical literature available here, the sample under reference is a chemically modified polyethylene"

The very fact that the samples are in the form of colourless translucent granules itself would clearly substantiate that the same are in its primary form. If these were compounded, then they would not have acquired translucence nature. The test report dated 22.8.2013 from CRCL clearly indicates that the density is in the range of 0.9410 to 0.9548 gm/cm³ which falls within the ambit of HS code Classification of 3901200 that says 0.94 gm/cm³ or more which clearly substantiates that subject material is HDPE. Specific gravity or density is a measure of compactness/crystallinity of molecular arrangements in a polymer. The following independent treatise would substantiate that once density of polyethylene is more than 0.94 gm/cm³, it would not be chemically modified polyethylene:

- i) Para 1.2 - Polyethylene Resins - "Polyolefin Reaction Engineering", First Edition, wherein density range for HDPE is shown as 0.945 - 0.97 g/cm⁻³.
- ii) Table 1 - Page 16 - Principal Properties of different types of Polyethylene - "Hand Book of Polyethylene" by Andrew J. Peacock
- iii) Para 1.7 - Page 14 - Properties of Polyethylene of "A Guide to Polymeric Geomembranes" by John Scheirs.

Hereto annexed and marked as **EXHIBIT-"Q"** are the copies of relevant pages (Para 1.2 Polyethylene Resins) from technical books "Polyolefin Reaction Engineering", First Edition , (Table 1 on Page 16) "Hand Book of Polyethylene by Andrew J. Peacock" and a relevant pages (Para 1. 7 Page 14) of A Guide to Polymeric Geomembranes by John Scheirs.

All the test reports dated 07.03.2013 of Chemical Examiner are based on technical literature and technical specification sheets and not by carrying out any test or analysis of the samples, which is clear from the test result reproduced elsewhere and from the same it is abundantly clear that the samples were not subjected to any test or chemical analysis and opinion/result has been formed by the Chemical Examiner solely based on literature or technical specifications of the product.

(D) **Support of Explanatory Notes to HSN & CETA and Notifications:**

The Notification No.21/2002-Cus dated 1.3.2002 (Sr.No.477) and Notn. No.12/2012-Cus dated 17.3.2012 (Sr.No.237) provide for concessional rate of Basic Custom Duty to certain grades of "polymers of ethylene". The Notifications neither stipulate any density of the materials nor any restriction on composition/constituents of the materials, for extending such concession. From Notn.No.12/2012-Cus dated 17.3.2012 Sr.No.477 of Notn.No.21/2002-Cus dated 1.3.2002 and Sr.No.237 it is clear that high density polyethylene (HDPE) by name finds mention with concessional rate of BCD of 5%. Ld. Revenue neither disputes classification of the imported goods under Heading 3901 nor does it dispute that the imported goods are HDPE. Five different grades of polyethylene mentioned under 5% BCD have to be polymers of ethylene.

The Explanatory Notes to HSN under Chapter 39 clearly substantiate that various grades polyethylene imported by the Noticees are high density polyethylene (HDPE) covered under head "**polymers of ethylene**". As per the General Explanatory Notes to HSN under Chapter 39, polymers consist of molecules which are characterized by the repetition of one or more types of monomer units. A polymer in which any one monomer contributes 95% or more by weight to the total polymer content is known as a homopolymer. The expression "co-monomer" covers all polymers in which no single monomer contributes 95% or more by weight to the total polymer content. The prefix "poly" when used with the name of a specific monomer (for example polyethylene, polyvinyl chloride, etc.) designates homopolymers. Further, the expressions like "polymer of ethylene", "polymer of other olefins", etc. cover all homopolymers, copolymers, polymer blends and chemically modified polymers, in which the specified monomer is predominant over every other monomer.

From the above, it is clear that "polymers of ethylene" covers all types of homopolymers, copolymers and polymer blends and/or even chemically modified polymers. Therefore, even if it is assumed that the HDPE imported by them is a chemically modified polyethylene (as per the allegations in the SCN), still the benefit of the said Notifications would be available, as said

Notifications extend concessional rate of BCD to high density polyethylene (HDPE) and there is no qualification or restriction that such HDPE must be homopolymers or copolymers or polymer blends and/or chemically modified polymers.

Further, Notes to Chapter 39 and Headings 3901 to 3914 as given in the First Schedule to CETA would also substantiate that the products imported are HDPE covered under the head "polymers of ethylene".

Further, this Heading has been divided into four parts. First part covers polyethylene having a specific gravity of less than 0.94. Second part covers polyethylene having a specific gravity of 0.94 or more. Third part covers ethylene-vinyl acetate copolymers. Other polymers of ethylene, which are not covered in first three parts, are covered in fourth part.

Note 6 to Chapter 39, both in CETA and HSN, makes the matter clear that the expression "primary form" applies inter-alia to granules. Since the imported products in the present case are in granule form, they are primary form of HDPE.

Further, by invoking Note 4 to Chapter 39, the disputed product would be treated as a co-polymer of ethylene, as the contents of ethylene is more than 95% and hexene is used upto 4%. For ease of reference the said Note 4 is reproduced below:

"The expression "copolymers" covers all polymers in which no single monomer unit contributes 95% or more by weight to the total polymer content"

Since specific gravity of disputed polyethylene in the present case is more than 0.94, the same would be classifiable under Tariff Item 3901 20 00, as high density polyethylene (HDPE).

The classification of the products covered under Heading 3901 is not at all based on any chemical composition/chemical modification or otherwise. The only condition is that the products covered thereunder should be in "primary form". Therefore, even if marginal quantum of any co-monomer (like hexene in the present case) is added to the polyethylene, the resultant product still remain as polymers of ethylene in primary form and not as compounded or chemically modified polymers of ethylene, as wrongly claimed by the Dept.

It is a well settled principle of law that an exemption Notification must be interpreted in its plain language used therein and when the language is plain and clear, benefit of such Notification should be extended to the assessee, in support of which reliance is placed on the following judgments:

- i) *Mewar Bartan Nirman Udyog – 2008 (231) ELT 27 (SC)*
- ii) *Compack Pvt. Ltd. – 2005 (189) ELT 3 (SC)*

The Dept's claim, as the Noticees understand, is that only homopolymers are eligible for concessional rate of BCD @ 5% under the aforesaid two Notifications. Even if it is assumed as correct for argument's sake (but not admitting), since ethylene, a monomer, is more than 95% by weight of the total polymer contained in high density polyethylene imported in the present case, invoking the aforesaid Explanatory Notes to HSN/CETA, it would be treated as a homopolymer and would be eligible for the benefit of the said Notifications.

As per Heading 3901, it covers all polymers of ethylene, in primary forms and Sub-Heading 3901.20 covers polyethylene having a specific gravity of 0.94 or more. The Explanatory Notes under Heading 3901 clearly indicate that said Heading covers polyethylene and chemically modified polyethylene. It also covers ethylene copolymers, in which ethylene is the predominant monomer. Further, high-density polyethylene (HDPE) is a polyethylene having a specific gravity of 0.94 or more at 20°C.

Further, In any case, going by the Explanatory Notes to HSN under Heading 3901, polyethylene having a specific gravity at 20°C of 0.94 or more is treated as high-density polyethylene (HDPE) and the Notifications extend concessional rate of BCD inter-alia to high-density polyethylene (HDPE). Therefore, the allegation that the disputed products (HDPE) are chemically modified polymers of ethylene, without adducing any supporting evidence, is far from truth and, hence, unsustainable.

The aforesaid contention would get support from the following treatise/ authoritative books:

Para 1.1 on Page 1 - Scope and Application – from "Method 1664, Revision B, n-Hexane Extractable Material" February 2010 Edition, issued by United Environmental Protection Agency....[copy enclosed and marked as **EXHIBIT-"R"**]

It is noteworthy that the Notifications do not differentiate the "polymers of ethylene" as chemically modified or otherwise. As long as the high density polyethylene (HDPE) is a "polymer of ethylene" in primary form and ethylene content is more than 0.95 %, the same would be eligible for concessional rate of BCD @ 5%, under the aforesaid Notifications. The HDPE imported by the Noticees fulfill all the aforesaid conditions and, hence, the same would be eligible for concessional rate of BCD @ 5% under the relevant Notifications. In view of the above submissions the proposal to deny the benefit of concessional rate of basic custom duty to the imported HDPE resins, under the aforesaid two Notifications, is incorrect and unsustainable.

(E) **Commercial parlance test:**

1. It is submitted that in the commercial parlance the disputed product is known as HDPE (high density polyethylene) by the manufacturers; the dealers and actual users coming under broad category of polymers of ethylene, in evidence thereof letters/ certificates from manufacturers, dealers, distributors, actual users, etc. are enclosed and collectively marked as **EXHIBIT-"S"**

Even other importers were/are also importing the very same HDPE and declaring the description of the same as HDPE in their Bills of Entry

Hereto annexed and collectively marked as **EXHIBIT-"T"** are the illustrative copies of Bills of Entry filed by other importers for the very same product.

To substantiate the above, they have obtained a letter-cum- certificate from the overseas exporters and also downloaded certain relevant data from the website, which evidences that the description of the imported products mentioned by the Noticees is in conformity with the description declared by other importers and also details appearing in the overseas exporter's website.

From the above, it is clear that commercially the disputed products are known as high density polyethylene (HDPE).

It is a well settled position of law that commercial parlance test shall prevail over all other tests for the correct classification of a product under CETA, based inter-alia on the following judgments:

- i) 1997 (89) ELT 633 (SC) – Chemical & Fibres
- ii) 1996 (88) ELT 630 (SC) - Metagraphs Pvt. Ltd.
- iii) 1996 (87) ELT 321 (SC) - Purewal Associates
- iv) 1997 (94) ELT 28 (SC) - United Copiex (India)
- v) 2003 (152) ELT 22 (SC) - Kedia Agglomerated Marbles
- vi) 2003 (152) ELT 3 (SC) - G.S. Auto International Ltd.

Further, the Hon'ble Supreme Court in the case of ***CCE, New Delhi v/s Connaught Plaza Restaurant (P) Ltd.***, reported in 2012 (286) ELT 321 (SC), reiterated principles of common parlance test as the standard for interpreting terms in taxing statutes, in support of which relevant portion of the said judgment (Paras 18 & 19) is reproduced below, for ease of reference:

"18. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of

interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the Legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts." [(See Oswal Agro Mills Ltd (supra)].

19. *A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in The King v. Planter Nut and Chocolate Company Ltd. - (1951) C.L.R. (Ex. Court) 122. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows:*

"...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously 'no'."

Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense."

Since the disputed products are known in the common parlance as HDPE (high density polyethylene) granules, without any qualification of either compounded HPDE and/or chemically modified HDPE, etc., the same has to be considered as "polymers of ethylene" in primary form eligible for concessional rate of BCD under the aforesaid relevant Notifications.

(F) **Support of Test certificate from overseas manufacturer-exporter:**

1. M/s.QChem, the manufacturer-exporter of the disputed HDPE, vide their certificate dated 14.1.2013, have certified as under:

"This is to certify that for customs purpose, the composition of Marlex HXM TR-571 high density polyethylene is as follows:

Ethylene : >98 wt%

Hexene : <2 wt%

Additives : <1 wt%

Ethylene : Hexene-1 >49

Other descriptions:

Product appearance : Pellets

Type : Blow moulding grade polyethylene

Specific gravity : ~0.953

Ash content : <1 wt%”

Similar certificates were obtained from M/s.QChem for each of the disputed grades (like Marlex HX TR-571, HXM-50100 and HHM TR-144) and submitted by them to the Commissioner of Customs, Kandla, vide their letter dated 22.01.2013, copy of which letter, along with its enclosures is enclosed as **EXHIBIT-“U”**

From the certificates, it is very clear that ethylene content is more than 98% by weight and hexene content is less than 2% and the specific gravity of the product is more than 0.95 gm/cm³. Therefore, invoking Note 4 to Chapter 39 and Explanatory Notes to HSN, the disputed products would be considered as polymers of ethylene in which ethylene monomer is more than 95%. Needless to add here that hexene is only a co-monomer and its presence would make any structural changes in the high density polyethylene (HDPE).

When the manufacturer-exporter, who manufactured the products batch-wise and exported not only to them, but also to various customers world over, certify that the ethylene content is more 98% and specific gravity is more than 0.94 gm/cm³, the same has to be accepted as a crucial evidence.

(G) **Support of independent treatise:**

The copolymerization of ethylene with small percentage of alpha olefins is necessary to achieve stress crack resistant HDPE. A relevant Paragraph from Point 4.1 on Page 77 of “Blow Moulding of Alpha Olefins Applications Handbook”, edited by George R. Lappin and Joe D. Sauer is reproduced below:

“Homopolymer HDPE (i.e. polyethylene made from ethylene only) would be the material of choice based on stiffness. However, homopolymer HDPE is susceptible to environmental stress cracking in the presence of many liquids, such as household detergents and cooking oil. Because of this the blow-molded container market for HDPE can be broken into two main segments: detergent grade or stress crack resistant and non-detergent grade. Detergent-grade HDPE is made by copolymerization a small percentage (1 or 2%) of an alpha olefin with ethylene. Hexene is preferred in Phillips processes, while butane is preferred in the Unipol process.”

"Since copolymerizing the alpha olefin with ethylene lowers the polymer density and therefore the stiffness, the choice of a polyethylene for a given container has to be a compromise between wall thickness and stress crack resistance. For example, if the fabricator requires high resistance to stress cracking, as in detergent bottles, a lower-density HDPE must be used. This, in turn, means that the walls of the container must be thicker to have the same rigidity as a homopolymer HDPE container. To keep costs down, the fabricator wants the thinnest-wall, stiffest container possible with adequate environmental stress crack resistance."

Hereto annexed and marked as **EXHIBIT-" V"** are the copies of relevant pages (Page 77 - Point 4.1) from "Alpha Olefins Applications Handbook", edited by George R. Lappin and Joe D. Sauer

(H) **Test Reports/results are erroneous – Not to be relied upon:**

1. The Noticees say that each of the test reports/results is erroneous and technically unsustainable, which gets evidenced from the following submissions:
 - i) Test Reports dated 20.12.2012, 10.01.2013 and 07.03.2013 of the Chemical Examiner are given solely based on technical literature and specifications without carrying out chemical analysis of the sampled.
 - ii) Assuming but not admitting the correctness of the test reports, the Noticees are of the firm opinion that N-Hexane extraction fraction & Xylene soluble fraction test is migration test to confirm the suitability & compatibility of these polymers for safe use in direct contact with food stuffs, especially during storage & cooking in moulded articles made from such polymers. Therefore, it is not the right methodology to infer/analyze the polymer composition / content of the disputed HDPE sample, Ideally Structural Analysis of Polymer should have been carried out by infra ray spectra method to understand/identify the constituent of the HDPE Polymer .
- (ii) The Test Report dated 22.8.2013 of the Director-CRCL indicates that the specific gravity of each of the six samples is more than 0.94 gm/cm³, which confirms that all the samples are of high density polyethylene (HDPE). Further the observation that samples are colourless translucent granules indicates that the same are in primary form as per Explanatory Notes to HSN under Chapter 39. Similarly, the presence of hexene confirms that these materials are manufactured using slurry process, wherein hexene is used as a co-

monomer alongwith ethylene, which is a well known process for manufacture of high density polyethylene materials. In the present case, the hexene content is upto 0.35 to 3.5%, and the same is within the permissible limit of upto 4%, which further confirms that material under reference is high density polyethylene (HDPE).

However, it is not clear as to how the conclusion has been drawn by the Director-CRCL that *"each of the sample under reference is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(2) for olefin based copolymers manufactured by the copolymerization of ethylene and hexene wherein polymer units derived from ethylene are not more than 90%"*, in any case, FDA regulation is not at all relevant to the present case as this is Migration test .

When the contents of the aforesaid test reports/results were made known to the Noticees, they, vide their letter dated 20.12.2013, expressed their apprehension that the samples might not have been tested in the manner in which it should be tested to ascertain whether the sample is high density polyethylene or not.

Since the Dept. did not accede to their request for getting the samples tested from any well equipped reputed testing house, the Noticees draw two samples (HDPE Marlex HXMTR-571 and HDPE Marlex HXM-50100) from the disputed imported materials and sent to M/s.SGS India Pvt. Ltd. for ascertaining whether the samples conform to FDA 21 CFR 177.1520 (a)(3)(i)(a)(1) specifications and the density of the product.

M/s.SGS India Pvt. Ltd., vide their Test Reports No.PN:HL:4490006423 and PN:HL:4490006424, both dated 15.01.2014, confirmed that the samples conform to the FDA 21 CFR 177.1520 (a)(3)(i)(a)(1) specifications and the density determined is 0.9475 and 0.9441, respectively.

The above test results by an independent test house clearly evidence that the product imported is high density polyethylene (HDPE) in primary form and it is not compounded polyethylene and/or chemically modified polymers of ethylene.

Further, samples of all the six disputed imported products (HDPE) were sent by the Noticees to the Institute of Chemical Technology, IIT-Mumbai, with a request carry out chemical analysis of the samples and give their report.

The Institute of Chemical Technology, Mumbai, an independent autonomous body in Chemical Engineering, vide its Test Report dated 30th May 2014, has clarified as under:

"From the FT-IR Spectra, DSC and TGA analysis, the results were indicates that the sample (Marlex® HXM TR-571) is a polymer of ethylene i.e., High Density Polyethylene (HDPE) having following characteristics.

- *Marlex® HXM TR-571 is a **copolymer having ethylene as monomer and 1-hexene as comonomer** there is prominently, only -CH₃ and -CH₂- stretching and bending vibrations seen.*
- *Melting Point was found to be 132.27°C. Density observed is 0.954 kg/cm³. Both reconfirm the polymer to be high density polyethylene having >95% character of polyethylene.*
- *There is no evidence of any chemical modification as the entire sample degrades without any residue at around 550°C*
- *Further values of n-hexane extractable fraction at 50°C and xylene soluble fraction at 25°C confirms that it is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(1) for olefin based copolymers manufactured by the copolymerization of ethylene and 1-hexene wherein the polymer units derived from ethylene are not less than 90 weight-percent.*
- *The sample is a pure copolymer and no evidence of compounding has been identified as molar mass content observed 96% & comonomer content is 2% in the sample specimen as revealed from TGA Test.*
- *All the above tests and inferences show that the sample is a pure copolymer of polyethylene and 1-hexene with more than 95% polyethylene character."*
- Hereto annexed and collectively marked as **EXHIBIT-"W"** are the copies of Test Reports of each of the disputed products from the Institute of Chemical Technology, Mumbai.

From the aforesaid test reports/results from independent testing house/ institution, it is clear that the disputed products are high density polyethylene (HDPE) in primary form and not

compounded polyethylene and/or chemically modified polymers of ethylene, as alleged by the Dept. in the present SCN.

It is a settled position of law that Experts' opinion is a guiding factor for the purpose of classification of a product and, hence, the same has to be given due weight age, in support which reliance is placed on the following judgments:

- i) 2000 (125) ELT 267 (AP) – Hyderabad Asbestos
- ii) 2001 (47) RLT 211 (T) – Bansal Industries
- iii) 1998 (99) ELT 60 (T) – Instruments Orthopaedics
- iv) 2007 (210) ELT 112 (T) – Abraham J. Tharakan
- v) 2009 (241) ELT 74 (T) – Farm Fresh Foods
- vi) 2009 (238) ELT 540 (T) – New Bombay Exports

In view of the above, the disputed products are squarely covered under the relevant Notifications and the same are eligible for concessional rate of BCD at 5%.

(J) **Cross Examination of Chemical Examiner & Director-CRCL:**

From the SCN, it is clear that the entire case is built-up based on the allegation that as per the test results/reports of the samples by the Chemical Examiner and Director-CRCL, the imported goods are either compounded polyethylene or chemically modified polyethylene and, hence, the same cannot be considered as "polymers of ethylene" in primary form. However, the test results/reports do not indicate as to how the Chemical Examiner and Director-CRCL have come to such a conclusion they are of the firm opinion that the test conducted in the Departmental Laboratories on the samples is not adequate to arrive at the chemical composition etc. they have requested for examination/ cross-examination of the concerned technical personnel who carried out the test/analysis of the samples.

(K) **Discrimination not permitted – Competitive ability affected:**

It is submitted that similarly circumstanced importers have been importing identical products from the very same exporter and have been claiming concessional rate of BCD @ 5% under the aforesaid Notifications, which have been allowed by the Customs Dept., in evidence thereof copies of few Bills of Entry of other importers are already enclosed at EXHIBIT-"Q".

The Customs Act being central law, provisions of the same have to be applied uniformly to all concerned throughout the country and hostile discrimination is not permissible, in support of which reliance is placed on the following judgments:

- i) *Mediwell Hospital & Health Care - 1997 (89) ELT 425 (SC)*

- ii) *Damodar J. Malpani - 2002 (146) ELT 483 (SC)*
- iii) *Mallur Siddeswara Spinning Mills - 2004 (166) ELT 154 (SC)*
- iv) *Swastik Oil Industries - 2003 (156) ELT 26 (Bom)*
- v) *Chemicals & Plastics India - 1995 (78) ELT 410 (Mad)*

(L) **Persuasive support of judgments:**

The Noticees submit that the following judgments would render persuasive support to their contention that the imported HDPE, even after addition of marginal percentage of hexene as a co-monomer, would be treated as HDPE in primary form:

- i) *Ratnamani Metal & Tubes - 2013 (291) ELT 369 (T)*
- ii) *PSL Ltd. - 2013-TIOL-1271-CESTAT-MUM*

(M) **Assessment of Bills of Entry not challenged -- Demand not sustainable:**

The SCN (at Para 21) categorizes the imported goods into two groups; one group of goods mentioned in Annexure-"A" to SCN are the goods already cleared on final assessment of Bills of Entry and the other group Bills of Entry have been assessed provisionally, pending test report. The clearances of the goods covered under the aforesaid Bills of Entry were made after assessments of Bills of Entry, under Section 47 of Customs Act, 1952. Such final assessment has not been challenged by the Dept., by reviewing the same under Section 129D(2) of Customs Act, and, hence, the same has become final. It is a well settled position of law that demand contrary to assessment does not sustain, unless such assessment is challenged, which view gets substantiated from the ratio of following judgments:

- i) *Flock (India) Pvt. Ltd. - 2000 (120) ELT 285 (SC)*
- ii) *Priya Blue Industries - 2004 (172) ELT 145 (SC)*
- iii) *Faxtel Systems (India) - 2004 (169) ELT 265 (T-LB)*
- iv) *Albert David Ltd. - 2004 (168) ELT 462 (T-LB)*
- v) *Eurotex Industries & Exports - 2007 (216) ELT 137 (T-LB)*

(N) **Section 28 of Customs Act,1962 not invocable:**

The present SCN proposes to recover the so called differential duty from them under Section 28 of Customs Act and applicable only when duty was leviable at the point of import, but was somehow not levied or short levied. Since Bills of Entry were finally assessed to, there cannot be short levy or short payment contrary to assessments which have not been disturbed.

(O) **No mis-declaration or suppression of facts - Extended period not invocable:**

The SCN (at Para 19) alleges that the Noticees have indulged in willful mis-statement of facts and there was intentional suppression of facts by not

declaring of HDPE imported by them as compounded and not pure (in primary form) and claimed concessional rate of BCD of 5% at Sr.Nos.237 & 477, instead of BCD @ 7.5% at Sr.Nos.236 & 559 under Notn.No.12/12-Cus dated 17.03.2012 and 21/2-Cus dated 1.3.2002, respectively.

In this connection it is submitted that the following evidences/submissions would substantiate that there was no mis-declaration and/or suppression of facts.

- (i) Bills of Entry were filed throughout the disputed period declaring the disputed product as "HIGH DENSITY POLYETHYLENE – MARLEX HXM TR-571, MARLEX TR-144, MARLEX HXM-50100, MARLEX HHM-3802, MARLEX EGDA-6888, MARLEX EMDA-6147" etc.
- (ii) The export documents of the overseas suppliers were also describing the disputed goods as stated above;
- (iii) The Technical Data Sheets of the supplier (M/s.QChem) were also showing the very same description like "High Density Polyethylene Resin – Marlex HXM TR-571, Marlex HHM TR-144", etc.
Hereto annexed and collectively marked as **EXHIBIT-"X"** are the copies of the Technical Data Sheets/catalogues of all the disputed grades of HPDE imported by the Noticees.
- (iv) Other similarly circumstanced importers are also declaring the description of the disputed products as declared by the Noticees, in support of which illustrative copies of Bills of Entry of other importers are enclosed [see EXHIBIT-"Q"].

It is not a case of the Dept. that the products imported under the disputed Bills of Entry are the one other than what is mentioned in the disputed Bills of Entry.

The claim and allegation of Ld. Revenue that they should have declared the products as "compounded" and/or "not pure" is far from truth and factual position, as the products imported are neither compounded nor chemically modified HDPE.

The Bills of Entry were assessed to by the Customs Authorities as claimed by the Noticees based on the correct description of the imported goods, without demur.

The invoices of indigenous manufacturers/suppliers of similar HDPE, like M/s.Reliance, IOCL and M/s.Haldia Petrochemicals, were also submitted by the Noticees, vide their letter dated 20.12.2013, who classify the same as HDPE under Heading 3901.

Technical literature/books, certificates, invoices of the overseas manufacturer-exporters certificate, etc. would substantiate that the products imported are HDPE, which are polymers of ethylene.

From the above it is clear that every information/details were well within the knowledge of the Dept. and there was no suppression of fact or mis-statement and, hence, invocation of extended period is incorrect and unlawful, based on the following judgments:

- (a) *Nestle India - 2009 (235) ELT 577 (SC)*
- (b) *Chemphar Drugs & Liniments - 1989 (40) ELT 276 (SC)*
- (c) *Pushpam Pharmaceuticals - 1995 (78) ELT 401 (SC)*
- (d) *Cosmic Dye Chemical - 1995 (75) ELT 721 (SC)*
- (e) *Tamil Nadu Housing Board - 1994 (74) ELT 9 (SC)*

In any case, issue involved in the present case is relating to interpretation of provisions of an exemption Notification and such legal interpretation is capable of having more than one interpretation. If an assessee interprets such provisions to his benefit, it cannot be construed as suppression of fact or mis-statement or mala fides on the part of the assessee. In such circumstances, extended period is not invocable, in support of which reliance is placed on following judgments:

- i) *Lanxess ABS Ltd. - 2010 (259) ELT 551 (T)*
- ii) *Neptune Equipments - 2010 (259) ELT 588 (T)*

(P) **Goods not liable to confiscation:**

The SCN proposes to confiscate the imported goods under Section 111(m) of Customs Act, 1962. This is applicable only if any goods do not correspond in respect of value or any other particulars with the Bill of Entry the goods are liable to confiscation. Here the description mentioned in the Bills of Entry and the goods imported are one and the same and there is no mis-declaration of the goods imported, as explained in detail elsewhere above. In view of the above, goods are not liable to confiscation.

(Q) **Goods not liable to confiscation when goods cleared by the Customs after assessment:**

They say that impugned goods were imported from M/s. Q Chem and it was assessed to and cleared on payment of appropriate import duties, including BCD, on appropriate value. The provisions of Section 111(m) of Customs Act are not applicable to the present case, as it is not a case where they had imported or attempted to import any prohibited goods. It is not a case that they had tried to smuggle prohibited goods like arms and ammunition, by concealing the same in high density polyethylene. Thus the proposal to confiscate the goods in question is against the very spirit of law and is not sustainable. Further the imported goods were assessed to finally

and permitted for clearances from the Customs and the goods are not available for confiscation and, hence, the question of confiscation does not arise. Since the goods imported are not liable to confiscation, the question of imposition of redemption fine, in lieu thereof, also does not arise.

Further, the said goods was allowed to be cleared by the Customs Authorities after verification under Section 47 of Customs Act, initiation of fresh proceedings and in consequence thereof confiscation is not sustainable, in support of which reliance is placed on the following judgments:

- (a) *Mohan Meakin Ltd. - 2000 (115) ELT 3 (SC)*
- (b) *UOI v/s. Popular Dyechem - 1987 (28) ELT 63 (Bom)*
- (ci) *Decor India & Ors - 1987 (31) ELT 400 (T)*
- (cii) *Upheld by SC - 1997 (94) ELT A-51*

Further, the goods were cleared by the Customs Authorities, without execution of any bond or undertaking and, hence, confiscation thereof and/or imposition of any redemption fine does not arise, in support of which reliance is placed on the following judgments:

- (a) *CC v/s Raja Impex - 2008 (229) ELT 185 (P & H)*
- (b) *Shiv Kripa Ispat - 2009 (235) ELT 623 (T-LB)*

(R) **Penalty not imposable in the absence of mens-rea:**

It is submitted that for imposing penalty, presence of mens-rea is a mandatory requirement and in the absence of which imposition of penalty is unjustified, as enshrined by the Hon'ble Supreme Court in the case of ***Hindustan Steel Ltd v/s. State of Orissa*** - [1978 (2) ELT (J-159)] and number of subsequent judgments from various judicial fora based thereupon. In the instant case there was no ulterior motive or malafide intention to evade duty and therefore, imposition of penalty is incorrect and uncalled for, based on settled position on the issue. The ratio of Hon'ble Apex Court's judgment in *Hindustan Steel Ltd. (supra)*, it has been by various High Courts that mens-rea is a mandatory requirement for imposition of penalty, in support of which reliance is placed on the ratio of following judgments:

- i) *CCE v/s Sadashiv Ispat Ltd. - 2010 (255) ELT 349 (P&H)*
- ii) *CCE v/s Adhunik Alloys Ltd. - 2010 (254) ELT 221 (P&H)*
- iii) *CCE v/s Indo German Fabs - 2007 (209) ELT 184 (P&H)*
- iv) *CCE v/s U.T. Ltd. - 2007 (207) ELT 27 (P&H)*

(S) From the above submissions it is clear that HDPE imported by the Noticees is chargeable to concessional rate of basic customs duty @ 5%

under Notn.No.21/02-Cus dated 1.3.2002, under Sr.No.477 (upto 16.03.2012) and thereafter under Notn.No.12/12-Cus dated 17.3.2012 (at Sr.No.237), as claimed by the Noticees and not chargeable to higher rate of BCD @ 7.5% under Sr.Nos.559 and 236, respectively, of the aforesaid Notifications. Further, the HDPE imported from QChem cannot be considered as chemically modified/compounded ones for denying concessional rate of duty of 5% available to Polymers to Ethylene, namely LDPE, LLDPE, HDPE, LMDEE, LSDPE, etc.

(T) The Noticee requested for a Personal Hearing.

30. PERSONAL HEARING

Personal hearing in the matter was given on 24.06.2015 which was attended by Shri M.H.Patil, and Shri T.Chadran Nair, Advocates and Mr.. Navin Kumar, Director and Mr. Ashok Shukla, Manager. During P.H. they submitted as under:- "they have filed various documents reg. the item under import. Particularly they have cited the product literature downloaded from the site and on that basis Dept has come to a conclusion that these items are chemically modified has no basis to form such opinion as there is nothing to indicate to that extent as seen from the literature. They have filed all the copies of literature of the product in question . They have cited the test report dated 10.01.13 and contended that there cannot be 100% HDPE and upto 4% Hexane is permitted to be part of HDPE for marketability and in their case its composition in the present case is always less than 4%. Ethylene content is more than 90% in their case and as per the literature it shows that it is more than 95%and conforms to FDA Regulation 21 CFR 177.1520, clause 3(i)(a)(1). Similar imports have been made through different custom houses and were allowed clearance at 5% duty only and one of the supplier is the same. He has cited chapter note 4 to chapter 39 and contended that even if copolymer is present but the classification remains the same under the same heading and the benefit cannot be denied. He has cited chapter note 5 and contended that there is no chemical modification and small % of Hexane is always present and in any case the main polymer is more than 95% in all their imports and hence remained to be classified as HDPE/LLDPE only. In view of the above the item under import is HDPE only and not chemically modified and they are eligible for the benefit of Notfn. No.12/2012 Sr. No.237. He has cited many case laws and contended that HSN has persuasive nature regarding classification of the product. Commercially it is known as HDPE and answers to common parlance and filed relevant case laws. Very same exemption has been extended to other importers and they were given discriminating treatment

and they also should be extended the benefit. Test report does not indicate the content of Hexane and whereas they have produced the analysis report of the supplier which indicate the composition. In the absence of any evidence that they are chemically modified HDPE the demand can't survive. Even otherwise the demand can be only prospective. He has contended that demand is time barred in as much import have taken place in 2010 onwards and SCN was issued in 2014 invoking extended period and hence time barred. Accordingly, the demand needs to be restricted to only one year period and he has cited case laws. If two interpretations are possible this case can't be treated as suppression of facts as per the settled case laws and cited case laws. As goods have been finally assessed no question of confiscation and imposition of R.F. as per the settled legal position and cited case laws. As review was not done of the B/Es assessed demand can't be made. If there is no demand and accordingly there can't be penalty on the notices. Regarding cross examination they contended that it was a absolutely must since the entire demand is on the basis of opinion of the Director, CRCL and they have cited many case laws. In view of the above, they requested to drop the further proceedings".

31. After the personal hearing on 24.06.2015 they have submitted another submission titled "Written Submissions aftermath Personal Hearing on 24.06.2015" under which they further submitted as under:-

The common issues involved in both the cases are as same as given at para 29 II above therefore, not repeated here for the sake of brevity.

In support of the contention that charges in the aforesaid SCNs both dated 08.01.2014 are not sustainable, after having reiterated all the submissions, statements and contentions made in the replies to SCNs, the following further submissions were made:

That Notn.No.21/2002-Cus dated 1.3.2002 (Sr.No.477) and Notn.No. 12/2012-Cus dated 17.3.2012 (Sr.No.237), both identically worded, prescribe concessional rate of Basic Customs Duty of 5% for specified five Polymers of Ethylene, as reproduced below: (Not repeated as same is given at para 24 supra).

The present case relates to import of High Density Polyethylene (HDPE) imported from the following suppliers:

- i) M/s.Exxon Mobil, Basell,
- ii) M/s.Chevron Philips (Qchem)
- iii) M/s.Titan, Daelim
- iv) M/s.Equate Petrochemical Co.

v) M/s.Borouge

The entry, in the Notifications, does not qualify or restrict any particular type or grade of HDPE and, hence, all types and varieties of HDPE, being polymers of ethylene, are eligible for concessional rate of BCD;

The Ld. Revenue's claim that 7.5% BCD, under Notn.No.21/2002-Cus (Sr.No.559) and succeeding Notn.No.12/2012-Cus (Sr.No.236), both identically worded, i.e. "all goods falling under Heading 3901 to 3915 (except 3908)" is not correct, when "HDPE" finds specific mention in the entries claimed by the Noticees;

It is submitted by them that the aforesaid testing/analysis carried out at CRCL, Kandla/New Delhi and as given in above paras do not give the details of the composition of the disputed product (HDPE) and the quantum of ethylene contained in the sample. The report of CRCL only ascertains and certifies the conformity of disputed material used for packing, storage, carrying, cooking of food items.

It is further submitted by them that to substantiate that the disputed products imported are polymers of ethylene, which also include high density polyethylene (HDPE), the following test reports/evidences were submitted:

- (a) Letter dated 26.5.2014 of Chevron Phillips (QChem) enclosing therewith the properties of the following grades of Marlex HDPE resins:
- i) Marlex HHM-TR-144
 - ii) Marlex HXM-TR-571
 - iii) Marlex HXM-50100
 - iv) Marlex HHM-3802

These certificates confirm that the ethylene contents in each of the grades ranges between 96.14% and 99.58 % and hexene ranges between 0.30% and 3.58% (as against permissible limit of hexane upto 4%);

The summary of NMR Analysis of the test results [page No.14 to 23 of Compilation (A), submitted]

(b) Three certificates, all dated 14.1.2013 (Pages A/24 to A/26), from the supplier (QChem), certifying that the ethylene contents in the disputed products is more than 98%; hexane is less than 2% and additives contents is less than 1% in the grades Marlex HXM TR-571, Marlex HHM TR-144 & Marlex HXM 50100.

(c) The test report dated 30.5.2014 of Institute of Chemical Technology, Mumbai, (Page A/27), wherein Dr.S.T.Mhaske, who conducted the test of the sample, clearly indicates as follows:

- i) test objective is inter-alia:
 - a) to understand the chemical composition of polymer sample (Marlex HXM TR-571) w.r.t. Monomer & Comonomer % by Thermogravimetric Analysis (TGA);
 - b) to carry out migration test as per FDA 177.1520 (n-hexane extractable fraction at 50°C and xylene soluble fraction at 25°C).
- ii) Both the first and second peaks confirm it to be an olefin polymer. Also the fifth and the sixth peaks reconfirm the presence of the methylene and methyl bonds. The other peaks confirm very little unsaturation character of the monomers. The rest of the peaks are due to any impurities in the sample.
- iii) Melting Point 132.27°C and Density 0.954 Kg/cm³
- iv) It has been clarified that from the Differential Scanning Calorimeter (DSC) procedures/observations, it can be inferred that the sample tested is majorly polyethylene. As there is not a significant variation in the melting point and density as compared to the homo-polymer polyethylene, it can be concluded that the copolymer is majorly polyethylene.
- v) From Thermogravimetry (TGA) results, one can conclude whether or not there is any modification in the main polymer backbone. As the entire sample degrades without any residue at around 550°C, it can be conveniently concluded that there is no compounding or modification done on the HDPE
- vi) The n-Hexane extraction test confirms that the copolymer is pure with no or negligible amount of low molecular weight impurities and Xylene soluble test confirms that there is very less percentage of amorphous fraction of polyethylene which confirms that the polymer can be used as a food grade material.
- viii) Marlex HXM TR-571 is a polymer of ethylene, i.e. High Density Polyethylene, having following characteristics:
 - a) Marlex HXM TR-571 is a copolymer having ethylene as monomer and 1-hexene as comonomer there is prominently only CH₃ and CH₂ stretching and bending vibrations seen.
 - b) Melting point was found to be 132.27°C. Density observed is 0.954 Kg/cm³. Both reconfirm the polymer to be high density polyethylene or its copolymer with >95% character of polyethylene.
 - c) There is no evidence of any compounding or modification as the entire sample degrades without any residue at around 550°C

- d) the sample is a pure copolymer and no evidence of compounding has been identified as molar mass content observed 96% & comonomer content is 2% in the sample specimen as revealed from TGA.
- e) All the above inferences show that the sample is a pure copolymer of polyethylene and 1-hexene with more than 95% polyethylene character

From the above test report/certificate of Dr.S.T.Mhaske of ICT, Mumbai, it gets conclusively evidenced that the ethylene content in the disputed product is over 98% and the hexene content is less than 2%. The product is polymer of ethylene and not is compounded or chemically modified HDPE, as claimed by the Dept.

In view of the aforesaid independent technical expert's (ICT) test report, who has given the report after having carried out required tests on the sample and also the test reports/certificates of the overseas supplier, the test reports of Chemical Examiner and/or CRCL, who have issued the reports either without carrying out any tests (by Chemical Examiner) on the sample or after carrying out wrong testing method (CRCL), are not reliable as an evidence to arrive at a conclusion that the product under dispute is chemically modified or compounded HDPE.

It was with a sole intention to bring home the aforesaid factual position and to disprove the conclusion arrived at by the Chemical Examiner and Director, CRCL, that the disputed product is compounded or chemically modified HDPE, they have requested the Commissioner to permit them to examine/cross-examine the Chemical Examiner and the Director, CRCL, and denial of the same by the Commissioner leads to violation of principles of natural justice, in support of which reliance was placed on the following judgments:

- i) *Youngmen Industries – 2004 (175) ELT 664 (T)*
- ii) *Hazoor Sahib Chemicals – 200u8 (226) ELT 444 (T)*
- iii) *Modipon Ltd. – 1999 (114) ELT 1006 (T)*
- iv) *Sell Right (P) Ltd. – 1997 (92) ELT 241 (T)*
- v) *Ultra Fine Fillers – 2004 (167) ELT 331 (T)*

It is their submission that, the Notes to Chapter 39 in Explanatory Notes to HSN and also corresponding Chapter Notes (Chapter 39) including perusal of definition of "polymer" "Primary forms" "powder, granules and flakes" etc. given in sub-heading notes of Customs Tariff clearly substantiate the admissibility of concessional rate of BCD to the disputed products.

Tariff entries and the Explanatory Notes to HSN have to be invoked for interpreting the entry in exemption Notification, based on the following judgments:

- i) 1995 (77) ELT 23 (S.C.) - Wood Craft Products Ltd
- ii) 1994 (71) ELT 44 (Tri) - Rackitt & Colman Of India
- iii) 1994 (70) ELT 580 (Tri) - LMP Precision Engg.Co.Ltd.
- iv) 1994 (70) ELT 294 (Tri) - Luxor Pen Company
- v) 1994 (69) ELT 383 (Tri) - New India Industries Ltd.
- vi) 1993 (67) ELT 303 (Tri) - Modi Zerox Ltd.
- viii) 1993 (66) ELT 255 (Tri) - Thermax Ltd.
- ix) 2002 (142) ELT 18 (SC) - Business Forms Ltd.

Further, identical products were/are being imported by various other manufacturers, which have been assessed to at concessional rate of 5% BCD, under Notn.No.12/12-Cus (Sr.No.237) in evidence thereof few copies of assessed Bills of Entry of M/s.Supreme Industries Ltd. (Page A/37 to A/45) for import of *inter-alia* **HDPE EGDA 6888** were relied upon. Very same grade, i.e. **HDPE EGDA 6888**, is one of the products in dispute and considered in CRCL's report dated 22.08.2013 (Page A/11).

The Customs Act, being central law, provisions of the same have to be applied uniformly to all similarly circumstanced assesseees throughout the country and discrimination is not permissible, in support of which reliance is placed on the following judgment:

- i) *Mediwell Hospital & Health Care - 1997 (89) ELT 425 (SC)*

The disputed products are commercially known by the manufacturers, importers, dealers, users, etc. as HDPE and, hence, commercial parlance test has to be invoked for the purpose of determining the availability of exemption, based on the following judgments:

- i) *Kedia Agglomerated Marbles - 2003 (152) ELT 22 (SC)*
- ii) *Purewal Associates - 1996 (87) ELT 321 (SC)*
- iii) *United Metal Printers - 2004 (62) RLT 845 (Tri)*
- iv) *Krishna Carbon Paper - 1988 (37) ELT 480 (SC)*
- v) *Dynamo Dilectrics - 1995 (76) ELT 41 (Guj)*
- vi) *G.S. Auto International - 2003 (152) ELT 3 (SC)*
- vii) *Asian Paints India Ltd. - 1988 (35) ELT 3 (SC)*

It is submitted that if the language of the Notn.No.12/2012-Cus (Sr.No. 237) and/or preceding Notn.No.21/2002-Cus (Sr.No.477) is plainly read, it is clear that exemption/concession is available to specified types of "**polymers of ethylene**" and HDPE, being a polymers of ethylene, the benefit thereof is admissible.

It is a settled position of law that in a taxing statute there is no room for any intendment and regard must be had to the plain meaning of the words used therein. If the tax-payer is within the plain terms of an exemption Notification, he cannot be denied its benefit by calling in aid any supposed intention of the authority, in support of which reliance was placed on the following judgments:

- i) 1997 (91) ELT 3 (SC) – Gujarat State Fertilizers Co.*
- ii) 1996 (86) ELT 453 (SC) – Shibani Engineering Systems*
- iii) 1978 (2) ELT (J 350) (SC) – Hemraj Gordhandas*
- iv) 2005 (189) ELT 3 (SC) – Compack Pvt. Ltd.*

It was further submitted that, in any case, the so called test reports of Chemical Examiner or, for that matter, test report of Director, CRCL, would have prospective application to the particular consignments from which the samples were drawn and it cannot be applied universally for all the imports made during the past period and/or future period, in support of which reliance is placed on the following judgments:

- ia) L.D. Textiles Industries Ltd. - 2009 (233) ELT 210 (Tri)*
- ib) -do- Upheld by the Supreme Court - 2012 (275) ELT A57 (SC)*
- ii) Hindustan Fibres Ltd. - 2009 (245) ELT 337 (Tri)*

In any case, demand contrary to final assessment does not sustain, unless such assessment is challenged, which view gets substantiated from the ratio of following judgments:

- i) Flock (India) Pvt. Ltd. – 2000 (120) ELT 285 (SC)*
- ii) Priya Blue Industries – 2004 (172) ELT 145 (SC)*
- iii) Faxtel Systems (India) – 2004 (169) ELT 265 (T-LB)*
- iv) Albert David Ltd. – 2004 (168) ELT 462 (T-LB)*
- v) Eurotex Industries & Exports – 2007 (216) ELT 137 (T-LB)*

Without prejudice to the submissions on merits, it was further submitted that demand for the period 01.10.2010 to 07.05.2012 (out of total period from 01.10.2010 to 07.05.2013) is barred by limitation, as there was no misdeclaration and/or suppression of facts, as Bills of Entry were filed throughout the disputed period declaring the disputed product as "HIGH DENSITY POLYETHYLENE – MARLEX HXM TR-571, MARLEX TR-144, MARLEX HXM-50100, MARLEX HHM-3802, MARLEX EGDA-6888, MARLEX EMDA-6147" etc. and claiming concessional rate of BCD at 5% under Notn.No. 21/2002-Cus dated 01.3.2002 (Sr.No.477) and/or Notn.No.12/2012-Cus dated 17.3.2012 (Sr.No.237). Even overseas suppliers' invoices, leaflets, technical literature/specifications were also submitted along with Bills of Entry.

It is a settled position of law that extended period is invocable only when there is positive act or omission, other than mere inaction or

failure on the part of manufacturer, and there must be some conscious or deliberate withholding of information to invoke extended period, in support of which reliance was placed on the following judgments:

- (i) *Padmini Products - 1989 (43) ELT 195 (SC)*
- (ii) *Chemphar Drugs - 1989 (40) ELT 285 (SC)*
- (iii) *Continental Foundation Jt. Venture - 2007 (216) ELT 177 (SC)*
- (iv) *Nestle India - 2009 (235) ELT 577 (SC)*

Further when the issue involved pertains to interpretation of legal provisions, which is capable of having two or more different interpretations and if assessee interprets same to his benefit, it cannot be considered as suppression of facts or misdeclaration or mala fide on his part to invoke extended period, in support of which reliance was placed on the following judgments:

- (a) *Lanxess ABS Ltd. - 2010 (259) ELT 551 (T)*
- (b) *Neptune Equipments - 2010 (259) ELT 588 (T)*

Since the goods have already been allowed to be cleared by the Customs Dept, without execution of any bond or undertaking, confiscation thereof and/or imposition of any redemption fine does not arise, in support of which reliance was placed on the following judgments:

- (a) *Raja Impex - 2008 (229) ELT 185 (P&H)*
- (b) *Shiv Kripa Ispat - 2009 (235) ELT 623 (T-LB)*

For the said reasons, penalties are also not imposable.

With the above submissions and those made in the defence replies to the SCNs, it is respectfully prayed for dropping the proceedings initiated under the aforesaid two SCNs against M/s.Time Technoplast Ltd. and M/s.TPL Plastech Ltd.

32. DISCUSSION AND FINDINGS.

I have carefully gone through the SCN, defence reply submitted by the importer, submission made at the time of PH. and further submission submitted aftermath of personal hearing and other relied upon documents in the subject case. The main issues to be decided in this case are:-

- (1) The Bills of Entry as mentioned in Annexure-A attached to the show cause notice and which have been assessed provisionally should not be assessed finally under Section 18(2) of the Customs Act, 1962 based on the test reports.
- (2) The benefit of duty exemption as claimed at Sr.No.477 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.237 of Notification No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) should

not be denied to them and levy duty as against at Sr.No.559 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.236 of Noti.No.12/2012-Cus dtd.17.03.2012 (from 17.03.2012) @ 7.5% of Basic Customs duty and differential duty amounting to Rs.68,39,840/- on imported goods, should not be demanded under Section 28(4) of the Customs Act, 1962. The amount of Rs.8,77,858/- already paid / deposited by the importer during investigation should not be appropriated against the demand of the differential duty.

(3) The interest should not be demanded and recovered at the appropriate rate under Section 28AB (till 07.04.2011) / 28AA (w.e.f. 08.04.2011) of the Customs Act, 1962 on the duty demanded.

(4) The imported goods which were under seizure / detention totally 483 MT v/a Rs.3,75,04,228/- should not be confiscated under Section 111(m) of the Customs Act, 1962. Since the seized / detained goods have been provisionally released to the importer, why fine in lieu of confiscation should not be imposed upon them under Section 125 of the Customs Act, 1962 and why the Bonds executed by them should not be enforced and Bank Guarantees furnished by them at the time of provisional release of seized / detained goods should not be encashed against their above liabilities towards duty, interest, fine and penalty etc.

(5) The other imported goods (i.e. other than seized / detained) totally 3084.25 MT v/a Rs.22,47,95,555/- should not be confiscated under Section 111(m) of the Customs Act, 1962.

(6) The Bonds and Bank Guarantee furnished at the time of provisional release of the goods / provisional assessment of the goods are liable to be enforced for recovery of duty / interest / fine / penalty etc.

(7) Penalty should not be imposed on them under Section 112(a) and / or 114A of the Customs Act, 1962.

32.1 I find that the main dispute in the matter is whether benefit of Notification No.21/2002-Cus dtd.01.03.2002- Sr.No.477 (upto 16.03.2012) and Sr.No.237 (from 17.03.2012) is available to the importer prescribing for concessional rate of duty @5% adv. or duty is chargeable @ 7.5% of Basic Customs duty under Sr.No.559 of Noti.No.21/2002-Cus dtd.01.03.2002 (upto 16.03.2012) and Sr.No.236 of (from 17.03.2012) based on the facts and evidences placed on record.

32.2 I find that as per show cause notice, on the basis of intelligence received that importer had imported "HDPE- Marlex HXM TR-571" by wrongly availing the benefit of exemption notification No.12/2012-Cus dated

17.03.2012, claiming the benefit at Sl. No.237 which attracted duty @ 5% of basic customs duty. However intelligence and the certificate of analysis of the product revealed that the said product was "Compound HDPE" and the duty is chargeable as at Sl. No.236 of the Notification No.12/2012-Cus attracting duty @ 7.5% of basic customs duty. Scrutiny of the data revealed that the importer was importing "HDPE - Marlex HXM TR-571". In response to a reference made to the Chemical Examiner, GR-I Custom House Laboratory, Kandla who vide his letter dated 20.12.2012 reported that the subject goods i.e. HDPE Marlex HXM TR-571 was a copolymer of polyethylene with Hexane and it was other than Homo polymer of Polyethylene i.e. HDPE, LDPE, LLDPE, LMDPE, LHDPE etc.

32.3 In view of the above opinion of the Chemical Examiner representative samples were drawn from the consignments of 336 MTs of HDPE stuffed in 21 containers covered by eight B/Es (including six W/H B/Es) of importer, comprising of HDPE of two different grades, under regular Panchnama dated 03.01.2013 for two different grades i.e. HDPE Marlex HHM 3802 pertaining to B/E No.W8893991 and HDPE Marlex HXM TR-571 pertaining to B/E No.8907794 and were sent to the Customs House Laboratory, Kandla for testing vide Test Memo No.15/2012-13 & 16/2012-13 both dtd.03.01.2013. The Chemical Examiner, vide reports No.400 & 401 both dated 10.01.2013 reported that :

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is a chemically modified polyethylene."

In light of the test report of the Custom House Kandla laboratory, it was established that the importer had imported compounded / chemically modified various grades of HDPE, the exemption benefit of the notification No. 12/2012-Cus dated 17.03.2012 at Sr.No.237 thus claimed by the importer was not correct and not admissible to them. Therefore, the said goods detained earlier under Panchnama dtd.03.01.2013 i.e.336 MTs of HDPE valued at Rs.2,61,18,822/- were placed under seizure under the provisions of Section 110 of the Customs Act, 1962 under Panchnama dtd.11.01.2013. and were handed over to the Manager of CWC CFS, Gandhidham for safe custody under Supratnama dtd.11.01.2013.

32.4 Statements of Shri George Eapen, authorized Person, was recorded on 07.01.2013 & 10.01.2013, under Section 108 of the Customs Act, 1962, under which he, inter alia stated that :- He had been authorized to give statement on behalf of M/s TPL Plastech Limited, Mumbai; that the importer

was a Limited company and Shri Anil Jain was a Managing Director of the company; that the importer was engaged in the manufacture of industrial packaging goods made of plastics and having different manufacturing units located all over India; the other group companies were M/s.TPL Plastech Limited, M/s.Time Mauser Industries P. Limited, M/s.Schoeller Archa Time Material Handling Solutions Limited; that they had imported various grades of HDPE at Kandla port; that they had claimed the benefit of exemption notification no. 12/2012-Cus dated 17.03.2012 by classifying their imported product 'HDPE Marlex HXM TR-571' mentioned at "(iii) High Density Polyethylene (HDPE) of Sr.No0.237 of the said notification. After perusing the test report no. 399, 400 & 401 all dated 10.01.2013 of the Custom House Kandla laboratory in respect of the goods imported vide Bills of entry no. 8899908, 8907794 and 8893991, **he confirmed that the goods imported by them were composed of polyethylene modified with hexane, was chemically modified.** He also confirmed that various grades of HDPE & LLDPE purchased from M/s Q. chem Distribution company Limited, Qatar were chemically modified/compounded; that from the Year 2010 onwards, M/s. Time Technoplast Limited, Mumbai had started importing various grades of HDPE and LLDPE at Kandla / Mundra Port; that on going through the Test Reports No.399, 400 & 401 dated 10.01.2013 issued by Chief Chemical Examiner, Gr.I, CHL, Kandla in respect of the goods imported vide Bills of Entry No.8899908, 8907794 and 8893991 respectively he confirmed that the said test reports were applicable to all the three grades of HDPE imported vide said detained 23 containers; that on the basis of above said test reports he confirmed that the goods imported vide Bills of Entry No.8899908, 8907794 and 8893991 were composed of polyethylene modified with hexane was chemically modified. He confirmed that in case of chemically modified or compounded HDPE of various grades, benefit of exemption notification **of 5% basic customs duty would not apply**; that on being asked whether there was same overseas supplier for the past import consignments of different grades of HDPE & LLDPE, for both the importers he stated that they had mainly imported different grades of HDPE & LLDPE from M/s. Q. Chem Distribution Company Limited, Qatar. They had also imported HDPE & LLDPE from other suppliers. however the quantity was very minimal. Almost, 95% purchase of different grades of HDPE & LLDPE had been made from M/s. Q. Chem Distribution Company Limited, Qatar. On being asked to confirm that various grades of HDPE and LLDPE imported by M/s. Time Technoplast Limited, Mumbai and M/s. TPL Plastech Limited, Mumbai from the beginning till date, were chemically modified / compounded, he stated that he had already stated that their main

overseas supplier was M/s. Q. Chem Distribution Company Limited, Qatar and accordingly he confirmed that various grades of HDPE and LLDPE imported by M/s. Time Technoplast Limited, Mumbai and M/s. TPL Plastech Limited, Mumbai from the beginning till date, were chemically modified / compounded, from the said supplier. Hence, the benefit of exemption notification availed by those two importer companies was actually not admissible.

32.5 I find further that the representative samples were drawn from the imported consignments detained vide Panchnama dated 11.01.2013 for two grades (B/E No.9032434 dtd.15.01.2013 for HDPE MARLEX HXM 50100 and B/E No.9031926 dtd.15.01.2013 for HDPE EGDA 6888) under Panchnama dtd.17.01.2013. The Chemical Examiner, Customs House Laboratory, Kandla vide report No.**403** dtd.08.02.2013 (T.M.No.17) reported that:

"The sample is in the form of colourless translucent granules. It is composed of polyethylene modified with hexane, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is having extra high molecular weight, chemically modified polyethylene."

The Chemical Examiner, vide report No.**404** dtd.08.02.2013 (T.M.No.18) reported that:

"The sample is in the form of colourless translucent granules. It is composed of chemically modified polyethylene, having specific gravity more than 0.94. As per the technical literature available here, the sample under reference is having excellent dart impact and Elmendorf tear."

32.6 The importer vide their letter dated 22.01.2013 requested for conducting further tests of different grades of HDPE imported by them from any of well equipped, reputed labs. Since the Central Revenues Control Laboratory (CRCL), New Delhi is an appellate authority for the Customs House Laboratory, Kandla, the samples of different grades of HDPE were forwarded for re-test vide this office letter dated 19.03.2013 to the Central Revenues Control Laboratory (CRCL), New Delhi and the test report received vide letter C.No.50-Cus/C-17/12-13 dated 22.08.2013 and letter F.No.5-Cus/C-17/12-13 dated 05.09.2013. Values of the physico-chemical parameters i.e. Density, Melting point, Hexane extractability and Xylene solubility were reported vide test report dated 22.08.2013 a scanned image of the same is given at para 13 of brief facts.

32.7 I find that on being specifically requested to confirm whether the sample under reference was chemically modified or otherwise and whether it was compounded or pure HDPE. The Director (Revenue Laboratories) vide letter F.No.5-Cus/C-17/12-13 dated 05.09.2013 informed that *"the sample*

under reference is compounded preparation of polyethylene and hexene, polyethylene units are not more than 90%. It is also clarified that, it is not pure HDPE.” The scanned image of the communication dated 05.09.2013 is produced at para No.14 of brief facts.

32.8 The test report of the Custom House Kandla Laboratory and CRCL, New Delhi clearly indicate that the goods imported by the importer were not pure HDPE and hence rightly attracts duty as per Sl. No. 236 of the Notification No.12/2012-Cus attracting duty @ 7.5% of basic customs duty. CRCL is the highest testing laboratory of the Revenue department and the findings cannot be disputed. There were no cogent reasons given by the importer to doubt the findings of CRCL, New Delhi.

32.9 Statement of Shri Naveen Kumar Jain, Director of the importer and Authorized Representative of M/s.TPL Plastech Limited was recorded under Section 108 of the Customs Act, 1962 on 21.11.2013, wherein, he inter alia, on perusal of the Test Reports No.399, 400 & 401 all dtd.10.01.2013 and 403 to 405 all dtd.08.02.2013 of CHL, Kandla he clarified that they understood that reports were confirming that density was more than 0.94 and it was polyethylene and that they would further study and submit their comments within four weeks time. On perusal of the test Report F.No.C.No.50-Cus/C-17/12-13 dtd.22.08.2013 and letter F.No.5-Cus/C-17/12-13 dtd.05.09.2013 of the CRCL, New Delhi he clarified that they understood that reports were confirming that density was more than 0.94 and it was polyethylene derived from ethylene and that they would further study and submit their comments within four weeks time.

33.1 The importer vide their letter dtd.20.12.2013, for both M/s.Time Technoplast Ltd and M/s.TPL Plastech Ltd, informed that the findings of the test reports were not scientifically applied and was a manifestation of just clauses of Food Drug Act (FDA) classification to prove that the subject material was compounded; that they were in the process of getting the material tested from an independent laboratory which they felt would substantiate that the HDPE granules imported by them were indeed in its primary form; that the process / methods followed by the customs laboratories in drawing their inferences to conclude that the subject HDPE granules were in compounded form be shared with them; that in their opinion, test reports should classify HDPE granules under FDA regulation ref. no. 21 CFR 177.1520 (c) 3.2(a)(1); that this classification clearly provided that the ethylene content was more than 90% wherein their claim was that the ethylene content was more than 95%; that they wished to make their observations contesting the findings of the customs accredited laboratory

reports; since these observations are given at Para No.17 of brief facts and therefore, not repeated here for the sake of brevity.

33.2 It was further stated by them that subject to acceptance of their submissions it was fully established that HDPE granules imported by them was HDPE in primary form and fell within the definition of HS Code 3901 2000 as claimed.

33.3 With regard to six test reports of Custom House Laboratory, Kandla they have contended that there was no chemical analysis nor scientific explanation on how the findings had been arrived and it appeared that the findings were the personal views of the chemical examiner; that the polyethylene was manufactured by chemical process using hexane or isobutene as a co-monomer along with ethene in presence of catalysts and this process was a chemical reaction to manufacture polyethylene hence there was no term as chemically modified polyethylene in this case.

33.4 With regard to the CRCL, New Delhi's reports they have contended that with no other material added it was clear that the Ethylene content in HDPE granules was more than 95%, while CRCL's report clearly indicates that the polymer units derived from ethylene are not more than 90%.

33.5 I find that the contention of the importer with regards to the Test report of Chemical Examiner Kandla is not acceptable because the test results given by the Chemical Examiner cannot be his personal views but are the results of the tests conducted on the samples. Further, the importer have themselves stated that the polyethylene was manufactured by chemical process using hexane or isobutene as a co-monomer along with ethene in presence of catalysts and this process was a chemical reaction to manufacture polyethylene. Shri George Eapen, Authorized Person of the importer in his statements dated 07.01.2013 & 10.01.2013 had accepted on the basis of above said test reports that the goods imported vide Bills of Entry No.8899908, 8907794 and 8893991 were composed of polyethylene modified with hexane. He confirmed that in case of chemically modified or compounded HDPE of various grades, benefit of exemption notification **of 5% basic customs duty would not apply.**

33.6 I further find that during the course of proceedings, importer registered its protest on the test result of C.H. laboratory, kandla and CRCL, New Delhi and advanced arguments as to why the said test results are not acceptable to them. Therefore, instead of recognising findings in the test reports in the aforesaid laboratories, they argued and pleaded to test the samples from any other laboratory but I find all such contentions and arguments are only an attempt to nullify the findings of the departmental

testing laboratories which are well equipped to test the samples under reference and well accepted even by the judicial forums and their attempt is with sole intention to escape from additional duty liability involved in misclassification of product under import as discussed hereinabove. I find that the contention of the importer that the test reports were not scientifically applied and was a manifestation of just clauses of Food Drug Act (FDA) classification to prove that the subject material was compounded, is not correct inasmuch as the test report of CRCL, New Delhi clearly says that :

“each of the six sample is in the form of translucent granules, each sample is organic in nature, answering test for presence of polyethylene and hexene, IR spectrum of each sample also confirms the presence of Polytehylene and Hexene.

Chemical tests, IR spectrum and value of density and melting point indicates that each sample u/r is a copolymer of ethylene and hexene. Further values of n-hexane extractable fraction at 50°C and Xylene soluble fraction at 25°C confirms that each of the six samples u/r is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(2) for olefin based copolymers manufactured by the copolymerization of ethylene and hexene wherein polymer units derived from ethylene are not more than 90%.”

33.7 The report of CRCL, New Delhi is very categorical and does not leave any doubt. While holding so, I have also gone through the findings in the test result issued by The Institute of Chemical Technology, Mumbai, an independent autonomous body in Chemical Engineering in which it was clarified vide Test Report dated 30th May 2014 that :

“From the FT-IR Spectra, DSC and TGA analysis, the results were indicates that the sample (Marlex® HXM TR-571) is a polymer of ethylene i.e., High Density Polyethylene (HDPE) having following characteristics.

- *Marlex® HXM TR-571 is a **copolymer having ethylene as monomer and 1-hexene as comonomer** there is prominently, only -CH₃ and -CH₂- stretching and bending vibrations seen.*
- *Melting Point was found to be 132.27°C. Density observed is 0.954 kg/cm³. Both reconfirm the polymer to be high density polyethylene having >95% character of polyethylene.*
- *There is no evidence of any chemical modification as the entire sample degrades without any residue at around 550°C*

- *Further values of n-hexane extractable fraction at 50°C and xylene soluble fraction at 25°C confirms that it is meeting the specification criteria of FDA Regulation 21 CFR 177.1520 (a)(3)(i)(a)(1) for olefin based copolymers manufactured by the copolymerization of ethylene and 1-hexene wherein the polymer units derived from ethylene are not less than 90 weight-percent.*
- *The sample is a pure copolymer and no evidence of compounding has been identified as molar mass content observed 96% & comonomer content is 2% in the sample specimen as revealed from TGA Test.*
- *All the above tests and inferences show that the sample is a pure copolymer of polyethylene and 1-hexene with more than 95% polyethylene character."*

33.8 However, I find that the test reports of CE. Kandla and that of CRCL were obtained by following the laid down procedure of the Department from drawal of samples to testing done by Chemical Examiner., Kandla and CRCL., New Delhi whereas the test report submitted by the importer is questionable and even the source of samples and method of sampling without the presence of customs officers of the Department is not acceptable. The validity of the test report depends only when the samples are drawn in the presence of the customs officers. Therefore, the same cannot be accepted as an evidence in a quasi-judicial proceeding. I am inclined to rely on the test reports of the central revenue laboratories obtained by following the laid down procedure of the Department.

34. Another important question raised by the importer is that by invoking the Chapter note 4& 5 of the Customs Tariff Act, 1975 they have tried to drive home their point that the imported goods are HDPE falling under Chapter 3901. Here I find that it is not relevant to invoke these notes as there is no dispute at all, as far as classification is concerned. The simple thing is that if the HDPE is pure the same will fall under Sr. No.237 of Notfn. No.12/12-Cus so that they will be eligible to concessional rate of 5% duty otherwise it will fall under Sr. No.236 of above Notification and duty rate will be 7.5% Advl. From the discussions as mentioned above it is amply clear that the goods are not in its pure form and therefore, would correctly fall and attract duty under Sr. No.236 of the above said Notification.

35. Once it is established that the goods clearly fall under Sr. No.236 of the above said Notification it is implied that the importer had not declared correct description of the imported goods and its applicable rate of duty in

terms of aforesaid notifications and thereby, mis-stated the facts before the Customs even earlier also so as to avail undue benefit of lesser effective rate of customs duty.

36. From the discussion made in the foregoing paras, I find that so far as the merits of the case is concerned i.e. whether the goods imported is pure HDPE or compounded or modified with other elements, the same stands conclusively proved in favour of revenue. Consequently, proposal for recovery of differential duty is required to be confirmed along with consequential action of recovery of interest.

37. So far as the issue of limitation is concerned, I find that the importer contended that extended period is not invocable in this case. On the basis of entire facts and evidences placed on record including scientifically proved testing analysis, I find that it is conclusively proved that the goods imported were not eligible for concessional rate of 5% adv. basic Customs Duty. The goods sought for clearance under the said concessional rate was assessed based on the description and classification declared by the importer which is subsequently found wrong. I therefore find this is a case of willful mis-statement on the part of the importer. In addition, importer is found to have suppressed true and correct facts relating to nature, character and specification of imported goods which led to contravention of various provisions of Customs Act, 1962 / Customs Tariff Act, 1975 and such contraventions are found to have been committed with sole intention to evade correct duty liability. All these facts and circumstances emerging on record based on evidences clearly prove that this is a fit case to invoke extend period and accordingly, contention of the importer on this count is not tenable. While holding so, I also have gone through contention of the importer that in case where the issue relates to interpretation, extended period is not invocable. I do not find any substance in the said contention as the issue relates to correct description and classification of the goods in light of the statutory provisions and not of interpretation. For the said reason, various judgments relied upon by the importer are of no avail being inapplicable. The following cases support my stand in this decision:-

In case of Mr. *Gillooram Gaurishanker Vs. Commr. Of C.Excise, Jamshedpur in order No.A-1764 to A-1768/CAL/2000 dated 20.10.2000 reported in 2001(136) ELT 434(Tri-Kolkata) held that Deliberate suppression and mis-statement of facts - Extended period invocable. The above case was affirmed by Supreme Court vide order dated 6-9-2006 by **dismissing** the Civil Appeal filed by Mr. *Gillooram Gaurishanker*.*

In another case – Sunshine Tube P.Ltd., Vs Commr. Of C.Excise, Belgaum in final Order No.236/2001 dated 26.2.2001 held that - Assessee fully aware of conditions of exemption notification but showing predetermined set of mind to not to comply with the same, totally negligent and knowingly not taking any steps to rectify the position with intention to evade duty - Extended period invocable - Section 11A of Central Excise Act, 1944. - The appellant was fully aware, but did not take effective steps to get the engravings done by a good qualified artisan, instead allowed, admittedly a bad workman, to do a job of markings which he knew got obliterated. This indicates not only total negligence on the part of the assessee to comply with an effect the intention undertaken, when he got the classification list approved. It also indicated a pre-determined set of mind to not to make "durable and prominent" markings. [para 4(b)] and ruled that extended period is invocable in such cases.

In case of Bharat Earth Movers Ltd., Vs Collector of C.Excise , Bangalore-2001(136) ELT 225(Tri-Bang) in Final Order held - Demand - Limitation - Exemption wrongly availed by not completely disclosing the facts and misguiding the Department - Extended period invocable - Section 11A of Central Excise Act, 1944. [para 4(b)]

The above cited case laws squarely applies to the case on hand and the importer deliberately availed the benefit of Notification No. 12/2012-Cus dated 01.03.2012 at Sr. No. 237 though they are not eligible.

38. I further find that in support of defence, importer contended about commercial parlance test. I find that there is no dispute that the imported goods cleared by the importer and covered under show cause notice was HDPE and this is not the case where the revenue alleged that the same is known in the commercial parlance as other than HDPE. The dispute in the instant case is whether the imported goods i.e. HDPE is a pure one or modified / compounded with other element so as to decide correct rate of concessional duty i.e. 5% or 7.5%. In view of these specific issue covered in the show cause notice, contention of the importer regarding commercial parlance is mis-placed being irrelevant and out of place and hence, does not deserve any consideration. For the said reason, judgments relied upon in support of the said contention are found misplaced and inapplicable in the facts and circumstances of the present case. Referring to the principle of common parlance, Apex Court in *Hindustan Aluminium Corporation Ltd., v. State of U.P.* - AIR 1981 SC 1649 = 1983 (13) E.L.T. 1656 (S.C.) said :- "That principle has been repeatedly reaffirmed in the decisions of this Court.

It holds good where a contest exists between the scientific and technological connotation of the word on the one hand and its understanding in common parlance on the other.

39. While holding so, I have also gone through contention of the importer saying that previous Bills of Entry have been finally assessed and that assessment is not challenged but I find no substance in the said contention as final assessment had taken place based on information and declaration made by the importer at the material time which have been found wrong at a later stage.

40. Another contention of the Noticees is that for imposing penalty, presence of mens-rea is a mandatory requirement and in the absence of which imposition of penalty is unjustified, as enshrined by the Hon'ble Supreme Court in the case of ***Hindustan Steel Ltd v/s. State of Orissa*** - [1978 (2) ELT (J-159)] and cited a number of subsequent judgments from various judicial fora based thereupon the above judgment. I find that the above case is not applicable in the case on hand in as much as the Court has held that no penalty should be imposed for technical or venial breach of legal provision or where the breach flows from the bona fide belief that offender is not liable to act in the manner prescribed by the statute. The present case is clearly a case of mis-statement of fact with the intention to pay less duty on imported goods and as against the argument of the importer, in a number of cases it has been held that for imposing penalty, *mens rea* is not an ingredient in Customs cases one being that in Commissioner of Custom, New Delhi Vs Art Live – 2014(314)ELT 632(Tri-Delhi) – “Confiscation and penalty – Misdeclaration - Mens rea - Bill of Entry filed for only one painting while consignment consisted of two imported paintings - In case of mis declaration, ‘mens rea’ not a pre-requisite for confiscation and imposition of penalty under Customs Act, 1962”. Further In the case of COMMISSIONER OF CUSTOMS (EXPORT), CHENNAI-I Vs. BANSAL INDUSTRIES, 2007 (207) E.L.T. 346 (Mad.) THE HIGH COURT OF JUDICATURE AT MADRAS held that :- “Confiscation and penalty - Misdeclaration and undervaluation of goods - Mens rea - Element of mens rea not required for imposition of punishment under Customs Act, 1962 - Finding of fact recorded by Tribunal that supplier by mistake loaded tin sheets waste which were not ordered by assessee - Order of Tribunal mainly proceeded on footing of intention of assessee to evade duty, which is not correct in matter of breach of a civil obligation attracting levy of penalty - Order of Tribunal set aside - Sections 111(m) and 112 of Customs Act, 1962. [paras 6, 8, 9]”

Similar position was upheld in number of cases.

41. I further find that while contesting the show cause notice and challenging test results of departmental laboratories, the importer asked for cross-examination of the officers of the said laboratories. I find that the officers conducting test on the samples have given their findings based on samples which were drawn and forwarded after following prescribed procedure. Further, such findings have been given based on analysis conducted in accordance with the prescribed norms and there is nothing on record to disprove the same. In these circumstances, cross-examination, even if granted, would not have brought on record any new or different findings than what is mentioned in the test results. For the said reason, I find that cross-examination, as required by the importer, would not serve any purpose and the said request is unjustified and unwarranted. In support of the above, reliance is placed on the judgment in the case of M/s Alpha Impex Vs UOI 2015(315)ELT 446 Tri- Delhi which was relied upon in case of Shalini Steels P.Ltd.,Vs. Commr of Cus.&C.Ex. Hyderabad 2011(269) ELT 485(AP) in the High Court of Judicature for Andhra Pradesh at Hyderabad which is affirmed by the Tribunal Ahmedabad in case of Chandan Steel Ltd., Vs Comm. Ex.& S.T. Vapi in final order No.A11289 to A11293/2013-WZB/AHD dated 10.10.2013.

42. In view of the above, I find that importer is not eligible for concessional rate of duty at 5 % and is liable for payment of differential duty along with interest as proposed in the show cause notice and act and omission on the part of the importer also rendered the goods liable for confiscation and rendered themselves liable for penalty. So far as the issue of confiscation is concerned, I find that the goods placed under seizure and subsequently released provisionally are liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962 and the importer is liable for payment of fine in lieu of confiscation in accordance with the provisions of law. Consequently, Bills of Entry provisionally assessed are required to be finalised as per correct rate of duty @ 7.5% Basic Customs Duty in terms of Sr. No. 559 (upto 16.03.2012)& 236(from 16.03.2012) of Notification No. 12/2012-Cus dated 17.03.2012. However, the goods earlier cleared by the importer are also held liable for confiscation and I refrain from imposing redemption fine as the goods are not physically available for confiscation nor released under any bond and in view of the settled legal position in the case of. SHIV KRIPA ISPAT PVT. LTD. Vs COMMISSIONER OF C. EX. & CUS., NASIK , 2009 (235) E.L.T. 623 (Tri. - LB) and CHINKU

EXPORTS Vs .COMMISSIONER OF CUSTOMS, CALCUTTA , 1999 (112) E.L.T. 400 (Tribunal) Redemption fine - Customs - Redemption fine imposed when goods not available for confiscation having been exported many years ago - Imposition of fine not sustainable - Section 125 of Customs Act, 1962.

43. As I propose to impose mandatory penalty U/S 114A of Customs Act, 1962, I refrain imposing separate penalty under Section 112(a) of Customs Act, 1962.

Accordingly, I pass the following Order:-

:: ORDER::

(a) I order final assessment of Bills of Entry as mentioned in Annexure-A attached to this notice under Section 18(2) of the Customs Act, 1962 based on the test reports as per correct rate of duty @ 7.5% Basic Customs Duty in terms of Sr. No. 559 (upto 16.03.2012) & 236(from 16.03.2012) of Notification No. 12/2012-Cus dated 17.03.2012.

(b) I deny the benefit of duty exemption as claimed at Sr.No.477 of Notn.No.21/2002-Cus dated 01.03.2002 (upto 16.3.2012) and Sr.No.237 of Notn.No. 12/2012-Cus dated 17.3.2012 (w.e.f. 17.3.2012) and order that the said goods are to be classified and attract duty of 7.5% at Sr.No.559 of Notn.No. 21/2002-Cus dated 01.03.2002 (upto 16.03.2012) and Sr.No.236 of Notn.No.12/2012-Cus dated 17.03.2012.

(c) Consequently I confirm the demand of differential duty amounting to Rs.68,39,840/- under Section 28(8) of the Customs Act, 1962 which was made under Section 28(4) of the Customs Act, 1962. I order to appropriate the amount of Rs.8,77,858/- already paid/deposited by the importer during investigation, against the demand of the differential duty.

(d) I order to charge and recover the interest at the appropriate rate under Section 28AB (till 07.04.2011) / 28AA (w.e.f. 08.04.2011) of the Customs Act, 1962 on the duty demand at (3) above.

(e) I confiscate the imported goods which were placed under seizure/detention weighing totally 483 MTs, valued at Rs.3,75,04,228/-, which were under seizure/detention, under Section 111(m) of the Customs Act, 1962. Since the seized/detained goods have been provisionally released to the importer, I impose fine in lieu of confiscation Rs.80,00,000/- (Rupees Eighty lakhs only) upon the importer under Section 125 of Customs Act, 1962.

(f) I order to encash the Bank Guarantee and enforce the Bonds executed by the importer at the time of provisional release of seized / detained goods against their above liabilities towards duty, interest, fine and penalty etc.

(g) I order confiscation of the other imported goods (i.e. other than seized/detained) totally 3084.25 MTs, valued at Rs.22,47,95,555/- under Section 111(m) of the Customs Act, 1962 which were cleared earlier. However, I refrain from imposing any fine as the goods are not physically available for confiscation.

(h) I impose penalty of Rs. 68,39,840/- (Rupees Sixty eight lacs thirty nine thousand eight thousand forty only) and also an amount equivalent to the amount of interest payable on the importer under Section 114A of the Customs Act, 1962. However, the same shall stand reduced to 25%, if the duty alongwith interest is paid within 30 days from the communication of order in terms of proviso to Section 114A of Customs Act, 1962.

This order is issued without prejudice to any other action that may be taken against the importer or any other person under the provisions of Customs Act, 1962 / Customs Tariff Act, 1975 and / or rules framed there under or under any other law for the time being in force.

Encl: As above

(P.V.R.REDDY)
PRINCIPAL COMMISSIONER

By Registered Post AD / Hand Delivery :

F. No. S/10-106/2013-14

Date: 31.08.2015

To

M/s TPL Plastech Limited,
Office No. 102, First Floor, VTM Building No.2,
C. Mehra, Industrial Estate, Saki Naka,
Mumbai-400 072

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone alongwith a copy of SCN.
2. The Assistant Commissioner, Assessment Group-II, Custom House, Kandla.
3. The Assistant Commissioner, Recovery Section, Custom House, Kandla.
4. Guard File