



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/10-05/ADJ/ADC/LIPL/2017-18
B	आदेश में मूल सं./ Order-in-Original No.	KDL/ADC/PMR/22/2017-18
C	पारित कर्ता/ Passed by	SH. PADALA MOHAN RAO, ADDITIONAL COMMISSIONER
D	आदेश की दिनांक/Date of order	30/01/2018
E	जारी करने की दिनांक/Date of issue	30/01/2018
F	एस.सी.एन. सं. एवं दिनांक/ SCN No. & Date	DRI/KZU/CF/ENQ-34(INT-06)/2017 dated 27/04/2017
G	नोटीसी/ पार्टी Noticee/Party	M/s Lanxess India Pvt. Ltd., Lanxess House, Plot No. A 162-164, Road No.27, MIDC, Wagle Estate, Thane (West)-400604 Maharashtra

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
7वीं मंज़िल, 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 ज्ञापन 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 Lanxess India Pvt. Ltd. (hereinafter referred to as the said importer), having their office at Lanxess House, Plot No. A 162-164, Road No.27, MIDC, Wagle Estate, Thane (West)-400604 and having IEC No. 0504023039, have been importing Tolune & Aniline for the purpose of using as raw material for manufacture of different chemicals through Kandla Port and have been evading duty of Customs by not declaring certain elements of costs which are attributable to extended freight, i.e. amounts paid towards ship demurrage charges, which should have been taken into account for arriving at the 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 Lanxess India Pvt. Ltd. have undervalued the subject goods by suppressing the detailed cost of demurrage incurred against such imports due to delay in unloading of imported goods from the ship. Investigation of DRI revealed that their act of omission and/or commission resulted in short payment of Customs duty of Rs. 16,31,496/-, 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 Sections 112(a) & 114A of the Act *ibid*.

2. M/s Lanxess India Pvt. Ltd. imported Tolune & Aniline Acetone in bulk. For that purpose they entered into agreement with the suppliers for supply of such goods. As per the provision of the agreement, the price is settled on CIF 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 results in incurring demurrage and such demurrage is to be paid by the importer to the supplier of the goods in addition to the CIF 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.

3. Intelligence further suggested that M/s Lanxess India Pvt. 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 CIF 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 CIF price. M/s Lanxess India Pvt. 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 imports.

4. The details of import by M/s Bhansali Engineering Polymers Ltd. during the last 5 years through Kandla Sea Port against which they had paid various amounts towards ship demurrage charges are given below under Para 5. 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 before initiation of inquiry by DRI.

5. Following Table contain details of such imports by the importer with particulars of amount of demurrage, Value, Customs duty payable and interest.

TABLE-1

Vessel specific Demurrage paid and Customs duty payable with interest				
Vessel Name	Demurrage in FC	Demurrage (Rs.)	Customs Duty Payable (Rs)	Interest
Bow Fuji	2015.87	125992	20976	8034
Bright World	9825.82	632292	108589	29125
Fuji Galaxy	6101.53	370363	61660	27722
Ginga Panther	1101.56	66204	11022	5135
Mt Genuine Hercules	17016	1064351	208513	125143
Mt. Kaimon Galaxy	5324.2985	294434	57681	38128
Sc Hongkong	22015.99	1346339	229244	94996
Sc Stealth	327.54	19882	3310	1504
Sc Taipei	6277.21	389501	64846	26724
Sea Charming	18025.66	1118492	186213	76097
Sea Fortune	36125.5	2321063	398618	112672
Zao Galaxy	27107.461	1568916	280822	162770
Total	151264.4	9317828	1631496	708049

TABLE-2

BE specific Demurrage paid and Customs duty payable with interest					
BE No	BE Date	Assessable Value (Rs)	Demurrage (Rs)	Customs Duty Payable (Rs)	Interest (Rs)
9675062	25-03-2013	37945841	217678	42644	29940
9697249	28-03-2013	37945841	217678	42644	29877
9735676	02-04-2013	42499342	243800	47762	33344

9787644	08-04-2013	17188859	98605	19317	13429
2367164	10-06-2013	24927085	126063	24697	16401
2489366	21-06-2013	33292577	168370	32985	21727
2687699	12-07-2013	65972246	375933	62587	40577
3527730	14-10-2013	76551648	507986	99517	59907
3591354	21-10-2013	83842045	556364	108995	65236
6148004	17-07-2014	66164623	66204	11022	5134.7
6361600	06-08-2014	73733229	10409	1733	790.24
8428273	13-08-2014	67097238	9472	1577	713.68
6471577	19-08-2014	73733228	370363	61660	27722
6742586	12-09-2014	116530787	564126	93919	41113
6752174	15-09-2014	42850002	207437	34535	15067
7259275	03-11-2014	69693538	389501	64846	26724
7327063	10-11-2014	139613439	1118492	186213	76097
7870101	01-01-2015	137770230	125992	20976	8034
9029357	24-04-2015	55676883	597136	102552	33564
9066204	28-04-2015	56088150	373271	64105	20854
9975104	21-07-2015	77867708	1353954	232527	66012
2030520	27-07-2015	55619791	967110	166091	46660
2297777	19-08-2015	78541567	379692	65208	17579
2377574	26-08-2015	52251664	252599	43381	11545
Total					
		1583397561	9298237	1631496	708049

TABLE-3

Vessel & BE specific Demurrage paid and Customs duty payable with interest						
Vessel Name	BE No	BE Date	Assessable Value (Rs)	Demurrage (Rs)	Customs Duty payable (Rs)	Interest (Rs)
Bow Fuji	7870101	01-01-2015	137770230	125992	20976	8034
	Total		137770230	125992	20976	8034
Bright World	2297777	19-08-2015	78541567	379692	65208	17579
	2377574	26-08-2015	52251664	252599	43381	11545
	Total		130793231	632292	108589	29125
Fuji Galaxy	6471577	19-08-2014	73733228	370363	61660	27722
	Total		73733228	370363	61660	27722
Ginga Panther	6148004	17-07-2014	66164623	66204	11022	5135
	Total		66164623	66204	11022	5135
Mt. Genuine Hercules	3527730	14-10-2013	76551648	507986	99517	59907
	3591354	21-10-2013	83842045	556364	108995	65236
	Total		160393693	10643451	208513	125143
Mt. Kaimon Galaxy	2367164	10-06-2013	24927085	126063	24697	16401
	2489366	21-06-2013	33292577	168370	32985	21727
	Total		58219662	294434	57681	38128
Sc Hongkong	2687699	12-07-2013	65972246	375933	62587	40577
	9029357	24-04-2015	55676883	597136	102552	33564
	9066204	28-04-2015	56088150	373271	64105	20854
	Total		177737279	1346339	229244	94996
Sc Stealth	6361600	06-08-2014	73733229	10409	1733	790
	8428273	13-08-2014	67097238	9472	1577	714
	Total		140830467	19882	3310	1504
Sc Taipei	7259275	03-11-2014	69693538	389501	64846	26724
	Total		69693538	389501	64846	26724

Sea Charming	7327063	10-11-2014	139613439	1118492	186213	76097
	Total		139613439	1118492	186213	76097
Sea Fortune	2030520	27-07-2015	55619791	967110	166091	46660
	9975104	21-07-2015	77867708	1353954	232527	66102
	Total		133487499	2321063	398618	112672
Zao Galaxy	6742586	12-09-2014	116530787	564126	93919	41113
	6752174	15-09-2014	42850002	207437	34535	15067
	9675062	25-03-2013	37945841	217678	42644	29940
	9697249	28-03-2013	37945841	217678	42644	29877
	9735676	02-04-2013	42499342	243800	47762	33344
	9787644	08-04-2013	17188859	98605	19317	13429
	Total		298375798	1568916	280822	162770
Grand Total			1586812687	9317828	1631496	708049

6. Accordingly investigation was initiated by DRI, Kolkata. Summons was issued to the said importer M/s Lanxess India Pvt Ltd. Their authorized representative Sri K.N. Ramakrishnan appeared before DRI on 21.04.2017 and recorded his statement. In his statement Sri Ramakrishnan inter-alia submitted that:-

- i) *He has been working as the Associate General Manager (Head of Logistics) of M/s Lanxess India Pvt Ltd. and his responsibility is to look after the logistics matter.*
- ii) *The company is involved in the manufacturing of chemical products for which they import raw materials i.e. Toluene & Aniline Acetone etc in bulk. For such imports in bulk they entered into agreement with their suppliers and the price of the goods are negotiated on CIF basis, which means cost of the goods would also include the freight element. But at the same time the agreement also provides for provision of demurrage at the rate fixed and mutually agreed upon between the supplier 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 paid by them subsequently on PDPR {Per day pro rata basis}.*
- iii) *As a matter of fact such elements of cost are not known to them at the time of filing of Bills of Entry. When a ship gets delayed, the supplier subsequently raises demand for demurrage through debit notes. Such demurrage amounts are settled and finalized through negotiation between supplier and them. Once mutually agreed they pay the demurrage to the supplier. This being subsequent development is normally not brought to the notice of Customs authority.*
- iv) *It was admitted that while determining the assessable value of the goods imported in bulk for which demurrage is subsequently paid, they never take*

into account such elements of cost in the form of demurrage as the same is not known to them at that moment.

- v) Such elements of demurrage do constitute part of the extended freight which was not known at the time of actual importation but are ascertained subsequently. Such elements of cost being the part of the extended freight do constitute/form part of the assessable value of the goods so imported and duty of Customs is also payable thereupon. It was admitted that 24 Bills of Entry such consignments were imported which incurred demurrage.
- vi) As per their calculation, an amount of Rs.16,31,496/- was payable as Customs duty on the amount of demurrage incurred by them during the last 5 yrs and they have paid the said amount along with interest of Rs.7,08,048/- in respect of import through Kandla port under protest. It was admitted that they did not inform the fact of payment of demurrage charges to the Customs authority at any point of time before initiation of investigation by DRI.
- vii) Provision of Section 14 of the Customs Act, 1962 and that of Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, were shown to him. Rule 10(2) of the said Rules stipulates 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 that at the time of determination of assessable value. Such components should have been taken into consideration.
- viii) It was admitted they did not do the same and such elements of costs in the form of demurrage was not taken into consideration at the time of filing of Bills of Entry which resulted in short payment of duty. However accepting their liability they have paid the differential amount of Customs Duty along with interest attributable to such cost of demurrage for import through Kandla Port.

-:LEGAL PROVISIONS:-

7. Following provisions of law which are relevant to this case have been quoted in Annexure A 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. Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

-: DISCUSSION & CHARGES FRAMED :-

8. *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: ”

9. 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;”

10. 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.**”

11. 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.

12. It revealed from the copies of the agreements between M/s Lanxess India Pvt. Ltd. and their suppliers 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.

13. 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. While filing Bills of Entry, the importer, M/s M/s Lanxess India Pvt. Ltd. have grossly failed to take such elements of extended freight in the form of ship demurrage charges into consideration for determination of assessable value of imported goods. They also failed to disclose such fact before the Customs authority.

14. 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 describes 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.

15. 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, 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.

16. 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.

17. M/s Lanxess India Pvt. Ltd. therefore appears 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 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 cost 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 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 Rs.16,31,496/-, which has now been paid by the importer along with appropriate interest after initiation of investigation by DRI.

18. 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 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 willful 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 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.

19. The authorised representative of the importer in his statement recorded on 21-04-2017 admitted such contraventions pointed out by DRI to them. It was admitted that while quantifying freight for the purpose of determination of CIF 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 paid or payable. 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 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.

20. 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.

21. It appears 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 Imported Goods) Rules, 2007, read with Section 14 of the Customs Act, 1962. No duty of Customs was paid on

such part of the undeclared 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 16,31,496/- appears to be recoverable from the said importer forthwith under Section 28(4) of the Customs Act, 1962. It further appears that such non- payment of duty of Customs also attracts Section 28AA of the Customs Act, 1962 and interest on the said amount of duty not paid becomes payable.

22. 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).

23. 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 appears to have rendered the importer liable to penalty under Section 112(a) of the Customs Act, 1962.

24. 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 appears 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 appears to render the importer liable to penalty under Section 114A of the Customs Act, 1962.

25. 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:”

26. 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.

27. The importer admitting their mistake agreed to pay the amount of Customs duty attributable to such Ship Demurrage charges paid by them from time to time. Accordingly after initiation of investigation by URI, they paid an amount of Rs 16,31,496/- towards differential amount of Customs duty. They also paid an amount of Rs 7,08,049/- towards interest.. The payment details are as follows:-

TABLE-4

Challan No.	Challan Date	DD No.	DD Date	Amount (Rs)	
				Duty	Interest
189	20-04-2017	559323	20-04-2017	42645	29876
185	20-04-2017	559322	20-04-2017	42647	29938
181	20-04-2017	559324	20-04-2017	47762	33344
178	20-04-2017	559325	20-04-2017	19317	13429
183	20-04-2017	559327	20-04-2017	32985	21726
182	20-04-2017	559326	20-04-2017	24697	16401
184	20-04-2017	559328	20-04-2017	62587	40578
198	20-04-2017	559329	20-04-2017	108995	65236
197	20-04-2017	559330	20-04-2017	99517	59907
196	20-04-2017	559331	20-04-2017	11022	5135
195	20-04-2017	559332	20-04-2017	1733	790
194	20-04-2017	559333	20-04-2017	1577	714
193	20-04-2017	559334	20-04-2017	61660	27722
192	20-04-2017	559335	20-04-2017	93919	41113
201	20-04-2017	559336	20-04-2017	34535	15067
191	20-04-2017	559337	20-04-2017	64846	26724
190	20-04-2017	559338	20-04-2017	186213	76097
186	20-04-2017	559339	20-04-2017	20976	8034
188	20-04-2017	559341	20-04-2017	64105	20855
187	20-04-2017	559340	20-04-2017	102551	33565
180	20-04-2017	559343	20-04-2017	166091	46660
179	20-04-2017	559342	20-04-2017	232527	66012
200	20-04-2017	559344	20-04-2017	65208	17579
199	20-04-2017	559345	20-04-2017	43381	11546
Total				1631496	708049

28. From the facts and discussion in the foregoing it appeared that:-

- a) M/s Lanxess India Pvt. Ltd. have been importing Tolune & Aniline Acetone through Kandla Port 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 (or the purpose of payment of Customs duty as per Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, read with Section 14 of the Customs Act, 1962.
- b) 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.
 - c) 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.
 - d) 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 (i) 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.
 - e) 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.
 - f) 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 the goods for delivery at the time and place of importation, which automatically includes cost of transport.
 - g) For the purpose of determination of such freight, cost of ship demurrage charge, which forms an integral part of the value of the goods should also be taken into consideration. The importer, M/s Bhansali Engineering Polymers Ltd. 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 tiling Bills of Entry. They also failed to disclose such fact before the Customs authority.
 - h) 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.

- i) M/s Lanxess India Pvt. Ltd. has 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 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 fact of incurring costs towards ship demurrage charges, which has resulted in short payment of Customs duty to the extent of Rs **16,31,496/-**.
- j) It is only because of the vigilance and detailed scrutiny of the documents by the 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 appears invocable in this case.
- k) 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 111(m) of the Customs Act, 1962.
- l) 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 at the undeclared 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 **16,31,496/-** appears to be recoverable from the said importer forthwith under Section 28(4) of the Customs Act, 1962.
- m) It further appears that such non-payment of duty of Customs also attracts Section 28AA of the Customs Act, 1962 and interest on the said amount of duty not paid becomes payable.

- n) The authorized representative of the importer M/s Bhansali Engineering Polymers Ltd. in his submission accepted and admitted their omission which ultimately led to short-payment of duty of Customs to the extent of Rs **16,31,496/-** which was subsequently paid with appropriate amount of interest after initiation of investigation by DRI.
- o) The duty evasion occurred due to misrepresentation and suppression of facts as elaborated above. Therefore, it appears that the importer is 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-34(INT-06)/2017 dated 27.04.2017 had been issued by the Additional Director, DRI Zonal Unit, Kolkata-700071 to M/s Lanxess India Pvt. Ltd. having their office at Lanxess House, Plot No. A 162-164, Road No.27, MIDC, Wagle Estate, Thane (West)-400604 whereby they were called upon to Show Cause in writing to the Additional/Joint Commissioner of Customs, Custom House, Near Baiaji Temple, Kandla-370210, within 30 days of receipt of the notice as to why:-

- a) The assessable value declared by the importer under Section 14 of the Customs Act, 1962, read with Rule 3 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, at the time of clearance of the impugned goods should not be rejected in terms of Rule 12 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, for non-inclusion of elements of cost in the form of Ship Demurrage Charges incurred by the importer but not declared for the purpose of determination of the assessable value of the goods;
- b) Differential duty of Customs amounting to Rs. **16,31,496/-**-(Rupees Sixteen lakh Thirty One thousand Four Hundred Ninety Six), payable on such goods imported through Kandla Sea Port, on account of elements 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 and recovered under Section 28(4) of the Customs Act, 1962;

- c) Subject goods having assessable value of Rs 158,33,97,561/- 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;
- d) Interest at appropriate rate under provision of Section 28AA of the Customs Act, 1962, should not be demanded and recovered;
- e) 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;
- f) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962;
- g) The entire amount of Rs 23,39,544/-, paid vide Money Receipt Nos, detailed in Table-4 above should not be appropriated and adjusted towards payment of Customs duty of Rs 16,31,496/- payable on such goods imported through Kandla Seaport along with interest thereupon, and:

DEFENCE SUBMISSION:-

30 M/s Lanxess India Pvt. Ltd. vide their letter dated 05.06.2017 submitted written defence reply to the present SCN. They inter alia submitted as under-

30.1 They have received the SCN under reference on 6 May 2017. The SCN has been issued under provisions of sub-section (4) of Section 28 of the Customs Act, 1962 demanding differential customs duty of Rs.16,31,496 along with interest thereon.

30.2 In this context they invite attention to the provisions of Sub-section (5) and (6) of Section 28 of the Customs Act, 1962, which reads as under-

(5) “ Where any [duty has not been levied or has been short -levied or short-paid] or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to [fifteen percent] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing”

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section(5), the proper officer shall determine the amount of duty or interest and on determination , if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4) shall, without prejudice to the provisions of Section 135,135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5)".

30.3 They wish to inform that they have paid the duty in full demanded in the SCN under reference, the interest payable thereon under Section 28AA and the penalty equal to fifteen percent of the duty specified in the notice as per the provisions of Section 28(5) as detailed below:

Particulars	Amount (Rs.)	Challan details	Remarks
Duty	16,31,496	Table-4 in Paragraph 27 of the SCN: RUD-3	SCN proposes to appropriate the payment
Interest	7,08,049		
Penalty @ 15% of duty	2,44,724	Challan No. 604 dated 02.06.2017	Challan enclosed

The computation of interest payable under Section 28AA of the Customs Act, 1962 on the duty demanded in the SCN was submitted to during investigations and is also enclosed herewith for ready reference.

The entire payment as required under sub-section (5) of the Customs Act, 1962 has been made on 02.06.2017, i.e. within thirty days from the receipt of the SCN under reference on 06/05/2017.

30.4 They therefore submit that the proceedings initiated by the SCN under reference should be deemed to be conclusive under the provisions of clause (i) of sub-section (6) of Section 28 of the Customs Act, 1962.

30.5 They pray for a personal hearing in case a different view is contemplated.

PERSONAL HEARING:-

31. The case was taken up for adjudication. Personal hearing in the case matter was granted to M/s Lanxess India Pvt. Ltd. on 29.11.2017. In this context, they sent a letter dated 22.11.2017 in which they reiterated the submissions made by them vide their letter 05.06.2017. Thereafter another Personal Hearing was granted on 17.01.2018. In this regard, they vide their letter dated 10.01.2018 stated that they do not expect hearing in the matter and requested to extend the benefit of provisions of clause (i) of sub section (6) of Section 28 of the Customs Act, 1962 and pass the appropriate order for deemed conclusion of the SCN.

DISCUSSION AND FINDINGS:

32. I have carefully gone through the entire records of the case, including the Show Cause Notice dated 27.04.2017, the written submissions dated 19.04.2017, 05.06.2017 22.11.2017 and 10.01.2018 as well as the relevant provisions of law. I take up the case on its merit for a decision.

33. The issue involved in the present proceeding which are required to be decided are rejection of assessable value declared by the importer under Section 14 of the Customs Act, 1962, read with Rule 3 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, at the time of clearance of the impugned goods through Kandla Port, demand of differential Customs duty of **Rs.16,31,496/-** along with applicable interest under Section 28AA *ibid*, payable on such goods imported on account of elements 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, confiscation of subject goods having assessable value of **Rs 158,33,97,561/-**, under Section 111(m) of the Customs Act, 1962, imposition of penalty on the importer under Section 114A and 112(a) of the Customs Act, 1962, proposed appropriation of entire amount of **Rs 23,39,544/-**, paid by the importer and to be adjusted towards payment of Customs duty of **Rs 16,31,496/-** payable along with interest thereupon

34. The facts of the case indicate that M/s Lanxess India Pvt. Ltd. having their office at Lanxess House, Plot No.A162-164, Road No.-27, MIDC, Wagle Estate, Thane (West)-400604 and having IEC No. 0504023039 have been importing Toluene & Aniline Acetone through Kandla Port 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 Customs Valuation (Determination of Value of imported Goods) Rules, 2007. Intelligence suggested that M/s Lanxess India Pvt. Ltd. have undervalued the subject goods while importing into India and suppressed the details of costs of ship demurrage incurred against such imports and thereby evaded Customs duty of **Rs.16,31,496/-** (Rupees Sixteen lakh Thirty One thousand Four Hundred Ninety Six only)

35. The first proposal in SCN is rejection of assessable value declared by the importer M/s Lanxess India Pvt. Ltd. under Section 14 of the Customs Act, 1962, read with Rule 3 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, at the time of clearance of the impugned goods. In this context, I find that for importing "Toluene & Aniline Acetone" in bulk the importer had entered into agreement with the suppliers for supply of such goods. As per the provision of the agreement, the price is settled on CIF 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 are 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 results in incurring demurrage and such demurrage is to be paid by the importer to the supplier of the goods in addition to the CIF 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.

I find that as per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007, the value of imported goods shall be the transaction value of such goods, that is the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. As a matter of fact as the price is determined on CIF 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 CIF price. M/s Lanxess India Pvt. 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 they did not come forward to pay such duty and grossly contravened the provisions of the Customs Act, 1962, in course of their import. I further find that the value declared at the time of importation is not the true transaction value as the documents and the depositions made by Sri K.N. Ramakrishnan, authorized representative of the importer, indicate that the actual transaction value of the goods imported is much higher than the declared one. Looking to the evidences available on records, the declared value cannot be considered as actual transaction value under Rule 3 ibid read with Section 14 of the Customs Act, 1962 and the same is liable for rejection as per Rule 12 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007.

36. The second issue raised in SCN is demand of differential Customs duty of Rs.16,31,496/- under Section 28(4) of the Customs Act, 1962 from M/s Lanxess India Pvt. Limited. In this connection, I find that Sri K.N. Ramakrishnan, their authorised representative in his statement recorded by DRI on 21.04.2017 under Section 108 of Customs Act, 1962, has admitted that while determining the assessable value of the goods in bulk for which demurrage is subsequently paid, they had never taken into

account such elements of cost 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. 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 element of cost namely Ship demurrage Charges. It was 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.

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, cost ingredients in the form of ship demurrage charges are includible in the cost of transportation charges. From the above facts and findings, 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. In view of discussions made as above, M/s Lanxess India Pvt. Limited is liable to pay the differential Customs duty of **Rs.16,31,496/-** under Section 28(4) of the Customs Act,1962. However, I also find that the importer during the course of investigation have already deposited **Rs.16,31,496/-** vide Challans mentioned in Table-4 of the SCN, towards differential Customs duty liability .The said amount of Customs duty of **Rs.16,31,496/-** deposited by M/s Lanxess India Pvt. Limited is required to be appropriated against the aforesaid Customs duty liability.

37. In context of SCN issued by DRI invoking extended period of limitation, as discussed above, suppression of facts on the part of the importer M/s Lanxess India Pvt. Limited 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.16,31,496/-**. I find that now with the introduction of self assessment under the Customs Act, 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 intelligence 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 invoked in this case.

Further as discussed(supra), the authorised representative of M/s Lanxess India Pvt. Limited in his statement recorded on 21.04.2017 has accepted and admitted their omission which ultimately led to short-payment of Customs duty to the extent of Rs.16,31,496/- which was subsequently paid with appropriate amount of interest after initiation of investigation by DRI. Hence, considering the factual position available on records, I am of the considered view that extended period of time provided under Section 28(4) of the Customs Act, 1962 is rightly invoked in this case, to demand the customs duty on demurrage charges paid.

38. The third proposal in SCN is confiscation of subject goods having assessable value of **Rs.158,33,97,561/-** under Section 111(m) of the Customs Act, 1962.

I find that Section 111(m) of the Customs Act, 1962, provides that any goods which do not correspond in respect of value or in any particulars with the entry made under this Act shall be liable to confiscation. In the instant case, as already discussed and as can be seen from the statement of authorised representative of M/s Lanxess India Pvt. 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 Lanxess India Pvt. 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 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. 16,31,496/-. In view of above facts on record, 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. 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. However, I refrain to hold the imported goods liable for confiscation, in the circumstances of the present case as no such confiscation is warranted as there was no seizure of the goods involved in the case.

39. In context of demand and recovery of Interest at appropriate rate under provision of Section 28AA of the Customs Act, 1962, I find that as per the wordings of Section 28AA of the Customs Act, 1962 it is quite clear that when M/s Lanxess India Pvt. Ltd. is liable to pay duty in accordance with the provisions of Section 28 ibid, they in addition to such duty are also liable to pay interest as well. The said Section provides for payment of interest automatically along with the duty. As M/s Lanxess India Pvt. Ltd. is liable to pay the differential Customs duty of Rs.16,31,496/-, they are also liable to pay interest involved on the said amount of Rs.16,31,496/-under the provisions of Section 28AA of the Customs Act,1962. However, I find that M/s Lanxess India Pvt. Ltd. during the course of investigation have already deposited Rs.7,08,049/- vide Challans mentioned in Table-4 of the SCN, towards interest liability and the same is required to be appropriated against the interest liability.

40. As regards proposal in SCN for imposition of penalty on M/s Lanxess India Pvt. Ltd. under Section 112(a) & 114A of the Customs Act, 1962, I find that 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 and 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. The evidences available on the record indicates that the duty evasion occurred due to misrepresentation and suppression of facts as elaborated above. Therefore, M/s Lanxess India Pvt. Ltd. is also liable to penalty under Section 112(a) and 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.

41. I further find that M/s Lanxess India Pvt. Ltd. have contended in their written reply dated 22.11.2017 that they have paid the entire amount of duty (Rs.16,31,496/-) along with interest (Rs.7,08,049/-) thereon under Section 28AA ibid on 20.04.2017 and penalty (Rs.2,44,724/-) equal to 15% of the duty specified in the SCN on 02.06.2017 i.e. within thirty days from the receipt of the SCN and hence, the proceedings initiated by the SCN against them should be deemed to be conclusive under the provisions of clause (i) of sub-section (6) of Section 28 of the Customs Act,1962.

41.1 In this regard, the relevant Sections 28(5) and 28(6) of the Customs Act,1962 are reproduced as under-

Section 28(5) of the Customs Act,1962-

(5) “ Where any [duty has not been levied or has been short -levied or short-paid] or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to [fifteen percent] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing”

Section 28(6) of the Customs Act,1962-

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section(5), the proper officer shall determine the amount of duty or interest and on determination , if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4) shall, without prejudice to the provisions of Section 135,135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5)”.

41.2 I find that the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, New Delhi has issued (i) Customs Circular No.11/2016-Customs dated 15.03.2016 from F.No. 450/190/2015-CusIV and (ii) Master Circular No. 1053/02/2017-CX dated 10.03.2017 issued from F.No.96/1/2017-Cx.I, with regard to the deemed conclusion of proceedings as per the provisions of Section 28(5) and Section 28(6) of the Customs Act,1962.

41.3 It is observed that in the subject Show Cause Notice, it has been mentioned at Para 27 that the importer admitting their mistake agreed to pay the amount of Customs duty attributable to such Ship Demurrage charges paid by them from time to time. Accordingly after initiation of investigation by DRI, they paid an amount of Rs.16,31,496/- towards differential amount of Customs duty . They also paid an amount of Rs.7,08,049/- towards interest. The aforesaid Customs duty of Rs.16,31,496/- and Interest of Rs. 7,08,049/- has been paid by the importer vide TR-6 Challans/Demand Drafts as detailed in Table-4 to the Show Cause Notice. I further find that penalty @ 15% of the duty amount, amounting to Rs. 2,44,724/-, has been paid by them vide TR-6 Challan no. 604 dated 02.06.2017. The above mentioned amounts of duty, Interest and Penalty are liable for appropriation and adjustment against the said liability. In view of the facts of the case, I find that the Customs duty, as proposed under Section 28(4) of the Customs Act,1962 do not requires to be determined under Section 28(8) along with interest under Section 28AA and with

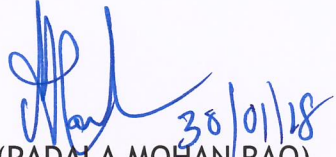
penal action under Section 112(a) and Section 114A of the Customs Act, 1962. I also refrain to hold the imported goods liable for confiscation, in the circumstances of the present case as no such confiscation is warranted as there was no seizure of the goods involved in the case.

41.4 Thus in view of the provisions of Section 28(5) and 28(6) of the Customs Act, 1962 and current legal provisions, in the present case when entire amount of Customs duty (Rs.16,31,496/-) under Section 28(4) along with applicable Interest (Rs.7,08,049/-) under Section 28AA ibid were paid in full even before issue of the Show Cause Notice and penalty @ 15% of the duty (i.e. Rs.2,44,724/-) was paid within 30 days from the receipt of SCN under reference, the present proceeding initiated against the importer M/s Lanxess India Pvt Ltd. vide the said SCN is liable to be concluded as duly provided under the provisions of Section 28(6)(i) of Customs Act, 1962. In view of the foregoing, the proceedings initiated against M/S Lanxess India Pvt Ltd, Lanxess House, Plot No. A 162-164, Road No.-27, MIDC, Wagle Estate, Thane (West)-400604 having IEC No. 0504023039, vide the impugned 'Show Cause Notice' are required to be concluded in terms of the provisions of Section 28(5) and 28(6) of the Customs Act, 1962..

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

ORDER

The proceedings initiated in the Show Cause Notice F.No. DRI/KZU/CF/ENQ-34(INT-06)/2017 dated 27.04.2017 against M/s Lanxess India Pvt. Ltd, Lanxess House, Plot No. A 162-164, Road No.-27, MIDC, Wagle Estate, Thane (West)-400604 are hereby ordered to be concluded in terms of the provisions of Section 28(5) and 28(6) of the Customs Act, 1962.


(PADALA MOHAN RAO)
Additional Commissioner (Adj.)
Custom House, Kandla.
Dated: 30.01.2018

F. No. S/10-05/ADJ/ADC/LIPL/2017-18

BY SPEED POST/AD

To,
M/s Lanxess India Pvt Ltd,
Lanxess House, Plot No. A 162-164,
Road No.-27, MIDC, Wagle Estate,
Thane (West)-400604.

Copy to :-

1. The Additional Director, Directorate of Revenue Intelligence, Kolkata Zonal Unit, 8, Ho Chi- Minh Sarani, Kolkata-700071 w.r. to SCN F.No. DRI/KZU/CF/ENQ-34(INT-06)/2017 dated 27.04.2017
2. The Deputy/Assistant Commissioner(RRA), Custom House, Kandla
3. The Deputy/ Assistant Commissioner(Recovery), Custom House, Kandla
4. Guard File