



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला ।

OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.

A	फाइल संख्या/ File No.	S/10-181/ADJ/ADC/IPL/2016-17
B	आदेश में मूल सं./ Order-in-Original No.	KDL/ADC/PMR/17/2017-18
C	पारित कर्ता/ Passed by	SH. PADALA MOHAN RAO, ADDITIONAL COMMISSIONER
D	आदेश की दिनांक/Date of order	28/12/2017
E	जारी करने की दिनांक/Date of issue	28/12/2017
F	एस.सी.एन. सं. एवं दिनांक/ SCN No. & Date	DRI/KZU/CF/ENQ-46(INT-43)/2016 dated 02/11/2016
G	नोटीसी/ पार्टी Noticee/Party	M/s Indian Potash Ltd., Seethakathi Business Centre, 1 st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006 IEC No.0493010122

1. यह अपील आदेश संबन्धित को नि शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

"सीमा शुल्क आयुक्त (अपील), कांडला

वीं मंजिल 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़
अहमदाबाद 380 009"

"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
7th Floor, Mridul Tower, Behind Times of India, Ashram Road
Ahmedabad - 380 009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.
4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by -

(i) उक्त अपील की एक प्रति और

A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule - I, Item 6 of the Court Fees Act, 1870.

5. अपील जापान के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), और सीमा शुल्क अधिनियम 1982, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 10% भुगतान करना होगा।

An appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute

BRIEF FACTS OF THE CASE:-

Intelligence was developed by the Directorate of Revenue Intelligence (DRI), Kolkata to the effect that M/s Indian Potash Ltd. (hereinafter referred to as M/s IPL or the said importer), having their registered office at Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box-No.738, Chennai-600006, and having IEC No. 0493010122, have been importing Fertilizers for agricultural use through various Ports in India and have been evading duty of Customs by not declaring certain elements of freight, which should have been taken into account for the purpose of determination of assessable value of the goods for the purpose of payment of Customs Duty as per the provisions of Section 14 of the Customs Act, 1962, read with Rule 3 and Sub-Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Intelligence suggested that M/s Indian Potash Ltd. have undervalued the subject goods by suppressing the detailed cost of demurrage incurred against such imports due to delay in unloading the imported goods from the ship. Investigation of DRI revealed that the act of omission and/or commission of the importer i.e. M/s IPL resulted in non- payment of Customs duty of **Rs.36,04,477/-(Rupees Thirty Six lakh Four thousand Four hundred Seventy Seven only)**, which appears to be recoverable under Section 28(4) of the Customs Act, 1962 and also appears to attract provision of Section 111(m) of the Customs Act, 1962, making the goods liable for confiscation and the importer liable to penalty under Section 112(a) & 114A of the Act *ibid*.

2) M/s Indian Potash Ltd.(IPL) imported Fertilizers and chemicals like Muriate of Potash, Rock Phosphate, Urea and Di-ammonium Phosphate etc in bulk.

3) M/s Indian Potash Ltd. had entered into agreement with various suppliers for supply of Fertilizers/ Chemicals in bulk. As per the provision of the agreement, the price is settled on Cost & Freight (CFR) basis which signifies that in addition to the price of the goods to be imported, it would also include cost of freight from the port of loading till the port of discharge. However, conditions were made that the cargo would be unloaded at the port of discharge within a specific period of time which is known as 'Lay Time' in the trade parlance. Any failure to release the ship within that specific time would result in incurring demurrage, and such demurrage is to be paid by the importer to the supplier of the goods in addition to the agreed upon CFR price as per agreement. On many occasions chartered ships get delayed and the importer is bound by the clause of the agreement to pay extra amount towards demurrage charges for such delay. Rate of demurrage and other particulars are well settled and covered in the agreement. These charges being extended freight recovered by suppliers logically form a part of the freight component and are includible in the assessable Value of Imported Goods in terms of Rule 10(2) of the Customs Valuation

(Determination of Value of Imported Goods) Rules. 2007 for being part of transport cost.

4) Intelligence further suggested that M/s Indian Potash Ltd. while importing such goods, for the purpose of determination of assessable value, calculated freight by taking into consideration standard freight paid by them. As a matter of fact as the price is determined on CFR basis, it normally does not separate individual elements of cost, i.e. Cost & Freight. However, specific provisions are made for certain elements consisting of unforeseen expenses, like Ship Demurrage Charge, which are required to be paid in addition to such CFR price. M/s Indian Potash Ltd had to incur such extra expenses in the form of Ship Demurrage charges on a number of occasions. But they did not disclose, on any occasion the fact that they had to pay demurrage to the supplier in addition to the actual freight. Such elements of cost being paid over and above the standard freight also constitute part of the extended freight and therefore, part of the assessable value of the goods. Customs duty should have been paid on such amounts, but the importer did not come forward to pay such duty and grossly contravened the provisions of the Customs Act, 1962, in course of their import.

5) The details of import of such goods namely Fertilizers, made by M/s Indian Potash Ltd. during the last 5 years through Mundra, Kandla, Vizag, Gangavaram, Krishnapatanam, Chennai & Kakinada Sea Ports against which they had paid various amounts towards Ship demurrage charges are given below under Para 6. Such details were submitted by the importer as evidence in response to summons and in support of quantum of demurrage paid they also furnished copies of the invoices/ Debit Notes raised by the supplier and also payment particulars. However, the importer did not disclose such details to the Customs authority nor did they pay any Customs duty on such amounts.

6) Annexure-A attached to the Show Cause Notice issued by DRI gives details of Vessel and Bill of Entry linked demurrage paid and calculation of duty payable thereupon. In addition to that the following Tables also give details of such imports where the importer had to pay demurrage charges:

TABLE-1

Port wise Demurrage, Assessable Value & Differential amount of Duty				
BE No.	Qty.	Demurrage	Value	Differential Duty
CHENNAI	43970	629843	112762551	33462
GANGAVARAM	80100	1477481	1514762720	89966
KAKINADA	76500	11489496	1529113614	694724
KANDLA	905738	23650178	23071159675	1271139
KRISHNAPATNAM	55280	4637083	1136538272	276652

MUNDRA	151148	1717512	3875560324	105359
VIZAG	404201	18529676	10454408731	1133175
TOTAL	1716937	62131270	42694305885	3604477

TABLE-2

Vessel specific Qty, Demurrage incurred, Value & Differential Duty

Vassel Name	Qty.	Demurrage	Value	Differential Duty
AGGELOS B	35000	1402133	826347463	87374
AJAX	71500	15710371	1479589421	950478
AURORA SB	36000	367345	532829936	17941
BULK AMERICAS	35000	1024898	1091920328	62006
CATAMARCA	27500	807495	851917522	48854
CHENGYANG IONEER	52487	4486776	1041842685	279594
CLEAR	50001	918378	1639937784	55562
Corewise ol	11000	31335	321979448	1895
DARYA GANGA	27000	87783	626987169	5469
DIAMOND SEA	32000	1026918	231722994	25673
DIMI	29250	429625	621420870	26772
E.R.BORDEAUX	34200	37875	514334097	1856
FANTASTIC	44000	438341	874705050	37374
GENCO PYRENEES	55000	1113559	1812046185	67370
GENCO PYRENEES	55000	1165793	1812098419	70530
GREAT INTELLIGENCE	60000	5607929	1561337111	341047
INCE FORTUNE	32350	1773813	749949250	110534
INCE KARDENIZ	50775	2319970	692959713	76844
JIN DA	32998	1161500	1080887163	70271
JS MEKONG	8500	2146250	195224411	133743
LOTUS SUN	45378	1202166	1346102158	72730
LOWLANDS BEACON	40498	949821	1222699232	59188
MEGA STAR	71148	558412	1612779983	34796
METEORA	53204	763813	1720843654	46211
NAVIOS ACHILLES	50299	157041	1844766208	9550
NESTOR	54963	981328	1205802988	59371
NOSCO GLORY	59280	1400139	1596173794	84709
OCEAN PRELATE	50440	934250	1837735880	56816
ODIGITRIA	21570	529904	558596752	27291
OLYMPIC PIONEER	6000	909000	131736031	56644
ROGUE	30626	1336937	986411747	80883
SFL KATE	24000	1002173	171922834	25054
TEAM QUEST	11400	68604	232186351	4276
THOR HARMONY	45100	2020000	1545961631	122846

TIGER TIAN	31730	1136503	244004720	28413
TRANSOCEAN 2	30000	240722	622842556	15001
TUO FU 1	43999	3498018	1289197784	211630
VOSHOD 2	126419	1501617	3087542357	95606
WANISA	65100	75499	1124428442	4705
WINGSAIL	27500	317386	233431020	7934
YIN NING	48723	489850	1519102748	29636
TOTAL	1716938	62131270	42694305885	3604477

TABLE-3

Port wise Vessel specific Demurrage, Value & Differential amount of Duty

Port	Vessel Name	Qty	Demurrage	Value	Deferential Duty
CHENNAI	COREWISE OL	11000	31335	321979448	1895
	ODIGITRIA	21570	529904	558596752	27291
	TEAM QUEST	11400	68604	232186351	4276
	TOTAL	43970	629843	1112762551	33462

GANGAVARAM	GREAT INTELLIGENCE	15000	1401982	390334278	85261
	WANISH	65100	75499	1124428442	4705
	TOTAL	80100	1477481	1514762720	89966

KAKINADA	AJAX	56500	11285415	1170470462	682768
	AURORA SB	20000	204081	358643152	11956
	TOTAL	76500	11489496	1529113614	694724

KANDLA	AGGELOS B	35000	1402133	826347463	87374
	BULK AMERICAS	35000	1024898	1091920328	62006
	CATAMARCA	27500	807495	851917522	48854
	DIAMOND SEA	32000	1026918	231722994	25673
	E.R. BORDEAUX	34200	37875	514334097	1856
	FANATASTIC	44000	438341	874705050	37374
	GENCO PYRENEES	55000	1113559	1812046185	67370
	GENCO PYRENESS	55000	1165793	1812098419	70530
	INCE FORTUNE	32350	1773813	749949250	110534
	INCE KARDENIZ	50775	2319970	692959713	76844
	JIN DA	32998	1161500	1080887163	70271
	JS MEKONG	8500	2146250	195224411	133743

	METEORA	53204	763813	1720843654	46211
	NAVIOS ACHILLES	50299	157041	1844766208	9550
	OCEAN PRELATE	50440	934250	1837735880	56816
	OLYMPIC PIONEER	6000	909000	131736031	56644
	SFL KATE	24000	1002173	171922834	25054
	THOR HARMONY	45100	2020000	1545961631	122846
	TIGER TIAN	31730	1136503	244004720	28413
	VOSHOD 2	126419	1501617	3087542357	95606
	WINGSAIL	27500	317386	233431020	7934
	YIN NIG	48723	489850	1519102748	29636
	TOTAL	905738	23650178	23071159678	1271139

KRISHNA PATNAM	AJAX	15000	4424956	309118958	267710
	AURORA SB	16000	163264	174186785	5985
	NOSCO GLORY	24280	48863	653232529	2957
	TOTAL	55280	4637083	1136538272	276652

MUNDRA	CLEAR	50001	918378	1639937784	55562
	MEGA STAR	71148	558412	1612779983	34796
	TRANSOCEAN 2	30000	240722	622842556	15001
	TOTA	151149	1717512	3875560323	105359

VIZAG	CHENGYANG PIONEER	52487	4486776	1041842685	279594
	DARYA GANGA	27000	87783	626987169	5469
	DIMI	29250	429625	621420870	26772
	GREAT INTELLIGENCE	45000	4205947	1171002833	255786
	LOTUS SUN	45378	1202166	1346102158	72730
	LOWLANDS BEACON	40498	949821	1222699232	59188
	NESTOR	54963	981328	1205802988	59371
	NOSCO GLORY	35000	1351276	942941265	81752
	ROGUE	30626	1336937	986411747	80883
	TUO FU 1	43999	3498018	1289197784	211630
	Total	404201	18529677	10454408731	1133175
			1716937	62131270	42694305889

TABLE-4

Port specific BE wise Demurrage, Value & Differential amount of Duty

Port	BE No.	BE Date	Qty	Demurrage	revised AV	Diff. Duty
CHENNAI	5524609	21-12-2011	21570	529904	558596752	27291
	6756378	15-09-2014	11000	31335	321979448	1895
	9274635	18-05-2015	11400	68604	232186351	4276
	Total		43970	629843	1112762551	33462

GANGAVARAM	3765714	30-12-2015	65100	75499	1124428442	4705
	5441189	12/12/2011	15000	1401982	390334278	85261
			80100	1477481	1514762720	89966

KAKINADA	5928690	26-06-2014	56500	11285415	1170470462	682768
	5962041	30-06-2014	2000	20408	14186318	510
	5964470	30-06-2014	18000	183673	344456833	11446
	Total		76500	11489496	1529113613	694724

KANDLA	126	30-11-2011	43889	507525	1075568713	31792
	190	9/2/2012	40000	458287	983194873	30424
	2070588	29-07-2015	27500	807495	581917522	48854
	2197981	21-05-2013	35000	1402133	826347463	87374
	2545387	27-06-2013	31730	1136503	244004720	28413
	2617217	16-09-2015	6000	909000	131736031	56644
	2955997	12/8/2013	53204	763813	1720843654	46211
	4286641	7/1/2014	32350	1773813	749949250	110534
	4679464	19-02-2014	24000	1002173	711922834	25054
	4833919	7/3/2014	21500	505000	490936211	31469
	5004507	25-03-2014	8500	2146250	195224411	133743
	5095577	3/11/2011	45100	202000	1545961631	122846
	5102951	4/4/2014	29275	1814970	202023502	45375
	5562656	24-12-2011	25000	78053	916891876	4748
	5562666	24-12-2011	16000	49954	586810800	3037
	5562683	24-12-2011	7500	23416	275067562	1423
	5568813	26.12.2011	1799	5618	56995970	342
	5802111	23-01-2012	50440	934250	1837735880	56816
	7101835	17-10-2014	22000	24364	431936369	1518
	7375872	14-11-2014	12200	13511	82397727	338
	7613351	8/8/2012	32998	1161500	1080887163	70271
	7924249	12/9/2012	110000	2279352	3624144604	137900
	8294358	23-10-2012	35000	1024898	1091920328	62006
8367494	31-10-2012	48723	489850	1519102748	29636	

	8597433	14-03-2015	39000	388530	775306749	24211
	8615851	16-03-2015	4000	39849	79518641	10531
	8616171	16-03-2015	1000	9962	19879660	2632
	8970718	8/1/2013	27500	317386	233431020	7934
	9770875	5/4/2013	32000	1026918	231722994	25673
	F-2193	22-03-2012	42530	535805	1028778771	33390
	Total		905738	21832178	23332159677	1271139

KRISHNA PATANAM	5823879	17-06-2014	24280	48863	653232529	2957
	5863557	19-06-2014	15000	4424956	309118958	267710
	5945792	27-06-2014	11000	112244	78024750	2806
	5980826	1/7/2014	5000	51020	96162035	3179
	Total		55280	4637083	1136538272	276652

MUNDRA	7863420	5/9/2012	50001	918378	1639937784	55562
	8208924	15-10-2012	30000	240722	622842556	15001
	9082057	21-01-2013	71148	558412	1612779983	34796
	Total		151149	1717512	3875560323	105359

VIZAG	2888759	2/8/2013	43999	3498018	1289197784	211630
	3032509	26-10-2015	54963	981328	1205802988	59371
	3438918	3/10/2013	52487	4486776	1041842685	279594
	5476210	15-12-2011	45000	4205947	1171002833	255786
	5854331	19-06-2014	35000	1351276	942941265	81752
	6785720	17-09-2014	20000	529845	593284039	32055
	6785763	17-03-2014	25378	672321	752818118	40675
	7425951	18-07-2012	30626	1336937	986411747	80883
	7994832	20-09-2012	27000	87783	626987169	5469
	9581698	6/6/2015	29250	429625	621420870	26772
	495/12	20-07-2012	13407	314441	404777832	19594
	496/12	20-07-2012	13548	317757	409046908	19801
	497/12	20-07-2012	13543	317623	408874492	19794
	Total		404201	18529677	10454408730	1133176
Grand Total		1716937	62131270	42694305885	3604477	

7) Accordingly investigation was initiated by DRI, Kolkata. Summons was issued to the said importer M/s Indian Potash Ltd. Their authorised representative Sri S. Ravikumar appeared before DRI on 02-08-2016 and recorded his statement. In his statement Sri Ravikumar inter- alia submitted that:-

- a) He has been working as Manager (Accounts) of M/s Indian Potash Ltd.
- b) They are involved in import of fertilizers for agricultural use. In course of such imports, goods are mainly brought in bulk for which they enter into agreement with their suppliers in case of C&F contract and with the supplier and vessel owners in case of FOB contracts. Price of the goods in most cases is fixed on Cost & Freight (C&F) basis which means the cost of the goods will also include freight. But at the same time the agreement also provide for specific time window within which the material in bulk are required to be discharged at the destination port. This period is called lay time and once the ship enters into Indian Sea water and becomes ready for discharge of cargo, such period of lay time starts as per contractual terms. As per the agreement they are required to complete such unloading process within the lay time period, in case of failure they are supposed to pay demurrage at the rate agreed upon between the suppliers/ship owners and them. On occasions ships get delayed for various reasons like non availability of berth or slow rate of discharge of cargoes etc. and demurrage is incurred. Such demurrage is calculated, negotiated and paid later on PDPR (Per day pro rata basis).
- c) Such elements of cost are not known to them at the time of filing of Bill of Entry. When a ship gets delayed, the supplier subsequently raises demand for demurrage either through invoice or debit notes. Such demurrage amounts are settled and finalized through negotiation between supplier and them. Once settled they pay the demurrage to the supplier/ship owner. This being subsequent development are normally not brought to the notice of the Customs authority, however at the time of filing of Bill of Entry the contract and/or charter party are submitted which have the demurrage/dispatch terms. Most of the goods are finally assessed and many are provisionally assessed.
- d) While determining the assessable value of the goods imported in the bulls for which demurrage is subsequently paid, they did not take into account the cost elements in the form of demurrage at the time of filing Bill of Entry.
- e) He would submit the statement with details of damage insured and paid by them in the last five years both in respect of Bills of Entry which are finally assessed and also Bill of Entry which have been provisionally assessed. He undertook to submit other documents as sought for within 5 days and also undertake to deposit the Customs duty of Rs.31 lakhs within 15 days.
- f) Such elements of demurrage do constitute part of the extended freight which is not known at the time at importation but are ascertained subsequently. Such cost being the part of the extended height do form part of the assessable value of the

goods so imported and duty of Customs is also payable thereupon. It was admitted that during the last five years, they incurred demurrage against 66 Bill of Entries, details of which have been submitted by them. It was admitted that they did not pay the amount of duty payable thereupon.

g) They were ready to pay the amount of duty along with interest and have started processing the same with respective Customs house. Provision of Section 14 of the Customs Act, 1962 and that of Rule 10 of Customs Valuation (Determination of Value of imported Goods) Rules of 2007 are shown to me. Rule 10(2) of the said rules states that the cost of transportation of the imported goods should be included in the value of the goods for the purpose of determination of assessable value. Explanation appended to the said rule 10(2) states that the cost of transportation of the imported goods includes Ship Demurrage Charge, Lighterage, Barge charges which implies at the time of determination of assessable value of the imported goods, such components should have been taken into consideration.

h) They did not do the same and such elements of costs in the form of demurrage was not taken into consideration for the purpose of determination of assessable value in cases where the goods were finally assessed as the same was not known at the time of filling of Bill of Entry. Thus has resulted in short payment of duty for the reason beyond their knowledge and as because such element of cost were not known to them at the time of importation and even after that unless and until they were settled. However accepting their liability they are ready to pay the differential amount of duty attributable to such cost of demurrage along with interest.

-: LEGAL PROVISIONS :-

8) Following provisions of law which are relevant to this case have been quoted in **Annexure- B** to the DRI Show Cause Notice:

- a. Section 14 of the Customs Act. 1962;
- b. Section 17 of the Customs Act. 1962;
- c. Section 46 (4) of the Customs Act. 1962;
- d. Section 28(4) of the Customs Act. 1962;
- e. Section 28AA of the Customs Act. 1962;
- f. Section 111 (m) of the Customs Act. 1962;
- g. Section 112(a) of the Customs Act. 1962.
- h. Section 114A of the Customs Act;
- i. Rule 3 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- j. Sub-Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- k. Circular No. 38/2007-Cus Dated 9/10/2007:

-: DISCUSSION & CHARGES FRAMED:-

9) Section 14 of the Customs Act, 1962 provides for determination of the assessable value of the goods on which duty is to be paid. The said Section inter-alia states:

“ the Value of imported Goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:”

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:”

10) Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, inter-alia states:

“ (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10:”

11) Further, Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, inter-alia states :

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

.....

(2) For the purposes of sub-Section (1) of Section 14 of the Customs Act. 1962 (52 of 1962) and these rules, the value of Imported Goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation:

.....

Explanation:-The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges.“

12) When the aforesaid two provisions are read in conjunction, it emerges that for imposition of Customs duty value of the goods would be transaction value of goods. And such transaction value is the price actually paid or payable for the goods for delivery at the time and place of Importation, which automatically includes cost of transport or in other words freight. Therefore, the transaction value, in addition to the agreed upon cost of the goods also include certain material costs which might be incidental and/or conditional. Even if such elements of costs are not shown as condition of sale and/or collected in a different manner, such elements have to be considered at the time of determination of the transaction value, inclusive part of the Section 14 has mentioned about a few of such elements like "*commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges*". but at the same time the said Section has directly referred to the Rules made for the purpose, which would actually determine ambit of such elements and the manner in which such elements would be considered.

13) It was revealed from the representative copy of the agreement between M/s Indian Potash Ltd. and their buyers that provision for imposition of demurrage charges has been made in the agreement. Such agreements require that the importer will have to pay demurrage for any delay of the ship for which there might be various reasons which are made part of the agreements.

14) For the purpose of determination of such freight, cost of ship demurrage charges which forms an integral part of the value of the goods also should be taken into consideration. While filing Bills of Entry, the importer M/s Indian Potash Ltd. have failed grossly to take such elements of extended freight in the form of ship demurrage charges into consideration for determination of assessable value of imported Fertilizers. They also failed to disclose such fact before the Customs authority.

15) The Customs Valuation (Determination of Value of imported Goods) Rules, 2007, was framed to compliment the said Section 14 of the Customs Act. 1962. The said Rules defines transaction value and also describe nature of the other cost elements and circumstances under which such costs would constitute part of the transaction value. Once an element of cost attributable to the transaction value is identified, the transaction value will automatically incorporate such essentials into it. There is no room to read the Section in isolation, rather in such cases the Section has to be read in concurrence with the relevant provision of the Rules to derive the true domain of it.

4
16) Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in clear terms has stated that transaction value as defined under Section 14(1) of the Customs Act, 1962, would also include cost of transport of the imported goods to the place of importation. The term "cost of transport" has been further clarified and expanse of the said phrase has been explained to cover ship demurrage charges on chartered vessels in particular vide Circular No. 38/2007-Cus dated 09-10-2007, leaving no room for conjecture or different interpretation. Such element of cost is not incurred as a matter of routine, therefore, as and when such elements do surface, it is onus of the importer to declare such costs to the Customs for proper assessment of assessable value and the Customs duty.

17) From a combined reading of the provisions of statute as aforesaid, cost ingredients in the form of ship demurrage charges, if incurred, should constitute a part of the transaction value which would in turn ultimately determine the assessable value of the goods for the purpose of determination of Customs duty. There is no way to keep such cost building blocks out of purview for the purpose of valuation of the imported goods on which duty of Customs has to be determined.

18) M/s Indian Potash Ltd, therefore appeared to have contravened the provisions of Section 46 of the Customs Act, 1962, by not declaring while presenting the Bills of Entry for clearance of goods or even at a later stage the fact that the goods had suffered/would suffer ship demurrage charges. The law demands true facts to be declared by the importer, it was duty of the importer to pronounce that the freight element declared by them was not correct and in cases of consignments under consideration they had incurred / might incur cost towards such ship demurrage which are nothing but extended freight being paid to the suppliers. As the importer has been working under the regime of self-assessment, where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of the goods, it was sole responsibility of the importer to project and pronounce correct facts and figures before the assessing authority. In the material case the importer is said to have grossly failed to comply with the requirement of law and deliberately mis-declared the value of the goods by outright suppressing the facts of incurring costs towards ship demurrage charges. Such suppression of facts on the part of the importer that led to mis-declaration of the value of imported goods by way of not taking ship demurrage charges into consideration for the purpose of determination of transaction value of imported Goods ultimately resulted in short payment of Customs duty to the extent of Rs.36,04,477/- (Rupees Thirty Six lakh Four thousand Four hundred Seventy Seven only).

19) Now, with the introduction of self assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent

audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self assessment by the importer, it was the duty of the importer to present correct facts in the Bills of Entry and they should have declared correct value of the goods so imported. However, contrary to this, the importer is said to have grossly mis-declared the value of the goods by wilful misstatement and suppression of facts and contravened the provision of the said Section 17. Such suppression resulted in short payment of duty and reflects malafide intention of the importer to evade duty of Customs. It is only because of the vigilance and detailed scrutiny of the documents by the officers of DRI, that the leakage of revenue could come to light. The importer did not come forward to pay such duty voluntarily on their own. But for the Intervention of DRI the said duty evasion would have remained undetected due to suppression of facts by the importer. Therefore, Section 28(4) of the Customs Act, 1962 appears invocable in this case.

20) The authorised representative of the importer in his statements recorded on 02.08.2016 admitted such contraventions pointed out by DRI to them. It was admitted that while quantifying freight for the purpose of determination of CFR price which ultimately led to arrive at the assessable value of the dutiable goods they had never taken into consideration the elements of demurrage, although, in certain cases the Imported goods suffered demurrage and they had to pay charges towards such demurrage to their own independent supplier. It was further admitted that for the purpose of determination of assessable value, they never declared before the Customs authority at the time of filing of Bills of Entry the amount of demurrage. It was further admitted by them that such elements being part of extended freight do form part of the assessable value of the goods imported and duty of Customs is also payable on them. It was also admitted that in the past even after determination of such demurrage they failed to disclose the same to Customs authority on such occurrences in case of individual vessels. Admission on the part of the importer further corroborates and justifies invocation of Section 28(4) of the Customs Act, 1962.

21) Section 111(m) of the Customs Act, 1962, provides that any goods which do not correspond in respect of value or in any other particulars with the entry made under this Act shall be liable to confiscation. In the instant case the importer grossly failed to comply with the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, and also failed to honour provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Deliberate & willful mis-declaration of the transaction value of the goods leading to short payment of Customs duty rendered the goods liable to confiscation under Section 111(m) of the Customs Act, 1962.

22) It appeared that Customs duty has been short paid in respect of the goods so imported as the same were brought and cleared without declaring the costs of ship demurrage charges, which constitute part of the transaction value of the goods as per Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, read with Section 14 of the Customs Act, 1962. No duty of Customs was paid on such part of the un-declared value of the goods. Therefore, the goods should be considered to have been imported without payment of proper duty of Customs attracting provision of Section 28 (4) for recovery of such duty short paid. Therefore an amount of **Rs. 36,04,477/-** appeared to be recoverable from the said importer forthwith under Section 28(4) of the Customs Act, 1962. It further appeared that such non-payment of duty of Customs also attract Section 28AA of the Customs Act, 1962 and interest on the said amount of duty not paid becomes payable.

23) Section 112(a) of the Customs Act, 1962, stipulates that any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act is liable to penalty as prescribed under the said Section. In the instant case, the importer failed to declare the actual assessable value of the goods by suppressing the cost borne by them in the form of Ship Demurrage charge on which no duty of Customs was paid and such mis-declaration by the importer appeared to have made the goods liable for confiscation under Section 111(m).

24) That for their acts of omission and/or commission, which resulted in short levy of duty and rendered the goods liable for confiscation under Section 111(m) for the reasons elaborated above, also appeared to have rendered the importer liable to penalty under Section 112(a) of the Customs Act, 1962.

25) According to Section 114A of the Customs Act, 1962, where the duty has not been levied or has been short-levied by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, under sub-Section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined. In the instant case it appeared that the importer did not declare such elements of cost which should have been considered for the purpose of determination of the assessable value of Imported Goods and on which Customs duty should have been paid and also failed to pay Customs duty thereupon, which appeared to be recoverable under Section 28(4) of the Customs Act, 1962. Such an omission/commission on the part of the importer that calls for recovery of duty under Section 28(4) of the Customs Act, 1962, also appeared to render the importer liable to penalty under Section 114A of the Customs Act, 1962.

26) Section 124 of the Customs Act, 1962, states that “no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

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

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

27) Therefore, while Section 28 gives authority to recover Customs duty, short paid or not-paid, and Section 111(m) of the Act, hold goods liable for confiscation in case such goods do not correspond in respect of value or In any other particulars with the entry made under the Act, Section 124 of the Customs Act, 1962, authorises the proper officer to issue Show Cause Notice for confiscation of the goods and imposition of penalty.

28) From the facts and discussion hereinabove it appeared that:

a) M/s Indian Potash Ltd. have been importing Fertilizers through various Ports and have been evading duty of Customs by not declaring certain elements of freight, which should have been taken into account for the purpose of determination of assessable value of the goods for the purpose of payment of Customs duty as per Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

b) Those goods are normally imported in bulk and chartered vessels are used for the purpose of transport of such goods. M/s Indian Potash Ltd (IPL) used to import directly from their suppliers. In course of such imports sometimes vessels get delayed and for that importer needs to pay demurrage charges to the supplier/ shipping company. Rate of demurrage and other particulars are well settled and covered in the charter agreement.

c) These charges being extended freight recovered by the supplier/ship owner/ charterer, logically form a part of the freight component and are includible in the assessable Value of Imported Goods in terms of Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

d) M/s Indian Potash Ltd. while importing such goods calculated freight by taking into consideration standard freight paid by them but they did not disclose the demurrage paid to the shipper. Such elements of cost being paid over and above the

standard freight also constitute part of the extended freight and therefore are part of the assessable value of the goods.

e) Customs duty should have been paid on such amounts, but the importer did not come forward to pay such duty in respect of the consignments detailed against Table 1, 2, 3 & 4 of this notice and grossly contravened the provisions of the Customs Act, 1962, in course of their import.

f) Summons was issued and statement of the authorised representative Sri S. Ravikumar was recorded in response to the summons issued under Section 108 of the Customs Act, 1962, on 02-08-2016. In his statement Sri Ravikumar inter alia submitted that:

i. It was admitted that while importing such Fertilizers they failed to declare the element of cost namely Ship Demurrage Charges.

ii. They did not disclose such elements of cost even subsequently nor did they pay any duty of Customs on such element of cost although such costs should constitute a part of the assessable value of such imported goods.

g) Section 14 of the Customs Act, 1962 provides for determination of the assessable value of the goods on which duty is to be paid. The Value of Imported Goods and export goods is the transaction value of such goods subject to such other conditions as specified in the rules made in this behalf. Such transaction value includes in addition to the price as aforesaid, any amount paid or payable for costs and services, to the extent and in the manner specified in the rules made in this behalf.

h) Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, states that the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10.

i) Rule 10(2)(a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, inter-alia states that for the purposes of sub-Section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of Imported Goods shall be the value of such goods, for delivery at the time and place of importation and shall include the cost of transport of the imported goods to the place of importation

j) The explanation part of Rule 10(2) of the Rules ibid has clarified that the cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges.

k) The aforesaid two provisions read in conjunction, makes it evident that for imposition of Customs duty, value of the goods would be transaction value of goods and such transaction value is the price actually paid or payable for the goods for delivery at the time and place of importation, which automatically includes cost of transport.

l) For the purpose of determination of such freight, cost of ship demurrage charges which forms an integral part of the value of the goods should also be taken into consideration. The importer, M/s Indian Potash Ltd have failed to take such elements of extended freight in the form of ship demurrage charges into consideration for determination of assessable value of the goods imported in bulk, while filing Bills of Entry. They also failed to disclose such fact before the Customs authority.

m) The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, was framed to compliment the Section 14 of the Customs Act. 1962. Once an element of cost attributable to the transaction value is identified, the transaction value will automatically incorporate such essentials into it. The Section cannot be read in isolation, rather in such cases the Section has to be read in concurrence with the relevant provision of the Rules to derive the true domain of it.

n) Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, in clear terms has stated that transaction value as defined under Section 14(1) of the Customs Act, 1962, would also include cost of transport of the imported goods to the place of importation. The term "cost of transport" has been further clarified and expanse of the said phrase covers ship demurrage charges on chartered vessels in particular.

o) From a combined reading of the provisions aforesaid, it is clear that cost ingredients in the form of ship demurrage charges, if incurred, should constitute a part of the transaction value which would in turn ultimately determine the assessable value of the goods for the purpose of determination of Customs duty. There is no way to keep such cost building blocks out of purview for the purpose of valuation of the imported goods on which duty of Customs has to be determined.

p) M/s Indian Potash Ltd has contravened the provisions of Section 46 of the Customs Act. 1962, by not declaring while presenting the Bill of Entry for clearance of goods or even at a later stage the fact that the goods had suffered ship demurrage charges. Despite the fact that the importer has been working under the regime of self assessment, the importer has grossly failed to comply with the requirement of law

and deliberately mis-declared the value of the goods by outright suppressing the facts of incurring costs towards ship demurrage charges, which has resulted in short payment of Customs duty to the extent of Rs 36,04,477/-.

q) It is only because of the vigilance and detailed scrutiny of the documents by the officers of DRI, that the leakage of revenue could come to light. But for the intervention of DRI the said duty evasion would have remained undetected due to suppression of facts by the importer. Therefore, extended period of time provided under Section 28(4) of the Customs Act, 1962 appeared invocable in this case.

r) Section 111(m) of the Customs Act, 1962, provides that any goods which do not correspond in respect of value with the entry made under this Act shall be liable to confiscation. In the instant case the importer grossly failed to comply with the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, and also failed to honour provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Deliberate & willful mis-declaration of the transaction value of the goods leading to short payment of Customs duty rendered the goods liable to confiscation under Section 111(m) of the Customs Act, 1962.

s) Customs duty has been short paid in respect of the goods so imported as the same were brought and cleared without declaring the costs of ship demurrage charges, and thereby no duty of Customs was paid on such part of the un-declared value of the goods. Therefore, the goods should be considered to have been imported without payment of proper duty of Customs attracting provision of the Section 28 (4) for recovery of such duty short paid. Therefore an amount of Rs.36,04,477/- appeared to be recoverable from the said Importer forthwith under Section 28(4) of the Customs Act, 1962.

t) It further appeared that such non-payment of duty of Customs also attract Section 28AA of the Customs Act, 1962 and interest on the said amount of duty not paid becomes payable.

u) The authorized representative of the importer M/s Indian Potash Ltd. in his submission accepted and admitted their omission which ultimately led to short payment of duty of Customs to the extent of Rs 36,04,477/- in relation to the import for the period of FY 2011 onwards.

v) The duty evasion occurred due to misrepresentation and suppression of facts as elaborated above, therefore, it appeared that the importer was also liable to penalty under Section 112(a) & 114A of the Customs Act, 1962. for improper importation of

goods on short payment of Customs duty by deliberately suppressing the actual freight element by not disclosing ship demurrage charges.

-: SHOW CAUSE:-

29. On completion of the investigation, a Show Cause Notice bearing F.No. DRI/KZU/CF/ENQ-46(INT-43)/2016 dated 02.11.2016 has been issued to M/s Indian Potash Ltd.(IEC No.0493010122), having their registered office at Seethakathi Business Centre, 1st Floor,684-690, Anna Salai, Post Box No.738, Chennai-600006 by the Additional Director, DRI, Kolkata Zonal Unit, 8, Ho Chi-Minh Sarani, Kolkata-700071. The instant Show Cause Notice is made answerable to six adjudicating authorities namely (i) Additional/Joint Commissioner of Customs, Custom House, Port Area, Vishakhapatnam-530035 (Duty demanded Rs.12,23,141/-),(ii) Additional/Joint Commissioner of Customs, Custom House, Near Balaji Temple, Kandla-370210 (Duty demanded Rs.12,71,139/-), (iii) Additional/Joint Commissioner of Customs, Custom House, Port Area, Kakinada-533007 (Duty demanded Rs.6,94,724/-), (iv) Additional/Joint Commissioner of Customs, Krishnapatanam Custom House, Gopala Puram, Muthukar, SPSR Nellore-524344 (Duty demanded Rs.2,76,652/-),(v) Additional/Joint Commissioner of Customs, Mundra PUB Building, Adani Port, Mundra, Kutch, Gujarat -370421 (Duty demanded Rs.1,05,359/-) and (vi) Additional/Joint Commissioner of Customs-II(Port-Import), Custom House, 60, Rajaji Salai, Chennai, Tamilnadu-600001 (Duty demanded Rs.33,462/-) respectively.

In the each case matter of subject goods imported through the aforesaid 06 ports, the Show Cause Notice has also proposed- confiscation of goods under Section 111(m) of the Customs Act, 1962, demand and recovery of interest at appropriate rate under Section 28AA, imposition of penalty under Section 114A and Section 112(a) of the Customs Act,1962.

30. The Additional Director, Directorate of Revenue Intelligence, Kolkata Zonal Unit, Kolkata-700071 vide his letter F.No. DRI/KZU/CF/ENQ-46(INT-43)/2016 dated 27.06.2017 has requested the Additional Commissioner of Customs, Custom House, Kandla to proceed with the process of adjudication in the matter of the Show Cause Notice pertaining to jurisdiction of Kandla Commissionerate without waiting for appointment of Common Adjudicating Authority. Simultaneously, he also informed that the matter has already been informed to the appointing authority of Common Adjudicating Authority (CAA). I, therefore, take up this case for adjudication.

31. In respect of goods imported through the Kandla Sea Port, M/s Indian Potash Ltd.(IPL) vide instant Show Cause Notice, have been called upon to Show Cause in writing to the Additional/Joint Commissioner of Customs, Custom House, Near Balaji Temple, Kandla-370210, within 30 days of receipt of this notice as to why:

a) Differential duty of Customs amounting to Rs.12,71,139/-(Rs. Twelve lakh Seventy

One thousand One Hundred Thirty Nine), payable on such goods imported through Kandla Seaport, on account of element of cost attributable to the ship demurrage charges paid by the importer over and above the normal price of the goods including freight to the suppliers, which was deliberately suppressed by the importer in contravention to the provisions of Sections 14(1), 17 & 46 of the Customs Act, 1962, and also in violation of Rule 3 & Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, should not be demanded under Section 28(4) of the Customs Act, 1962:

b) Subject goods having assessable value of Rs 2307,11,59,675/(Two thousand Three hundred and Seven Crore Eleven lakh Fifty Nine thousand Six hundred Seventy Five). imported through Kandla Sea Port should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962, for being Imported by suppressing the cost elements in the form of Ship Demurrage Charges and for not disclosing the same to the Customs authority which resulted in incorrect determination of the assessable value of imported goods leading to short payment of Customs duty.

c) Interest at appropriate rate under provision of Section 28AA of the Customs Act, 1962, should not be demanded and recovered:

d) Penalty should not be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods by suppressing the elements of cost attributable to the ship demurrage charges incurred by them in contravention to the provisions of Sections 14(1), 17 & 46 of the Customs Act, 1962 and also for violation of Rule 3 & Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, as elaborated above, which resulted in mis-declaration of the actual value of the goods for the purpose of determination of duty and ultimately resulted in short payment of Customs duty recoverable under Section 28(4) of the Customs Act, 1962.

and

e) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods by reasons of misrepresentation and suppression of facts by not taking into account cost of ship demurrage charges in the assessable value of the goods as elaborated above resulting in short-payment of duty, which rendered the goods liable to confiscation under Section 111(m) of the Customs Act, 1962 and duty of Customs payable under Section 28(4) of the Act *ibid*.

PERSONAL HEARING AND DEFENCE REPLY:-

32. Personal hearing in the matter was granted on 17.08.2017. However, neither the noticee nor their representative appeared for personal hearing on the scheduled

date. They vide their letter dated nil received by this Office on 21.08.2017 requested to refer the matter to DRI/CBEC for appointing a common Adjudicating Authority for the adjudication of cases pertaining to various Custom Houses instead of taking up of the matter pertaining to only Kandla Port. Further, the date of personal hearing was fixed on 11.10.2017. Shri R. K.Shah, Sr. Manager (A & A), as well as authorized representative of the noticee vide his letter dated 11.1.2017 requested to grant the date of hearing in second week of November,2017. Accordingly, the personal hearing was granted on 08.11.2017. Again no body appeared for the personal hearing on the said scheduled date. Thereafter, final hearing in the case matter was fixed on 29.11.2017 which was attended by Shri S.Suriyanarayanan, Advocate and Shri R.K.Shah, Sr. Manager (A&A). They submitted a written defence reply dated 29.11.2017 at the time of P.H. and mainly reiterated the submissions made by them in their said defence reply. During the course of P.H., they further requested to grant 10 days time to submit some further written submission in their defence. Further M/s IPL vide their letter dated 14.12.2017 filed additional written submissions in their defence and requested to decide the case accordingly.

33. Defence reply dated 29.11.2017 filed by M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006.

33.1 The show caused notice has been issued to M/s. Indian Potash Ltd, on the premise that they have imported the fertilizers by not declaring the element of cost attributable to ship demurrage charges. As per the notice, the ship demurrage charges should have been taken into account while arriving at the assessable value for the purpose of payment of customs duty. Because of non inclusion of the ship demurrage charges, it has resulted in loss of differential duty, which is recoverable .

33.2 It is also proposed to hold the goods liable for confiscation under Section 111(m) of the Act and impose penalties.

33.3 The Noticee denies the allegation that M/s. India Potash Ltd., have contravened the provisions of the Customs Act,1962 with any intention to evade the payment of duty. In this regard, the Noticee submits that no demand of duty invoking the extended period is applicable, nor penalty is imposable on the notice.

33.4 In this regard, the following facts and submissions are made.

Differential duty and interest paid

The Noticee submits that without prejudice to their submission as below that the ship demurrage charges are not includable and that extended period cannot be invoked for the demand of differential duty.

33.5 They have paid the following duties and interest for the imports through the Kandla and Mundhra ports :

- (i) Kandla - Rs. 20,55,868/- on 25.11.2016;
- (ii) Mundra - Rs. 1,80,961/-/- on 24.11.2016

Copies of the challan are enclosed as Annexure 2.

Facts in Brief

33.6 M/s. Indian Potash Ltd., (IE Code 0493010122), is a public Sector Cooperative Company engaged in the business of import and distribution of bulk fertilizers through different Ports in India. The present demand relate to the period 2011-12 to 2015-16 and during this period, IPL, imported various types of fertilizers through different ports, namely, Chennai, Vizag, Kandla, Kakinada, Krishnapatnam, Mundhra and other ports. The fertilizers are imported in terms of the contract entered into with the supplier and IPL.

33.7 As per the contract, the seller agrees to sell the fertilizers at a fixed price and the price per MT is on C & F basis. The goods would be supplied at the port specified .

33.8 The C&F contract contains which has the, the shipment terms. As per this, the seller will arrange for chartering suitable carrier to load the fertilizer in full ship loads and the seller is responsible for fulfilling the conditions at the load port. The freight is paid by the seller and the price charged is inclusive of freight. The buyer is responsible for fulfillment of the conditions at the discharge port. The Appellant did not charter the vessel.

33.9 It is the terms of the transaction that the cargo shall be discharged at the rate of 10000 MT per day and the laytime allowed for discharge shall be calculated on the Bill of Lading Quantity. According to the contract, if any wharfage or demurrage results at the port of discharge due to negligence of the seller or their nominee, the wharfage/demurrage shall be to the account of the seller. If any wharfage or demurrage, resulting from the negligence or default on the part of the buyer, the same shall be to the buyer's account.

33.10 As per the shipment terms, if there is quick unloading and return of the vessel, the sellers shall pay to the buyer or their nominee, amount at the rate as mentioned in the Charter Party per day or prorata for part of the day saved at the discharge port. This is called despatch money.

33.11 IPL submits that in the particular case of import of covered under the BE No.2070588, the total demurrage incurred was Rs. 8,07,495.

33.12 IPL submits that all their imports of fertilizers covered in respect of the cases cited in the notice are contracted on C & F basis and the price is inclusive of cost of transportation from the port of loading, till arrival of vessel at the destination port. IPL has not purchased the fertilizers on FOB basis and the chartered the vessels on their own account to import the fertilizer. It is submitted that in all these cases, the price is inclusive of freight. This is a verifiable fact.

List of bills of entry for Kandla and Mundhra ports

33.13 The particulars of imports in respect of which demurrage was incurred are as under:

Port specific BE wise demurrage, value & differential amount of duty.						
Port	B.E. No.	B.E.Date	Quantity	Demurrage	Revised Assessable value	Differential duty.
KANDLA	126	30/11/2011	43889	507525	1075568713	31792
	190	09/02/2012	40000	458287	983194873	30424
	2070588	29/07/2015	27500	807495	851917522	48854
	2197981	21/05/2013	35000	1402133	826347463	87374
	2545387	27/06/2013	31730	1136503	244004720	28413
	2617217	16/09/2015	6000	909000	131736031	56644
	2955997	12/08/2013	53204	763813	1720843654	46211
	4286641	07/01/2014	32350	1773813	749949250	110534
	4679464	19/02/2014	24000	1002173	171922834	25054
	4833919	07/03/2014	21500	505000	490936211	31469
	5994596	25/03/2014	8500	2146250	195224411	133743
	5095577	03/11/2011	45100	2020000	1545961631	122846
	5102951	04/04/2014	29275	1814970	202023502	45375
	5562656	24/12/2011	25000	78053	916891876	4748
	5562666	24/12/2011	16000	49954	586810800	3037
	5562683	24/12/2011	7500	5618	65995970	342
	5802111	23/01/2012	50440	934250	1837735880	56816
	7101835	17/10/2014	22000	24364	431936369	1518
	7375872	14/11/2014	12200	13511	82397727	338
	7613351	08/08/2012	32998	1161500	1080887163	70271
	7924249	12/09/2012	110000	2279352	3624144604	137900
	8294358	23/10/2012	35000	1024898	1091920328	62006
	8367494	31/10/2012	48723	489850	1519102748	29636
	8597433	14/03/2015	39000	388530	775306749	24211
	8615851	16/03/2015	4000	39849	79518641	10531
	8616171	16/03/2015	1000	9962	19879660	2632
	8970718	08/01/2013	27500	317386	233431020	7934
	9770875	05/04/2013	32000	1026918	231722994	25673
	F-2193	22/03/2012	42530	535805	1028778771	33390
	Total			905738	23650178	23071159675

Raising of invoices for demurrage or dispatch money

33.14 IPL submits that as per the practice seller raises supplementary invoice on account of any ship demurrage charges payable due to delay in unloading of cargo. The invoice is issued after the lay time statement is finalized.

33.15 Where lay time actually used for unloading of cargo is less than the lay time allowed as per discharge rate, the supplier makes payment towards the dispatch money to IPL. IPL submits that during the above period, they earned dispatch money on imports through various ports in India, including the Kandla and Mundhra ports.

33.16 IPL submits that in the case of imports through the Kandla and Mundhra ports during 2010-11 to 2015-16, they earned good dispatch money of as against the total demurrage charges of Rs. 2,53,67,690. Over all, against all the imports referred to in the notices, the total demurrage incurred was Rs,6,23,31,270. As against this the total dispatch money earned for the imports is more than the demurrage charges incurred. It is the submission of IPL that, if the demurrage charges is to be added to the value of the fertilizer imported, by proposing reassessment of the goods, then assessments of goods in cases of dispatch money earnings must be also be allowed and refund granted. The amount of refund that IPL would be eligible would be much more than the demand raised in the Notice.

Filing of Bill of entry

33.17 IPL submits that they filed Bills of Entry before arrival of the vessel declaring the value of the goods equivalent to the contract price (C & F) plus insurance. The price is inclusive of the cost of transportation from the port of loading till the arrival of the vessel at the destination Port and the insurance is added to that. Landing charges are added on fixed percentage basis, to the C&F charges plus insurance. On payment of duty based on the value so declared, the goods are allowed to be unloaded and cleared from the port on out of charge. The assessments in most of the cases is final, barring a few cases where there could be provisional assessments.

33.18 IPL submits that for several years, the aforesaid of assessment of duty based on C&F price plus insurance plus fixed landing charges is being followed at various ports. IPL did not revise the assessable value, whether ever they incurred ship demurrage charges or earned incentive from the supplier by way of discharge money. The Customs Department was also following the same practice.

33.19 It is in the aforesaid background, the present notice has been issued.

Allegations denied

33.20 At the outset, IPL submits that no differential duty is payable by them for the reasons stated in the grounds below:

Grounds for reply

- A.1 According to the notice, the transaction value of the imported goods at the time and place of importation, shall be the value defined under Section 14 of the Customs Act, 1962, read with the Customs Valuation Rules. Relying upon the

statutory provisions and the Customs Valuation Rules, the notice seeks to include the ship demurrage charges in the cost of transportation of the imported goods on chartered vessel. The Notice also seeks to invoke the extended period of limitation to demand duty.

- A.2 IPL submits that none of the grounds for demanding duty are legally correct for the reasons as stated herein under.

Ship demurrage charges not addable to the transaction value based on CIF

- B.1 The entire case is on the short point, whether the ship demurrage charges are to be considered as freight and included in the assessable value of the goods imported. Admittedly, IPL is required to file Bill of Entry before commencing of discharge fertilizer, declare the assessable value and pay customs duty. The price of the goods is C & F and the freight up to the Port of Importation already stands included as part of the price. IPL had additionally added the insurance and also landing charges on fixed basis. The question of importer anticipating ship demurrage charges and including the same in the assessable, at the stage of filing the bill of entry, therefore does not arise. There is therefore no mis-declaration of the assessable value in the bill of entry.

Ship demurrage charges as per mercantile law.

- B.2 The term "demurrage" as per Black's Law Dictionary (Maritime law), means liquidated damages owed by the Charterer to the Ship owner for the charterer's failure to load or unload the cargo by agreed time. In the present case, there was no delay in loading at the originating port.
- B.3 The vessel carrying bulk fertilizer, have facilities for unloading or discharging of the cargo and the rate of discharge is also fixed. Taking into account the rate of discharge and the bill of lading quantity, lay time i.e time allowed for unloading of the cargo is arrived at. The importer/ buyer engage the services of stevedoring agents to discharge/unload the cargo. If the time taken for unloading of the cargo exceeds the lay time allowed, demurrage charges are payable to the vessel owner. If the delay in discharge or unloading of the cargo is due to the fault of the buyer or its nominee, the demurrage charges would be to the account of the buyer.

Ship demurrage charges does not form part of the cost of transportation.

- B.4 Section 14(1) of the Customs Act, 1962 defines valuation of imported goods and reads as under:

SECTION 14. Valuation of goods. - (1) *For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price*

is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

(i) *the circumstances in which the buyer and the seller shall be deemed to be related;*

(ii) *the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;*

(iii) *the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :*

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

B.5 It is clear from the above that the value of the imported goods is a deemed value i.e the price paid or payable for the goods imported, at the time and place of importation. As per the proviso, transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf. Thus the mandate in the proviso is to include to the cost of transportation and other amounts including unloading charges in the assessable value. The question that arises is, when the price is already inclusive of the cost of transportation i.e CIF and no separate transportation is payable by the importer, can the demurrage charges on account of detention of the vessel due to delay in unloading can be added to the CIF price, as if the demurrage charges is nothing but transportation. Does the interpretation

in the notice, based on which it is proposed to add the demurrage charges to the freight, in terms of the said Rules is correct ?

B.6 Rule 10(2) of the Customs Valuation Rules, 2007 read as under:

“Rule 10. Cost and services. -

(1).....

(2) For the purposes of sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

- (a) the cost of transport of the imported goods to the place of importation;*
- (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and*
- (c) the cost of insurance :*

Provided that -

- (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;*
- (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);*
- (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods :*

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above.”

Explanation._ The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges.

Demurrage charges are nothing but landing charges

B.7 IPL submits that in the present case, the price of the fertilizer is already inclusive of transportation. Further, lay time @ 10000 Mts per day is also allowed for unloading the cargo. Any further delay in unloading, for reasons attributable to the buyer, is alone recoverable from the Appellant. Such charges, are nothing but

the charges incurred in unloading of the goods. Such charges cannot be considered as cost of transportation, when the price is C&F.

- B.8 It is submitted that addition of the ship demurrage charges would apply only where the vessel is chartered by the buyer importer and where the cost of transportation is addable, as an addition to the FOB price. Where the vessel is not chartered by the importer and the price is C&F, the question of adding transportation charges, does not arise. Since the vessel was not chartered by the Appellant, the delay in unloading and returning of the vessel, cannot be treated as part of the transportation charges. In the present case, the fertilizer is purchased on C&F basis. In such a case, it is irrelevant whether the price is inclusive of the entire freight or not. It is between the parties to agree for a C&F price and in such case, the question of adding any freight to the price so charged does not arise. If no freight is separately addable, the question of deeming the demurrage charges as freight and adding the same to the transaction value, that is already on C&F basis does not arise. The notice, without appreciating this position wrongly proposes to add the demurrage charges to the transaction value declared.

Charges due to delay in unloading of cargo not includable in the assessable value where the landing charges are charged on fixed basis.

- B.9 The ship demurrage charges have arisen due to the delay in unloading the cargo and where the period of lay time allowed for unloading of the vessel has been exceeded. Such charges are nothing but amount payable with reference to unloading of cargo.
- B.10 The Customs Valuation Rules, as per Rule 10(2)(b) provide for adding loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation to the transaction value. According to the second proviso, the charges relating to Rule 10(2)(b), shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c). If the price is already on C&F basis, then only insurance and 1% of the price is addable. When the Customs have already assessed the goods by loading the value by 1% on a fixed basis, the question of charging any further amount incurred towards unloading of the cargo, does not arise.
- B.11 The above position was also clarified by the CBEC in its Circular M.F (D.R) Circular No.29/2004-Cus dated 13.4.2004, that the 1% loading charges collected by the Department under Rule 9(2)(b) (now revised as Rule 10(2)(b)), are towards the loading, unloading and handling charges at the place of importation, which is the land mass of the country.
- B.12 The Noticee submits that, when the charges related to unloading associated with the delivery of goods has already been added on fixed percentage basis, the

question of once again adding the ship demurrage charges on account of the delay in unloading does not arise.

The issue no longer res integra

- B.13 In the case of Coramandal Fertilisers Ltd., Vs., Collector of Customs, 2000 (115) ELT 7 (SC), a question arose as to whether the expenses for unloading would be addable when landing charges are already assessed at the percentage of CIF value of the imported goods. The Supreme Court examined the issue and held as under.

7. "Landing charges" are exactly what the words mean, the expenditure incurred by an importer for bringing goods on board ship to land. Landing charges, in law, must be assessed on actuals, but, as a matter of practice, particularly to facilitate expeditious clearance, landing charges are assessed at a percentage of the value of the goods and such assessment is accepted. When so assessed, landing charges cover the totality of all that an importer expends to bring imported goods to land.

8. In the present case, the Customs authorities assessed the landing charges that the appellants incurred at 1.4 percent of the CIF value of the goods. There is no objection by the appellants to this. It is not the case that such percentage exceeds the costs in this behalf that they have actually incurred and that they should get a refund. What they do contend is that the 1.4 per cent landing charges represent all that they have had to expend to bring the said goods to land and that, therefore, no addition of stevedoring or unloading charges can be made.

9. In our view, the submission made on behalf of the appellants is unexceptionable. It is open to the Customs authorities not to assess landing charges at a percentage and to assess them at actuals. But if they do assess them on a percentage basis, they cover thereby all aspects of landing charges and it is not open to them then to seek to add any amount thereto on the basis that this or that or the other was not covered thereby.

- B.14 The ship demurrage charges is nothing but the expenses on account of additional time taken to unload the cargo. According to the Supreme Court decision, when the landing charges/unloading charges are already assessed and added on percentage basis, the Customs cannot add any further amount to that on the ground that the expenses for unloading were not covered under landing charged.
- B.15 According to the Notice (para 7(f)), the ship demurrage charges constitute part of the extended freight which is not known at the time of importation, but are ascertained subsequently. According to the notice, such cost, being part of the extended freight should form part of the assessable value. IPL submits that this argument is legally incorrect. IPL submits that when the valuation of the imported

goods, is based on C&F, irrespective of the freight incurred, the assessable value would be the price charged on C&F basis. The question of adding the transportation on actual basis, therefore does not arise. When the price is on C & F basis and it is the responsibility of the supplier to arrange for transportation up to the place of importation, a fact which is not disputed, the question of inclusion of transportation charges separately in the assessable value does not arise. When transportation charges already form part of the price paid or payable and is not addable separately, the ship demurrage charges which is nothing but the cost incurred on account of the time taken for unloading the goods, cannot be once again added to the value of the goods imported. The notice therefore merits to be dropped.

- B.16 IPL therefore, submits that the ship demurrage charges are not includible as part of the freight because the sale is on C&F basis. The ship demurrage charges, are also not includible in the assessable value in terms of Rule 10(2)(b), as the additional expenses to land the goods, has already been added on percentage basis. When 1% of the CIF value of the goods has already been added, the question of adding ship demurrage charges once again to the assessable value does not arise.
- B.17 IPL submits that they had to incur expenses towards unloading of vessel by using stevedoring agent etc., the ship demurrage charges is also part of the cost of unloading of the cargo. Such cost are added on notional basis in terms of the provisions of Rule 10 (2) (b) of the Customs Valuation Rules. The question of adding the demurrage charges once again, does not arise. In any case, there is no provision, in the Customs Valuation Rules, applying the explanation regarding ship demurrage charges, to the landing charges as per the Rule 10 (b).
- B.18 The Notice therefore merits to be dropped.

Extended period not invocable

- C.1 The Notice seeks to demand duty of Rs.12,71,139 being the differential duty payable in respect of the bills of entry pertaining to kandla and Mundhra ports. The demand is proposed under Section 28(4) of the Customs act. The said section has been invoked, alleging that there was suppression of the fact i.e the correct assessable value after including the ship demurrage charges was not declared, at the time of filing the bill of entry.
- C.2 IPL submits that at the time of filing the bill of entry, the importer would not even know that there would be ship demurrage charges. The price is C&F, and IPL added insurance and the percentage landing charges. For example, in the case of BE 2197981 dated 21.5.2013, the total demurrage charges is Rs.14,02,133 and the total assessable value proposed to be revised is Rs.82,63,47,463. Thus the ship demurrage is 0.169% of the assessable value. Since IPL, has already included 1% of the CIF price of the fertilizer, it was of the bona fide view that no further charges by way of ship demurrage is includible in the value.

- C.3 The ship demurrage charges depends upon the time taken for the unloading of the vessel. This is known only after the vessel has left after discharge of its goods. The Notice itself admits in para 7(f), that at the time of import, the demurrage charges are not known. IPL submits that there can be no mis declaration of the assessable value, which was correctly declared based on the C&F and by adding insurance and landing charges. There is no case of evasion of duty, as the importer does not even know if there is going to be delay in the unloading of the cargo. In any case, when the 1% landing charges is more than the ship demurrage charges, the question of adding the same does not arise.
- C.4 IPL also submits that during the relevant period, it was the practice across the country in the Custom Houses at Visakhapatnam and other places, not to include, the ship demurrage charges associated with the unloading of cargo, in the assessable value. In any case, if the ship demurrage is to be treated as part of freight, then the dispatch money earned must also be treated as reduction in freight and reduced from the assessable value. IPL has neither sought reduction in assessable value on account of despatch money nor has included the demurrage in assessable value, as the transaction value is C&F and no freight is separately chargeable to arrive at the assessable value.
- C.5 IPL was of the bonafide view that when they have already included 1% of the value of the goods towards unloading charges, the same would cover the ship demurrage charges, arising on account of delay in the unloading of the cargo.

Circumstances narrated in Section 28 (4) are absent.

- C.6 Section 28(4) of the Customs act reads as under:

SECTION 28. Recovery of duties not levied or short-levied or erroneously refunded. - (1)

(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.

C.7 None of the circumstances of Section 28(4) applied to the present case. As explained supra, the importer would not even know if they would be incurring demurrages or earning dispatch money. IPL earned dispatch money in many of the cases and did not claim any reduction in the value. In this circumstances, non disclosure of the demurrage and payment of differential duty long after the goods are imported and cleared, was not on account of any intention to evade payment of duty.

C.8 IPL submits therefore that extended period of demand is not invocable in the present case. The entire demand invoking the extended period merits to be dropped.

Goods not liable for confiscation and no penalty imposable

C.9 According to the notice, the goods are also liable for confiscation under Section 111 (m) , as the value was not declared correctly and there is failure to comply with the provisions of Sections 14, 17, & 46 .

C.10 It is also alleged that the duty evasion occurred due to misrepresentation and suppression of facts and hence, the importer is also liable to penalty under Section 112 (a) and 114 A, for improper importation of goods on short payment of customs duty by deliberately suppressing the actual freight element by not disclosing ship demurrage charges.

C.11 The Appellant submit that whatever declaration that was made at the time of filing the declaration was correct. The Appellant was not required to pay any amount towards the freight towards the freight for the bulk cargo. The ship demurrage charges arose on account of the extended lay time. Hence, this is nothing but landing charges. When the same has been added on a fixed percentage basis, the question of charging the ship demurrage charges once again does not arise.

C.12 In any case, at the time of filing the entry inwards, the appellant was not aware that they would be delay in unloading of the cargo. The basis for confiscation under section 111(m), namely, that the goods or the value did not correspond with the description or value declared in the bill of entry, therefore does not arise.

C.13 Section 111(m) of the Customs act, read as under:

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

(a)

(m) *any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the*

declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

C.14 The Noticee therefore submit that the goods are not liable for confiscation. Consequently, no penalty is imposable on the importer under the provisions of Section 112(a) and 114A of the Customs Act.

C.15 The Noticee submits that for the reasons stated above, the goods are not liable for confiscation and no penalty is imposable.

No notice ought to have been issued

C.16 The Noticee would also like to submit that notwithstanding the submission above, they have paid the differential duty as per the request of the Investigating Officers. The interest has also been paid. Considering that, the notice ought not to have been issued.

Proceedings merits to be dropped

C.17 In the circumstances, the proceedings initiated merits to be dropped.

Request for hearing

C.18 The Noticee submit that they may be afforded the opportunity of personal hearing before the case is adjudicated.

34. Defence reply dated 14.12.2017 filed by M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006.

In addition to reiterating the grounds and contentions in their reply filed against the subject SCN, the following additional contentions were advanced against the SCN during the personal hearing.

34.1 Since the adjudication is not in accordance with or by the "proper officer" notified under section 2(34) as well as with the ratio of the Delhi High Court decision in *Mangali Impex Ltd- Mangali Impex Ltd. v. Union of India & Ors. - 2016 (335) E.L.T. 605 (Del.)* by the Delhi High Court, the adjudication by your Honour, with great respect to your Honour, will be illegal.

34.1.1 In paragraph 70.3 of its decision in *Mangali Impex* (cited supra), the Delhi High Court held as below.

Quote

70.3 As regards the period subsequent to 8th April 2011, it is evident that if the administrative chaos as envisaged by the Supreme Court in *Sayed Ali* (supra) should not come about, there cannot be any duplicating aid/or overlapping of jurisdiction of the officers. It would have to be ensured through proper co-ordination and administrative instructions issued by the CBEC that once a SCN is issued specifying the adjudicating officer to whom it is answerable, then that adjudication officer,

subject to such officer being a 'proper officer' to whom the function of assessment has been assigned in terms of Section 2(34) of the Act, will alone proceed to adjudicate the SCN to the exclusion of all other officers who may have the power in relation to that subject matter.

Unquote

34.1.2 Serial No. 2 in the table under Notification No. 40/2012-Cus (NT) issued by Government of India prescribing proper officers for various sections of Customs Act, 1962 deals with the sections for which the Additional/ Joint Commissioners of Customs will be "proper officers". This serial number does not contain sections 14, 17, 46 and 28(4) of the Customs Act, 1962. In other words, till date, none of the sections taken recourse to in the SCN issued by DRI, Kolkata have been vested under the jurisdiction of your Honour. Hence in terms of notification no. 40/2012-Cus (NT) read with ratio in paragraph 70.3 of Mangali Impex (cited supra) decided by Delhi High Court, the SCN cannot be adjudicated by your Honour.

34.1.3 It is to be noted that paragraph 70.3 of Mangali Impex (cited supra) has not been disputed by revenue before Supreme Court. The challenge by revenue is limited to Delhi Court striking down the validation of SCNs issued before 2011 by DRI through section 28(11) inserted through amendment only. Hence inspite of the stay by Supreme Court on Mangali Impex decision, the contentions above have to be considered by your Honour before proceeding with the adjudication.

34.2 Without prejudice to the foregoing and alternatively, the SCN demanding demurrage on all payments towards demurrage is contrary to the Customs Valuation Rules, 2007 as interpreted by the CBEC.

In this regard, reliance is placed on following extracts from CBEC Circular Circular No. 38/2007-Cus., dated 09.10.2007.

Quote

34.2 The clarifications with regard to the major changes in the new Valuation Rules for imported goods are given below for proper application of the Valuation Rules, i.e., Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 :-

(i)

(v) An 'Explanation' has been added to Rule 10(2) clarifying that the cost of transport of the imported goods includes ship demurrage charges on chartered vessels, lighterage charges or barge charges. This Explanation is to take care of cases

of imports by time chartered vessels or bulk carriers discharging goods on high seas needing additional expenditure for delivery of the goods at the "Place of Importation" mentioned in Rule 10(2)(a). The 'place of importation', as observed by the Supreme Court in the case of *Garden Silk Mills Ltd. v. Union of India* [1999 (113) E.L.T. 358 (S.C.)] means the place where the imported goods reach the landmass of India in the Customs area of the port, airport or land customs station, or if they are consumed before reaching the landmass of India, the place of consumption. Therefore, in cases where ship demurrage charges are paid by the importer for detention of the ship in the harbour before touching the landmass at the docks or at the place of consumption, these charges would be includible in the cost of transportation. Similarly, in cases where the big mother vessels cannot enter the harbour for any reason and goods are brought to the docks by smaller vessels like barges, small boats, etc., the cost incurred by the importer for bringing the goods to the landmass or place of consumption, such as lighterage charges, barge charges will also be included in the cost of transportation.

.....

Unquote

34.2.1 Firstly, the said circular shows that the provisions regarding demurrage in the 2007 Valuation Rules were due to Garden Silk Mills judgement by Supreme Court and not due to any provision in the GATT or WTO rules regarding customs valuation. Since valuation provisions in customs have to accord with GATT/ WTO provisions due to India being signatory to treaties and GATT Code etc, the valuation rules including demurrage for customs duty through subordinate legislation is illegal and ab initio void.

34.2.2 Secondly, without prejudice to the foregoing, the DRI SCN does not segregate vessels berthed in the docks or mid-sea for purposes of adding demurrage. Therefore, without prejudice to the contention regarding the illegality of Valuation Rules in respect of demurrage, DRI cannot interpret the valuation provisions contrary to the interpretation by CBEC who framed the Valuation Rules, 2007. Hence the SCN has to be quashed and set aside as demurrage incurred in the docks/ jetty berthed vessels was never to be levied for duty.

34.2.3 If the interpretation by DRI has to be considered, your Honour has to first give credit for dispatch money earned by Indian Potash Ltd. This ground has already been canvassed in the reply to the SCN.

34.3 In view of the above grounds relied upon as well as the other contentions in the reply to the SCN, it can be easily inferred and understood that the issue is one of interpretation and there was and is always scope for different interpretations

regarding includability of demurrage charges for valuation purposes under the Customs Act, 1962. Hence the SCN issued by DRI invoking extended period of limitation is illegal.

34.4 In view of the above, in addition to issue of lack of jurisdiction, Indian Potash Ltd. prays for setting aside the SCN with consequential relief of refund of amounts paid with interest as per law, or in the alternative, the dispatch monies paid be considered for valuation which will result in refunds of duties paid before issue of SCN.

DISCUSSION AND FINDINGS:

35. I have carefully gone through the records of the case, including the Show Cause Notice dated 02.11.2016, the written submissions dated 29.11.2017 and 14.12.2017 as well as the oral submissions made during the course of Personal Hearing.

36. I find that the following main issues are involved in the subject Show Cause Notice, which is required to be decided-

- a) Whether the Differential duty of Customs amounting to Rs.12,71,139/- (Rupees Twelve lakh Seventy One thousand One Hundred Thirty Nine), payable on such goods imported through Kandla Seaport, on account of element of cost attributable to the ship demurrage charges paid by the importer over and above the normal price of the goods including freight to the suppliers, which was deliberately suppressed by the importer in contravention to the provisions of Sections 14(1), 17 & 46 of the Customs Act, 1962, and also in violation of Rule 3 & Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, should be demanded under Section 28(4) of the Customs Act, 1962.
- b) Whether the Subject goods having assessable value of Rs 2307,11,59,675/ (Rupees Two thousand Three hundred and Seven Crore Eleven lakh Fifty Nine thousand Six hundred Seventy Five), imported through Kandla Sea Port should be held liable for confiscation under Section 111(m) of the Customs Act, 1962, for being Imported by suppressing the cost elements in the form of Ship Demurrage Charges and for not disclosing the same to the Customs authority which resulted in incorrect determination of the assessable value of imported goods leading to short payment of Customs duty.
- c) Whether Interest at appropriate rate under provision of Section 28AA of the Customs Act, 1962, should be demanded and recovered:
- d) Whether Penalty should be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods by suppressing the elements of cost

attributable to the ship demurrage charges incurred by them in contravention to the provisions of Sections 14(1), 17 & 46 of the Customs Act, 1962 and also for violation of Rule 3 & Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, as elaborated above, which resulted in mis-declaration of the actual value of the goods for the purpose of determination of duty and ultimately resulted in short payment of Customs duty recoverable under Section 28(4) of the Customs Act, 1962 and

e) Whether Penalty should be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods by reasons of misrepresentation and suppression of facts by not taking into account cost of ship demurrage charges in the assessable value of the goods as elaborated above resulting in short-payment of duty, which rendered the goods liable to confiscation under Section 111(m) of the Customs Act, 1962 and duty of Customs payable under Section 28(4) of the Act *ibid*.

37. The facts of the case indicate that M/s Indian Potash Limited have paid Demurrage charges (charges for delay in unloading of their imported goods), to the supplier/shipping company. I find that Customs duty is payable on such demurrage charges which are to be included in the cost of transport of the imported goods, as per the provisions of Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007 read with the proviso clause to Section 14 of the Customs Act, 1962. M/s Indian Potash Limited have not paid the applicable Customs duty of Rs.12,71,139/- on such demurrage charges.

38. I have gone through the relevant provisions of the Sections 14, 17 and 46 of the Customs Act, 1962, Rule 3(1) and Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007. The same are reproduced as under-

(i) **Section 14 of the Customs Act, 1962 :** (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, “ *the Value of imported Goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified In the rules made in this behalf:*

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance,

loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:"

(ii) **Section 17 of the Customs Act, 1962**, authorises any importer or exporter of the goods to self assess the duty leviable on the Import or export of goods. The said section also provides for verification of self assessment by the proper officer and reassessment.

(iii) **Section 46 (4) of the Customs Act, 1962**, reads as: "The Importer while presenting a Bill of Entry, shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods....."

(iv) **Rule 3(1) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007**. The said Rule inter-alia states:-

" (1) Subject to rule 12, the value of the imported goods shall be the transaction value adjusted in accordance with provision of rule 10;"

(v) **Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007**. The said Rule inter-alia states:-

Rule 10(2)(a): For the purposes of sub-Section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include

(a) the cost of transport of the imported goods to the place of importation:

.....

Explanation:-The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges."

39. For further clarification in the issue the relevant para of Board's Circular No.38/2007-Cus dated 09.10.2007 is reproduced as under:-

" An 'Explanation' has been added to Rule 10(2) clarifying that the cost of transport of the imported goods includes ship demurrage charges on chartered vessels, lighterage. This Explanation is to take care of cases of imports by time chartered vessels or bulk carriers discharging goods on high seas needing additional expenditure for delivery of the goods at the " Place of Importation" mentioned in Rule 10(2)(a). The 'place of importation', as observed by the Supreme Court in the case of Garden Silk Mills Ltd Versus Union of India [1993(113) E.L.T.358 (S.C.) means the place where the imported goods reach the landmass of India in the Customs area of the port, airport or land customs station, or if they are consumed before reaching the

landmass of India, the place of consumption. Therefore, in cases where ship demurrage charges are paid by the importer for detention of the ship in the harbor before touching the land mass at the docks or at the place of consumption, these charges would be includible in the cost of transportation. Similarly, in cases where the big mother vessels can not enter the harbor for any reason and goods are brought to the docks by smaller vessels like barges, small boats, etc., the cost incurred by the importer for bringing the goods to the land mass or place of consumption, such as lighterage charges, barge charges will also be included in the cost of transportation.”

40. I have considered the contention of M/s Indian Potash Ltd. made in their defence reply dated 29.11.2017 and 14.12.2017. In context of proposal in SCN regarding demand and recovery of differential Customs duty of Rs.12,71,139/- (Rupees Twelve lakh Seventy One thousand One hundred Thirty Nine only) under Section 28(4) of the Customs Act, 1962, M/s Indian Potash Ltd. have submitted in their defence reply that no differential duty is payable by them as ship demurrage charges does not form part of the cost of transportation. In this connection, I find that Shri S. Ravikumar, Manager (Accounts) cum authorised representative of M/s Indian Potash Ltd., in his statement recorded by DRI on 02.08.2016 under Section 108 of Customs Act, 1962, has admitted that while quantifying freight for the purpose of determination of CFR price which ultimately led to arrive at the assessable value of the dutiable goods they had never taken into consideration the cost elements in the form of demurrage, although, in certain cases the Imported goods suffered demurrage and they had to pay charges towards such demurrage to their own independent supplier. He has further admitted that for the purpose of determination of assessable value, they never declared before the Customs authority at the time of filing of Bills of Entry the element of cost namely Ship demurrage Charges. It is further admitted by them that such elements being part of extended freight do constitute a part of the assessable value of the goods imported and Customs duty is also payable thereupon but they did not pay the amount of duty payable thereupon.

I find that the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, was framed to compliment the said Section 14 of the Customs Act, 1962. The said Rules defines transaction value and also describe nature of the other cost elements and circumstances under which such costs would constitute part of the transaction value. Once an element of cost attributable to the transaction value is identified, the transaction value will automatically incorporate such essentials into it. There is no room to read the Section in isolation, rather in such cases the Section has to be read in concurrence with the relevant provision of the Rules to derive the true domain of it.

I further find that Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, in clear terms has stated that transaction value as defined under Section 14(1) of the Customs Act, 1962, would also include cost of

transport of the imported goods to the place of importation. I also observe that the term "cost of transport" has been further clarified and expanse of the said phrase has been explained to cover ship demurrage charges on chartered vessels in particular vide Circular No. 38/2007-Cus dated 09.10.2007, leaving no room for conjecture or different interpretation. Such element of cost is not incurred as a matter of routine, therefore, as and when such elements do surface, it is onus of the importer to declare such costs to the Customs for proper assessment of assessable value and the Customs duty.

In view of the above facts and findings, it is crystal clear that by applying Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, read with Section 14 of the Customs Act, 1962 and as per the Board's Circular No.38/2007-Cus dated 09.10.2007, cost ingredients in the form of ship demurrage charges are includible in the cost of transportation charges. From the above, it transpires that no duty of Customs was paid on such part of the undeclared value of the imported goods. Therefore, I observe that the goods should be considered to have been imported without payment of proper duty of Customs attracting provision of Section 28 (4) for recovery of such duty short paid. Therefore, the contention of M/s IPL that no differential duty is payable by them as ship demurrage charges does not form part of the cost of transportation is baseless and not acceptable to me. Accordingly, I find that M/s Indian Potash Limited is required to pay the differential Customs duty amounting to **Rs. 12,71,139/-** as demanded vide the Show Cause Notice.

In view of discussions made as above, I hold that the said differential duty of Rs. 12,71,139/- (Rupees Twelve Lakh Seventy One Thousand One Hundred Thirty Nine only) not levied or short levied is required to be recovered from M/s Indian Potash Ltd. under Section 28(4) of the Customs Act, 1962. I also find that M/s Indian Potash Ltd. have already deposited Rs.12,71,139/- vide GAR-7 Challan dated 25.11.2016 towards Customs duty liability, the said amount is required to be appropriated against the aforesaid said Customs duty liability.

41. The noticee M/s Indian Potash Ltd. have contended in their defence reply that the SCN issued by DRI invoking extended period of limitation is illegal. They have submitted that there was neither mis-declaration of the assessable value nor suppression of facts by them so as to evade the payment of Customs duty. In this context, as discussed above, suppression of facts on the part of M/s Indian Potash Ltd. led to mis-declaration of the value of imported goods by way of not taking ship demurrage charges into consideration for the purpose of determination of transaction Value of imported Goods which ultimately resulted in short payment of Customs duty to the extent of **Rs. 12,71,139/-**. I find that with the introduction of self assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been

dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self assessment by the importer, it was the duty of the importer to present correct facts in the Bills of Entry and they should have declared correct value of the goods so imported. However, contrary to this, the importer grossly mis-declared the value of the goods by wilful misstatement and suppression of facts and contravened the provision of the said Section 17. Such suppression resulted in short payment of duty and reflects malafide intention of the importer to evade duty of Customs. It is only because of the vigilance and detailed scrutiny of the documents by the officers of DRI, that the leakage of revenue could come to light. The importer did not come forward to pay such duty voluntarily on their own. But for the Intervention of DRI the said duty evasion would have remained undetected due to suppression of facts by the importer. Therefore, Section 28(4) of the Customs Act, 1962 is invocable in this case.

Further as discussed (supra), the authorised representative of M/s Indian Potash Ltd. in his statement recorded on 02.08.2016 has admitted that while importing such fertilizers they failed to declare the element of cost namely Ship Demurrage Charges, they did not disclose such elements of cost even subsequently nor did they pay any duty of Customs on such element of cost although such costs should constitute a part of the assessable value of such imported goods. It was also admitted that in the past even after determination of such demurrage they failed to disclose the same to Customs authority on such occurrences in case of individual vessels. Admission on the part of the importer further corroborates and justifies invocation of Section 28(4) of the Customs Act, 1962. Hence, considering the factual position available on records, the noticee contention that there was no mis-declaration of assessable value of the goods and suppression of facts and the SCN issued by DRI invoking extended period of limitation is illegal, is not acceptable to me. Therefore, I am of the considered view that extended period of time provided under Section 28(4) of the Customs Act, 1962 is invocable in this case, to demand the customs duty on demurrage charges paid.

42. The next issue to be decided is whether the subject goods having assessable value of Rs 2307,11,59,675/- (Rupees Two thousand Three hundred and Seven Crore Eleven lakh Fifty Nine thousand Six hundred Seventy Five) are liable for confiscation under Section 111(m) of the Customs Act, 1962. M/s Indian Potash Ltd. in their defence reply have submitted that the goods are not liable for confiscation and no penalty imposable. In this regard, I refer to and discuss the provisions of Sections 111(m), 17 & 46 of the Customs Act, 1962-

(i) **Section 111 (m) of the Customs Act, 1962, inter alia stipulates-**
"111. Confiscation of improperly imported goods etc. -

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

.....

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

(ii) Section 17 of the Customs Act, 1962 authorises any Importer or exporter of the goods to self assess the duty leviable on the Import or export of goods. The said section also provides for verification of self assessment by the proper officer and reassessment.

(iii) Section 46 (4) of the Customs Act, 1962. Reads as: “The Importer while presenting a Bill of Entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.....”

I find that Section 111(m) of the Customs Act, 1962, provides that any goods which do not correspond in respect of value with the entry made under this Act shall be liable to confiscation. In this case, as already discussed and decided by me (supra) and as can be seen from the statement of Manager (Accounts) and authorised representative of M/s Indian Potash Ltd. where they admitted that they have not included demurrage charges with cost of transportation of the imported goods and thereby evaded the Customs duty as per Rule 10(2) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007. M/s Indian Potash Ltd have contravened the provisions of Section 46 of the Customs Act, 1962, by not declaring while presenting the Bill of Entry for clearance of goods or even at a later stage the fact that the goods had suffered ship demurrage charges. Despite the fact that the importer Indian Potash Ltd. have been working under the regime of self assessment where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of goods, the importer has grossly failed to comply with the requirement of law and deliberately mis-declared the value of the goods by outright suppressing the facts of incurring costs towards ship demurrage charges, which has ultimately resulted in short payment of Customs duty to the extent of Rs 12,71,139/-. In view of above, I find that in the instant case the importer has grossly failed to comply with the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, and also failed to honour provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. This contravention and/or violation falls within the purview of the nature of offence prescribed under Section 111(m) of the Customs Act, 1962. Deliberate & willful mis-declaration of the transaction value of the goods leading to short payment of Customs duty has rendered the goods liable to confiscation under Section 111(m) of the Customs Act, 1962. Therefore, the noticee contention that goods are not liable for confiscation is quite

contrary to the facts available on records. Thus, I hold that the goods are liable to confiscation under Section 111(m) of the Customs Act, 1962.

42.1 However, I find that there is a difference between “confiscation” and “liable for confiscation”. It is settled law that that the goods which are “liable for confiscation” can be ordered for to be confiscated, and fine in lieu of confiscation can be imposed. Mis-declaration of the assessable value of the imported goods is one of the modality to derive illegal benefit by evasion of customs duty. In cases where value of the imported goods is not correctly declared for some purpose, then it would not only amount to violation of the conditions for import/export of the goods but it would certainly amount to illegal/unauthorized imports and against the statute.

42.2 In the instant case, I find that M/s. Indian Potash Ltd. have contravened the provisions of Sections 14, 17, 46 and 111(m) of the Customs Act, 1962, and also failed to honour provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in as much as they have intentionally mis-declared the actual assessable value of the goods. Since the goods are “not available for confiscation” but they are “liable for confiscation” under Section 111(m) of the Customs Act, 1962, therefore, M/s. Indian Potash Ltd. is liable for redemption fine under Section 125 of the Customs Act, 1962 in lieu of confiscation.

The Section 125 of the Customs Act, 1962 -Option to pay fine in lieu of confiscation stipulates as under-

(1) Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods 1[or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit: Provide that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of of imported goods the duty chargeable thereon. 2(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods]

Further, Hon'ble Supreme Court in case of Commissioner of Customs, Ahmedabad Vs M/s Jayant Ointments Pvt Ltd[(100) ELT 10] and Jain Exports Pvt Ltd Vs UOI[1996(66) ELT 537] has held that quantum of redemption fine depends on facts and circumstances of each case and no hard and fast rules may be laid down. Fine could be imposed even in cases of bonafide imports. However, Section 125 of

that Section 4 of the Customs Act, 1962 talks of appointment of Officers of Customs. It states that the Central Board of Excise & Customs may appoint such person as it thinks fit to be officers of Customs. The concept of 'proper officer' becomes relevant for the purpose of assessment of duty under Section 17, provisional assessment of duty under Section 18, the exercise of the power to issue SCN under Section 28 where there has been non-levy, short levy or erroneous refund of Customs duty or where any interest payable has not been paid or part paid or erroneously refunded. It is only a proper officer who can exercise jurisdiction under the above provisions and certain other provisions which explicitly state that the power there in are to be exercised only by a proper officer. In order to determine which of the officer of the Customs are 'Proper Officers' one has to necessarily examine in terms of the Section 2(34) of the Act, whether such 'proper officer' has been assigned those functions by the C.B.E.C. or the Commissioner of Customs. I observe that vide most significant Notification No. 44/2011-Customs(N.T.) dated 06.07.2011, as amended, in exercise of the powers conferred by sub-section 34 of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise & Customs (CBEC), have assigned the functions of the proper officer to the various officers including those under Directorate of Revenue Intelligence(DRI), such as Additional Director General, Additional Director or Joint Director, Deputy Director or Assistant Director for the purposes of Section 17 and Section 28 of the Customs Act, 1962. Further, according to Circular No.44/2011-Customs dated 23.09.2011, I find that Notification No.44/2011-Customs (N.T.) dated 06.07.2011 whereby the Officers of the DRI, DGCEI, Commissionerates of Customs (Preventive) and Central Excise Commissionerates were assigned the function of the 'Proper Officers' and the amendment of Section 28 of the Act settled the issue of validity of SCNs issued by them. It is also clarified that " in other words, there shall be no change in the present practice and Officers of DRI and DGCEI shall not adjudicate the Show Cause Notices issued under Section 28 of the said Act". In the present case, for the goods imported through Kandla Sea Port, the SCN is made answerable to the Additional/Joint Commissioner of Custom, Custom House, Kandla as the adjudicating authority, hence the said authority have proper jurisdiction and is legally competent to adjudicate the case matter when imports concerned have taken place at Kandla Sea Port. Therefore, the argument of M/s IPL on this count is without any merit. I also find that decision in Mangali Impex and the case laws relied upon by M/s IPL in the aforesaid matter is legally not sustainable and not relevant in the instant issue. Thus the contention of M/s IPL is mis-placed and deserves to be rejected.

47. I have considered the reliance placed upon by the noticee M/s IPL in their written defence submission on case laws/judgements on some issues raised in the SCN. In this regard, I am of the view that the conclusions arrived may be true in those cases, but the same can not be extended to other case(s) without looking to the hard

in different context and under different facts and circumstances, which can not be made applicable in the facts and circumstances of this case. However, while applying the ratio of one case to that of the other, the decisions of the Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004(170)ELT 135(SC) has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgement in the case of Escorts Ltd. Vs CCE, Delhi [2004(173) ELT 113(SC)] wherein it has been observed that one additional or different fact may make difference between conclusion in two cases, and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC(Port), Chennai Vs Toyota Kirloskar[2007(2013)ELT4(SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of a decision has to culled from facts of given case, further, the decision is an authority for what it decides and not what can be logically deduced there from.

48. In view of the foregoing discussions and findings, I pass the following order-

ORDER

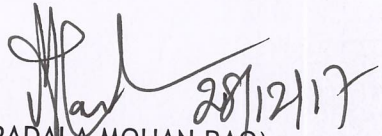
(a) I confirm the demand of the differential Customs duty amounting to **Rs.12,71,139/- (Rupees Twelve lakh Seventy One thousand One Hundred Thirty Nine only)**, payable on account of goods imported through Kandla seaport without payment of proper Customs duty by deliberately suppressing the actual freight element by not disclosing ship demurrage charges under Section 28(4) of the Customs Act, 1962 and order for recovery of the same from M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006. Since M/s Indian Potash Limited have already paid Rs.12,71,139/- vide GAR-7 Challan dated 25.11.2016 against the Customs duty liability, I order to appropriate the same against the said duty liability.

(b) The subject goods having assessable value of Rs 2307,11,59,675/ (Rupees Two thousand Three hundred and Seven Crore Eleven lakh Fifty Nine thousand Six hundred Seventy Five only), imported through Kandla Sea Port by M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006, are held liable for confiscation under the provision of Section 111(m) of the Customs Act, 1962. However, since the impugned goods are not physically available for confiscation, I impose redemption fine of **Rs.6,00,000/- (Rupees Six Lakhs only)** under Section 125 of the Customs Act, 1962, in lieu of confiscation of the goods.

(c) I confirm the demand of interest involved on the differential Customs duty of Rs.12,71,139/-, mentioned at (a) above , and order for recovery of the same from M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006 under Section 28AA of the Customs Act, 1962. Since M/s Indian Potash Limited have already paid Rs.7,84,729/- vide GAR-7 Challan dated 25.11.2016 against the interest liability, I order to appropriate the same against the interest liability.

(d) I impose a penalty of **Rs.12,71,139/-(Rupees Twelve lakh Seventy One thousand One Hundred Thirty Nine only)** on M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006 under Section 114A of the Customs Act, 1962. However, it is clarified that in terms of provisio to the Section 114A of the Customs Act, 1962, since the duty and interest has already been paid by M/s IPL, the amount of penalty liable to be paid shall be twenty-five percent of the duty, if the same is paid within 30 days from the date of communication of this adjudication order.

(e) I impose a penalty of **Rs.3,00,000/-(Rupees Three Lakhs only)** on M/s Indian Potash Ltd., Seethakathi Business Centre, 1st Floor, 684-690, Anna Salai, Post Box No.738, Chennai-600006 under Section 112(a) of the Customs Act, 1962.


(PADALA MOHAN RAO)
Additional Commissioner (Adj.)
Custom House, Kandla.

F. No. S/10-181/ADJ/ADC/IPL/2016-17

Dated: 28 .12.2017

To,

M/s Indian Potash Ltd.,
Seethakathi Business Centre,
1st Floor, 684-690,
Anna Salai, Post Box No.738,
Chennai-600006

Copy to :-

- 1.The Additional Director, Directorate of Revenue Intelligence, Kolkata Zonal Unit, 8, Ho Chi Minh Sarani, Kolkata-700071
- 2.The Deputy/Assistant Commissioner(RRA), Custom House, Kandla
3. The Deputy/ Assistant Commissioner(Recovery), Custom House, Kandla
4. Guard File