



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला
OFFICE OF THE COMMISSIONER OF CUSTOMS,
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A	File No.	S/10-80/Adj/ADC/CFCL/2018-19
B	Order-in-Original No.	KDL/ADC/GCJ/22/2019-20
C	Document Identification Number	20200171ML00003N4102
D	Passed by	SH. GYANCHAND JAIN, ADDITIONAL COMMISSIONER
E	Date of order	23.01.2020
F	Date of issue	23.01.2020
G	SCN No. & Date	SCN F.No DRI/MZU/D/INT-35/2017(Chambal) dated 15.02.2019
H	Noticee(s)/Co-Noticee(s)	M/s Chambal Fertilisers & Chemicals Limited, Gadepan, Dist. Kota, Rajasthan-325208

1. यह अपील आदेश संबन्धित को नि प्रदान शुल्क: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
मंजिल वी 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 जापन के साथ इयूटि/ 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), अधिनियम शुल्क सीमा और 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, आयुक्त (अपील)के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (Appeals) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACT OF THE CASE

M/s. Chambal Fertilisers & Chemicals Ltd (hereinafter referred to also as CFCL), (IEC 1390000028), having their registered office at Gadepan, Dist. Kota, Rajasthan -325208, were engaged in the import of Mono Ammonium Phosphate (MAP), Di Ammonium Phosphate (DAP), Muriate of Potash, NPK Complexes etc, in bulk. They were also engaged in the manufacture of Urea and are having their plant at Gadepan, Rajasthan.

1. Intelligence developed by Mumbai Zonal Unit of the Directorate of Revenue Intelligence (hereinafter referred to as DRI), indicated that CFCL, had contravened the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, read with Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, by not declaring certain elements of costs for arriving at the assessable value of the goods for the purpose of payment of customs duty in as much as they had not accounted for barging /lighterage charges incurred towards transport of bulk cargo i.e Mono Ammonium Phosphate (MAP), Di Ammonium Phosphate (DAP), Muriate of Potash, etc from mother vessel at midstream/ anchorage to the landmass/wharf and also ship demurrage charges incurred on the chartered vessels in the Assessable value for payment of duty.

1.1. Intelligence developed further suggested that, CFCL had discharged partial cargo in case of some of the bulk cargo consignments imported and cleared by them at Kandla Port, at midstream /anchorage by deploying barges i.e the cargo is unloaded from the mother vessel, which is anchored at midstream, into the barges and then the cargo is brought to the landmass /wharf by these barges. For this activity CFCL had employed M/s Rishi Shipping, Gandhidham, who had handled their cargo from midstream till landmass /wharf and that CFCL, had not included these barging / lighterage charges in the Assessable Value for payment of customs duty. Intelligence also further suggested that CFCL had incurred ship demurrage charges on the imports of bulk cargo at various ports and that they had not accounted for these charges in the Assessable Value for payment of custom duty.

1.2. In terms of Rule 10 (2) (a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value of imported goods includes the cost of transport of the imported goods to the place of importation. The explanation provided therein states 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.

For ready reference Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is reproduced below.

Rule 10.Cost and services. -

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

(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the Imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

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

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

(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).

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a).

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.

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

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

1.3. Further, the Boards Circular No 38/2007-Customs, dated 9.10.2007 inter alia states that :

“(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 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 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."

1.4. Therefore, the charges incurred for transportation of cargo from midstream or anchorage to the landmass as well as ship demurrage charges are includible in the cost of transport (in terms of clause (a) of Rule 10(2) of the Customs Valuation Rules, 2007), in addition to the loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation, which is covered under clause (b) of Rule 10 (2) of the said Rules.

1.5. Based on the above intelligence, investigations were initiated against M/s Chambal Fertilisers & Chemicals Ltd . As a part of investigation, summons were issued to CFCL on 18.07.2017. M/s CFCL vide letters dated 25.7.2017, 1.8.2017, 04.08.2017 and 24.08.2017 sought time to submit the information and vide letter dated 30.08.2017 submitted some information. Subsequently, Shri Tapan Sharma , Manager Imports of CFCL, appeared on 7.9.2017 and his statement was recorded.

1.6. STATEMENTS OF CONCERNED PERSONS.

1.6.1 Statement of Shri Tapan Sharma , Manager Imports of CFCL, was recorded under Section 108 of the Customs Act, 1962, on 07.09.2017. **(RUD-1)**. In his statement Shri Tapan Sharma inter alia stated that:-

i. After completion of his BSc in Agriculture from Rajasthan Agricultural University, Bikaner, he joined M/s Chambal Fertilizers & Chemicals Limited, in the year 1993 and presently was working in the capacity of Manager -Imports. He looked after overall port operations of the company which included imports.

ii. M/s Chambal Fertilisers & Chemicals Ltd, were into manufacturing of Urea and were having their plant at Gadepan, Kota, Rajasthan. They were also leading importers of Fertilisers like Di Ammonium Phosphate (DAP), Muriate of Potash (MOP) and NPK Complexes (Nitrogen Phosphorous Potash); that it was a Dr. K K Birla group company and Shri Anil Kapoor was the Managing Director of the company.

iii. They had been importing the said items i.e Fertilisers like Di Ammonium Phosphate (DAP), Muriate of Potash (MOP) and NPK Complexes (Nitrogen Phosphorous Potash) in bulk mostly through Kandla, Mundra, Kakinada and Vishakapatnam. That, in some cases they had also imported through Hazira, Krishnapatnam and Gangavaram Ports.

iv. On being asked as to whether any of these bulk imports were discharged at midstream or at anchorage, he stated that in some cases at Kandla Port, partial cargo may have been discharged at midstream; that no lighterage /barging operations had taken place at other Ports as sufficient draft was available there and that he would produce the details of the import consignments where lighterage /barging had taken place, within two weeks.

v. On being asked as to whether they had incurred any barging /lighterage charges on the discharge of cargo on the shipments from the mother vessel at midstream, he stated that, they had employed M/s Rishi Shipping at Kandla Port, as their handling agents for their import consignments there; that they had negotiated a consolidated rate with M/s Rishi Shipping for all the activities incurred for handling/transportation of material from vessel till rake loading (railway) or truck loading; that they had not separately paid any payment on account of lighterage/barging charges; that he would go through the records and would provide all the details within two weeks.

vi. On being asked as to whether they had included the barging / lighterage charges incurred by them on the discharge of cargo from the mother vessel at midstream, for payment of customs duty, he stated that, since their rates were consolidated and no separate charges were paid on Account of barging / lighterage, they were not aware whether lighterage /barging activity had taken place or otherwise and therefore they had not taken into account this aspect while paying customs duty

vi. He was shown Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, wherein, in terms of Rule 10 (2) (a) of the Customs Valuation Rules, 2007, the value of imported goods includes the cost of transport of the imported goods to the place of importation. The explanation provided therein states 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. On being confronted, he admitted that the value of imported goods includes the cost of transport of the imported goods to the place of importation and that the charges incurred by them towards barge charges /lighterage charges, are includable in the value of imported goods for payment of customs duty.

vii. He further stated that, the barging /lighterage charges should have been included by them in the assessable value for payment of duty; that as stated by him earlier, since their rates were consolidated and no separate charges were paid on Account of barging / lighterage, they were not aware whether lighterage /barging activity had taken place or otherwise and therefore they had not taken into account this aspect while paying customs duty; that he would verify this aspect from their handling agent M/s Rishi Shipping, and would provide with the break up of cost details towards barging /lighterage charges. He also further stated that they would pay the duty on lighterage /barging charges after taking the breakup of costs on this account from M/s Rishi Shipping.

viii. On being asked whether they had incurred or paid any demurrage charges on the chartered vessels on which they had imported bulk cargo, he stated that yes, they had incurred /paid demurrage charges on chartered vessels to their suppliers and that subsequent of receipt of summons, realizing that, duty should have been discharged by them on the demurrage charges on chartered vessels, they had voluntarily paid an amount of Rs.19,46,168/- on account of duty and interest payable on demurrage charges on chartered vessels, incurred by them and that he would provide the details of the payments and the worksheet within two to three days.

1.6.2. Further statement of Shri Tapan Sharma , Manager Imports of CFCL, was recorded under Section 108 of the Customs Act, 1962, on 02.11.2017. **(RUD-2)**. In his statement Shri Tapan Sharma inter alia stated that;-

- i. He was shown his earlier statement dated 7.9.2017 and confirmed the contents therein.
- ii. As stated by him in the said statement, he had gone through the details of their bulk imports and that they had imported bulk cargo through Kakinada, Vishakapatnam, Mundra, Kandla, Hazira, Krishnapatnam and Gangavaram Ports. It had been verified by them that except for Kandla port, no lighterage/ barging operations had taken place at other Ports as sufficient draft was available there. As regards Kandla Port, they had employed M/s Rishi Shipping as their handling agents for their import consignments there and that they had negotiated a consolidated rate with M/s Rishi Shipping for all the activities incurred for handling/transportation of material from vessel till rake loading (railway) or truck loading and that they had not separately paid any payment on account of lighterage/barging charges.
- iii. That as stated by him in his earlier statement, they ascertained with M/s Rishi Shipping and that M/s Rishi Shipping vide letter dated 23.9.2017, had informed them

that they had not raised any separate bills towards lighterage/ barging as they were considering it as part of their consolidated rates; that M/s Rishi Shipping had further informed them that during the period 2012-13 till 31.08.2017, lighterage/barging of partial cargo in some of their consignments had been carried out and they had provided them with those details. He produced the said details and further stated that a total quantity of 184603 MTs had been subjected to barging /lighterage during the said period.

- iv. He further stated that as regards cost of said lighterage operations, they had not been charged separately for the same by M/s Rishi Shipping as their rates were consolidated irrespective of any lighterage/barging. That, however, M/s Rishi Shipping have informed them that in case of M/s IFFCO, they had been charging them @ Rs. 125/-PMT, whenever full cargo was discharged at midstream; that he produced the copy of the letter of M/s Rishi Shipping alongwith the details of quantity lighteraged and also sample invoice in case of M/s IFFCO provided by them; that they had considered the said rate of Rs 125/- PMT, and that they would be working out the duty payable on the basis of said rate (Rs.125/-PMT) and also the interest payable thereon within a week. He also submitted a letter dated 2.11.2017, **(RUD-3)**, reiterating the said details.
- v. He further stated that the barging /lighterage charges should have been included by them in the assessable value for payment of duty and that since rates were consolidated and no separate charges were paid on Account of barging / lighterage, they were not aware whether lighterage /barging activity had taken place or otherwise and therefore they had not taken into account this aspect while paying customs duty; that they would work out the differential duty alongwith interest payable thereon within a week and would pay the same within fifteen days.

1.6.3. Shri Tapan Sharma, Manager -Imports of CFCL, vide letter dated 16.11.2017, **(RUD-4)**, informed that in accordance with the statement given by him on 07.09.2017 and 02.11.2017, they were forwarding demand draft dated 14.11.2017, drawn on HDFC Bank Ltd, Kota, for Rs. 22,65,562/- towards differential duty, alongwith interest payable thereon by them, on the barging /lighterage charges. They also further stated that, they have also paid a total amount of Rs. 20,50,525/- (which included amount of Rs 19,46,168/- stated by him in his statement dated 7.9.2017) towards differential duty and interest payable on the demurrage charges incurred on vessels of bulk cargo imported by them at various ports. It was further stated that the non-inclusion of barging /lighterage /demurrage charges in the assessable value during clearance was unintentional and it happened as they were unaware of the provisions of law. They further stated that, they would also be paying 15% of the duty amount as penalty under Section 28(5) of the Customs Act, 1962, and would seek

closure of the proceedings in terms of Section 28(6) of the Customs Act, 1962. That payment of penalty would be made in due course. They also enclosed detailed worksheet showing differential duty payable and interest payable thereon on barging /lighterage charges as well as demurrage charges alongwith the said letter.

1.6.4. CFCL, vide letters dated 11.01.2018 (**RUD-5, 6 & 7**), enclosed demand draft No. 932445 dated 30.11.2017, drawn on State Bank of India, Kota, for Rs. 2,13,639/- towards 15% penalty on the differential duty paid by them on the barging /lighterage charges. They also further informed that they have also paid an amount of Rs. 1,59,460/- towards 15% penalty on the differential duty paid by them on the vessel demurrages at various ports and enclosed the original challans/receipts of payments. They also submitted original challans/receipts for payment of Rs 20,50,525/- made by them at various ports, towards differential duty and interest on vessel demurrage charges. They also stated that they would seek closure of proceedings in terms of Section 28(6) of the Customs Act, 1962.

1.6.5. Further statement of Shri Tapan Sharma , Manager Imports of CFCL, was recorded under Section 108 of the Customs Act, 1962, on 18.01.2018. (**RUD-8**). In his statement Shri Tapan Sharma inter alia stated as under:

i. That as stated in his statement dated 2.11.2017, they had worked out the duty payable by them on lighterage/ barging charges and as informed by them vide their letter dated 16.11.2017, they had voluntarily paid an amount of Rs. 22,65,562/- towards differential duty along with interest (duty payable Rs. 14,24,258/- and Interest Rs 8,41,304/-. Total Rs. 22,65,562/-) payable on the lighterage/ barging charges and that, vide their letter dated 11.01.2018, they had also paid an amount of Rs. 2,13,639/- being 15% of the duty amount (15% of Rs 14,24,258/-), as provided for under Section 28(5) of Customs Act, 1962.

ii. That in case of duty payable by them towards demurrage charges on chartered vessels, as stated in their letter dated 16.11.2017, they had voluntarily paid an amount of Rs. 20,50,525/- towards differential duty along with interest (duty payable Rs. 10,63,062/- and Interest Rs 9,87,463/- Total Rs. 20,50,525-) payable on the vessel demurrage charges and that vide their letter dated 11.01.2018, they had also paid an amount of Rs. 1,59,460/- being 15% of the duty amount (15% of Rs 10,63,062/-), as provided for under Section 28(5) of Customs Act, 1962.

iii. That in both the cases i.e. lighterage /barging charges as well as demurrage on chartered vessels, the differential duty voluntarily paid by them includes the duty payable beyond five years period.

iv. That the non inclusion of lighterage/barging/ demurrage charges in the assessable value during the clearance was unintentional and it happened as they were unaware of the provisions of law. Accordingly, they have voluntarily paid the differential duty alongwith interest for the period beyond five years also.

v. That the differential duty, interest and penalty amount voluntarily paid by them for the period beyond five years may be appropriated accordingly.

1.6.6. CFCL, also vide letter dated 18.01.2018, (RUD-9), reiterated that, in both the cases i.e. lighterage /barging charges as well as demurrage on chartered vessels, the differential duty voluntarily paid by them includes the duty payable beyond five years period: that the non inclusion of lighterage/barging/ demurrage charges in the assessable value during the clearance was unintentional and it happened as they were unaware of the provisions of law. Accordingly, they have taken a conscious decision and have voluntarily paid the differential duty along with interest for the period beyond five years also; that they have also paid 15% of the duty amount as provided for under Section 28(5) of the Customs Act, 1962 and that they would not be contesting the issue and would seek closure of the proceedings in terms of Section 28(6) of the Customs Act, 1962, on receipt of show cause notice. They also further requested that the differential duty, interest and penalty amount voluntarily paid by them for the period beyond five years may be appropriated accordingly

1.7. ANALYSIS OF DOCUMENTS:

1.7.1. M/s CFCL, during the course of investigation submitted the copies of relevant import documents, in respect of the consignments, wherein lighterage/barging of cargo had taken place , and also the import documents where they had incurred demurrage charges on chartered vessels. Along with the documents CFCL also submitted the detailed worksheets showing the differential customs duty payable by them on the barging /lighterage charges as well as vessel demurrage charges.

1.7.2. In case of lighterage/barging charges, it was submitted by M/s CFCL, that, except for Kandla port, at no other ports their consignments were subjected to lighterage and that in case of Kandla Port, they had employed M/s Rishi Shipping as their handling agents for their import consignments and that they had negotiated a consolidated rate with M/s Rishi Shipping for all the activities incurred for handling/transportation of material from vessel till rake loading (railway) or truck loading and irrespective of that they had not separately paid any payment on account of lighterage/barging charges. They had also submitted that on ascertaining with M/s Rishi Shipping, M/s Rishi Shipping vide letter dated 23.9.2017, had confirmed that they (M/s Rishi Shipping) had not raised any separate bills towards lighterage/ barging as they were considering it as part of their consolidated rates and that as confirmed by M/s Rishi Shipping during the period 2012-13 till 31.08.2017,

a total quantity of 184603 MTs had been subjected to barging /lighterage. M/s CFCL submitted copies of relevant boat notes showing the qty lighteraged/barged in case each shipment. From the documents and details submitted it was seen that during the period 2012-13 till 31.08.2017, in case 22 shipments/vessels of bulk cargo consisting of Di Ammonium Phosphate (DAP), Muriate of Potash (MOP), a total quantity of 184603 MTs of cargo had been subjected to lighterage at Kandla Port.

1.7.3. M/s CFCL, also submitted copies of contracts entered with M/s Rishi Shipping, wherein it was mentioned that the rates were inclusive of barge charges if required and that no extra charges shall be paid related to discharging the cargo on to barges etc. It was further submitted that in accordance with the contracts with M/s Rishi Shipping, they had not been charged separately for the lighterage activity by M/s Rishi Shipping, since their rates were consolidated irrespective of any lighterage/barging. It was further submitted by them that, on the quantity lighteraged in their shipments, as ascertained from the boat notes submitted, they would discharge the duty liability. For, arriving at the rate of lighterage, on being enquired with M/s Rishi Shipping, it was informed to them that in case of M/s IFFCO, who also import at Kandla, M/s Rishi Shipping had charged them @ Rs. 125/-PMT, whenever cargo was discharged at midstream. M/s CFCL also had submitted copy of letter of M/s Rishi Shipping dated 23.9.2017 alongwith copy of sample invoice in case of M/s IFFCO, provided to them by M/s Rishi Shipping. Based on this rate of Rs. 125/-PMT, the duty payable was worked out and paid by M/s CFCL on the total lighteraged qty of 184603/- MTs. The total amount paid was Rs.22,65,562/- which was inclusive of duty Rs. 14,24,258/- and Interest Rs 8,41,304/-.

1.7.4. In case of vessel demurrage charges, M/s CFCL, submitted relevant import documents along with the Credit notes issued by them to their overseas suppliers on account of demurrage charges paid by them. It was submitted by M/s CFCL that during the period 2010 to 2015, in case of 26 shipments of Di-Ammonium Phosphate (DAP), Muriate of Potash (MOP) and NPK cleared from various ports viz. Hazira, Kakinada, Kandla, Mundra and Vizag, they had paid demurrage charges amounting to USD 357716.90. The amount in Indian Rupees considering the exchange rate relevant to the corresponding import documents (Bills of Entry), was working out to Rs 1,82,57,151/-. M/s CFCL submitted detailed worksheet working out the differential duty payable along with the interest payable thereon and accordingly paid a total amount of Rs. 20,50,525/- which was inclusive of duty Rs. 10,63,062/- and Interest Rs 9,87,463/.

1.8. LEGAL PROVISIONS & DISCUSSION:

1.8.1. 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 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:

1.8.2. 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;"

1.8.3. 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."

1.8.4. When the aforesaid 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. 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 incurred in different manner, such elements have to be considered at the time of determination of the transaction value. The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, were 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.

1.8.5. 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) 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 lighterage or barge charges and vessel demurrage charges 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 Customs duty.

1.8.6. From a combined reading of the provisions of statute as aforesaid, it appears that cost ingredients in the form of vessel demurrage charges as well as lighterage /barge charges and the expenses related to the said activity at midstream /anchorage till the goods reach the landmass, 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.

1.8.7. Rule 11 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, provides that:-

(1)The importer or his agent shall furnish -

(a) a declaration disclosing full and accurate details relating to the value of imported goods; and

(b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer, as considered necessary by the proper officer for determination of the value of imported goods under these rules.

1.8.8. Section 46 of the Customs Act, 1962, provides that:-

(1) *The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting ³[electronically] to the proper officer a bill of entry for home consumption or warehousing in the prescribed form :*

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

1.8.9. M/s CFCL, therefore, have contravened the provisions of Rule 11 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in as much as they failed to furnish truthful declaration therein, disclosing full and accurate details relating to the value of imported goods, as provided for in the said Rule, and also Section 46 of the Customs Act, 1962, by not declaring, while presenting the Bill of Entry for clearance of goods, the said lighterage/ barging charges as well as the ship demurrage charges. The law demands true facts to be declared by the importer. 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, the responsibility lies with 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 has mis-declared the value of the goods, by suppressing the facts of incurring lighterage /barging charges as well as vessel demurrage charges, for the purpose of determination of transaction value of imported goods. Such suppression of facts, on the part of the importer, has led to mis-declaration of the value of imported goods, which ultimately resulted in short payment of Customs duty.

1.8.10. Section 17 (1) of the Customs Act, 1962:-

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

1.8.11. As provided under Section 17 of the Customs Act 1962, now, with the introduction of self assessment under the Customs Act, more faith is bestowed on the importer and therefore, the practice of routine assessment, concurrent audit and examination has been dispensed with. 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 suppression of facts and contravened the provision of the said Section 17 of the Customs Act, 1962. Therefore,

extended period provisions as per Section 28(4) of the Customs Act, 1962, is invocable in this case.

1.8.12. Apart from the legal provisions discussed above, other important legal provisions relevant to the present case are briefly mentioned as under:-

1.8.12.1. Section 17 (1) of the Customs Act, 1962:-

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

1.8.12.2. Section 28 (4) of the Customs Act, 1962 :-

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.

1.8.12.3. Section 111 of the Customs Act, 1962:- Confiscation of improperly imported goods, etc:-

The following goods brought from a place outside India shall be liable for 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.

1.8.12.4. Section 114A of the Customs Act, 1962 - Penalty for short-levy or non-levy of duty in certain cases:

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case

may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined.

1.8.12.5. Section 114AA of the Customs Act, 1962 - Penalty for use of false and incorrect material:

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

1.9. VOLUNTARY PAYMENT OF DUTY, INTEREST & PENALTY:

During the course of investigation, CFCL, voluntarily deposited a total sum of Rs. **46,89,185/- (Rupees Forty Six Lakh Eighty Nine Thousand One Hundred Eighty Five Only)** towards the differential duty, interest and penalty of 15% of the duty amount as provided for under Section 28(5) of the Customs Act, 1962, stating that they would seek closure of the proceedings in terms of Section 28(6) of the Customs Act, 1962, on receipt of Show Cause Notice. The details of the payments are as under:-

Sr No	Challan No	Date	Amount deposited in (Rs)	Name of the Custom House where deposited	Payment on account of
1	12250	5.9.2017	407891	Kakinada	Duty and interest on demurrage charges
2	12251	do	149848	do	do
3	12252	do	228190	do	do
4	12253	do	234418	do	do
5	12254	do	32293	do	do
6	12255	do	56362	do	do
7	12256	do	7443	do	do
8	12257	do	35050	do	do
9	12258	do	18931	do	do
10	12459	6.12.2017	86210	do	Penalty on demurrage charges
11	1898	14.11.2017	4573	Hazira	Duty and interest on demurrage charges
12	2066	7.12.2017	487	do	Penalty on demurrage charges
13	1245	7.9.2017	99783	Mundra	Duty and interest on demurrage charges
14	1745	4.12.2017	6775	do	Penalty on demurrage charges
15	DM-135	5.9.2017	49025	Vizag	Duty and interest on demurrage charges
16	CM 90	6.12.2017	5388	do	Penalty on demurrage charges
17	1316	5.9.2017	95471	Kandla	Duty and interest on demurrage charges
18	1317	5.9.2017	111748	do	do

19	1318	do	46983	do	do
20	1319	do	54949	do	do
21	1320	do	200042	do	do
22	1321	do	45882	do	do
23	1322	do	84725	do	do
24	1323	do	61187	do	do
25	1324	do	25730	do	do
26	1700	6.12.2017	60600	do	Penalty on demurrage charges
27	60	15-12-2017	2265562	do	Duty and interest on lighterage /barge charges
28	69	08-02-2018	213639	do	Penalty on barge charges
		Total	46,89,185/-		

1.10. SUMMARY OF INVESTIGATION:

From the foregoing discussion, it is seen that:-

1.10.1. M/s Chambal Fertilisers & Chemicals Ltd, having their registered office at Gadepan, Dist. Kota, Rajasthan -325208, were engaged in the import of Mono Ammonium Phosphate (MAP), Di Ammonium Phosphate (DAP), Muriate of Potash, NPK Complexes etc., in bulk, had discharged partial cargo in case of some of the bulk cargo consignments imported and cleared by them at Kandla Port, at midstream /anchorage, by deploying barges i.e. the cargo is unloaded from the mother vessel, which is anchored at midstream, into the barges and then the cargo is brought to the landmass /wharf by these barges. For this activity CFCL had employed M/s Rishi Shipping, Gandhidham, who had handled their cargo from midstream till landmass /wharf and that CFCL, had not included these barging / lighterage charges in the Assessable Value for payment of customs duty. Intelligence also further suggested that CFCL had incurred ship demurrage charges on the imports of bulk cargo at various ports and that they had not accounted for these charges in the Assessable Value for payment of custom duty.

1.10.2. The charges incurred towards lighterage /barging charges as well as ship demurrage charges, forms part of the value of imported goods, in terms of Rule 10 (2) (a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, which states that, the value of imported goods includes the cost of transport of the imported goods to the place of importation and the explanation provided therein states 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.

1.10.3. During the statement recorded under Section 108 of the Customs Act, 1962, on 07.9.2017, Shri Tapan Sharma , Manager Imports CFCL, stated that, they had employed M/s Rishi Shipping at Kandla Port, as their handling agents for their import consignments there; that they had negotiated a consolidated rate with M/s Rishi Shipping for all the activities incurred for handling/transportation of material from vessel till rake loading (railway) or truck loading; that they had not separately paid any payment on account of lighterage/barging charges. He further stated that, since their rates were consolidated and no separate charges were paid on Account of barging / lighterage, they were not aware whether lighterage /barging activity had taken place or otherwise and therefore they had not taken into account this aspect while paying customs duty. He also stated that he would verify this aspect from their handling agent M/s Rishi Shipping, and will pay the duty on lighterage /barging charges after taking the breakup of costs on this account from M/s Rishi Shipping. As regards demurrage charges on the chartered vessels, he stated that they had incurred /paid demurrage charges on chartered vessels to their suppliers and that subsequent of receipt of summons, realizing that, duty should have been discharged by them on the demurrage charges on chartered vessels, they have voluntarily paid duty and interest payable on demurrage charges.

1.10.4. In his subsequent statement on 02.11.2017, Shri Tapan Sharma stated that on ascertaining with M/s Rishi Shipping, it was informed to them that, in their case during the period 2012-13 till 31.08.2017, a total quantity of 184603 MTs had been subjected to barging /lighterage and since their rates to M/s Rishi Shipping were consolidated irrespective of any lighterage, they have considered rate of Rs.125/- PMT, being charged by M/s Rishi Shipping in case of another firm M/s IFFCO, in case of midstream discharge of cargo and accordingly will work out the duty and pay the same in due course.

1.10.5. CFCL, vide letter dated 16.11.2017, forwarded demand draft for Rs. 22,65,562/- towards differential duty, along with interest payable thereon by them, on the barging /lighterage charges. They also further stated that, they have also paid a total amount of Rs. 20,50,525/- towards differential duty and interest payable on the demurrage charges incurred on vessels of bulk cargo imported by them at various ports. It was further stated that the non-inclusion of barging /lighterage /demurrage charges in the assessable value during clearance was unintentional and it happened as they were unaware of the provisions of law; that they will also be paying 15% of the duty amount as penalty under Section 28(5) of the Customs Act, 1962, and would seek closure of the proceedings in terms of Section 28(6) of the Customs Act, 1962. Subsequently CFCL also paid an amount of Rs. 2,13,639/- towards 15% penalty on the differential duty paid by them on the barging /lighterage charges and Rs. 1,59,460/- towards 15% penalty on the differential duty paid by them on the vessel demurrages.

1.10.6. M/s CFCL vide their letter dated 18.01.2018 also further stated that in both the cases i.e. lighterage /barging charges as well as demurrage on chartered vessels, the differential duty voluntarily paid by them included the duty payable beyond five years period; that non inclusion of lighterage/barging/ demurrage charges in the assessable value during the clearance was unintentional and it happened as they were unaware of the provisions of law; that they have voluntarily paid the differential duty along with interest for the period beyond five years also and that the differential duty, interest and penalty amount voluntarily paid by them for the period beyond five years may be appropriated accordingly.

1.10.7. M/s CFCL submitted relevant import documents as well as the boat notes of respective shipments in case of lighterage and it was seen that during the period 2012-13 till 31.08.2017, a total quantity of 184603 MTs had been subjected to barging /lighterage, in case 22 shipments/vessels of bulk cargo consisting of Di Ammonium Phosphate (DAP), Muriate of Potash (MOP). The details of these consignments are as per Annexure –A to the Show Cause Notice. Likewise, in case of vessel demurrage charges, M/s CFCL, submitted relevant import documents along with the Credit notes issued by them to their overseas suppliers on account of demurrage charges paid by them. It was submitted by M/s CFCL that during the period 2010 to 2015, in case of 26 shipments of Di-Ammonium Phosphate (DAP), Muriate of Potash (MOP) and NPK cleared from various ports viz. Hazira, Kakinada, Kandla, Mundra and Vizag, they had paid demurrage charges. The details of these consignments are as per Annexure –B to the Show Cause Notice.

1.10.8. As provided for under Section 17 of the Customs Act 1962, now, with the introduction of self assessment, 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 suppression of facts and contravened the provision of the said Section 17 of the Customs Act, 1962. Therefore, extended period provisions as per Section 28(4) of the Customs Act, 1962, is invokable in this case.

1.10.9. It is apparent that Customs duty had been short paid on the goods so imported by CFCL, as the same were brought and cleared without declaring the costs towards lighterage /barging charges, as well as vessel 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) of the Customs Act, 1962, for recovery of such duty short paid. The details of these consignments along with the duty payable thereon are detailed in Annexure A1(with respect to lighterage/barging) and Annexure B1(with respect vessel demurrage) to the Show Cause Notice, which is recoverable from the said importer under the extended period provisions as per Section 28(4) of the Customs Act, 1962.

1.10.10. Further, the demand of duty from M/s CFCL as detailed Annexure A2(with respect to lighterage/barging) and Annexure B2(with respect vessel demurrage) to the Show Cause Notice is beyond the period of five years. The amount of differential duty for the goods imported beyond five years period, as detailed therein, was not paid or short paid due to wilful mis-statement and suppression of facts by CFCL. Section 28(4) of the Customs Act, 1962, provides that where an importer has by reasons of collusion, wilful misstatement or suppression of facts, had not paid any duty which has not been levied or has been short levied, then the demand could be issued within five years from the relevant date. However, it does not bar voluntary deposit of self-admitted duty for any imports beyond five years to be adjusted for duty and interest leviable against the said imports. The limitation with respect to time only appears to bar the department from issuing demand notice under Section 28 (4) of the Customs Act, 1962. It does not bar the importer to pay back the evaded duty on their own. Thus, the amount deposited voluntarily by the importer towards duty/interest liable to be adjusted against the duty and interest recoverable for the period beyond five years. This proposition has been upheld in the case of India Cements Ltd. Vs. CCE, Madras [1984 (18) ELT 499 (Trib.)] by the special bench of CESTAT, New Delhi. Shri Tapan Sharma, Manager –Imports of CFCL, in his statement dated 18.01.2018 as well as vide letter dated 18.01.2018, has requested that the differential duty, interest and penalty amount voluntarily paid by them for the period beyond five years may be appropriated accordingly. Therefore the amount of Rs. 35,47,758/- (Rupees Thirty Five Lakh Forty Seven Thousand Seven Hundred Fifty Eight only) voluntarily paid by M/s CFCL towards duty liability/interest for the period beyond five years as detailed in Annexure A2 and Annexure B2 to the Show Cause Notice, is to be adjusted out of the voluntary payments made by them as mentioned in para 10 of the Show Cause Notice.

1.10.11. Further, the details of consignments along with the duty payable thereon, within the demand period of five years are detailed in Annexure A1(with respect to lighterage/barging) and Annexure B1(with respect vessel demurrage) to this Show Cause Notice. Therefore, an amount of Rs. 8,07,641/- (Rupees Eight Lakh Seven Thousand Six Hundred Forty One Only), as detailed in the said Annexure 'A1' and Annexure A2, on account of differential duty payable on lighterage/barging charges and vessel demurrage charges respectively, are recoverable from the said importer under the extended period

provisions as per Section 28(4) of the Customs Act, 1962. Further, such non-payment of duty of Customs, also attracts interest under section 28AA of the Customs Act, 1962 and therefore interest of Rs 2,12,639/- (Rupees Two Lakh Twelve Thousand Six Hundred Thirty Nine Only), as detailed in the said Annexure 'A1' & 'A2', on the said amount of duty, also becomes payable, in terms of Section 28AA of the Customs Act, 1962.

1.10.12. It is seen that the goods imported by M/s CFCL, as detailed in Annexure 'A1' & 'A2', to the Show Cause Notice, were cleared without declaring the costs towards lighterage /barging charges as well as vessel 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 during the clearance. Thus the impugned goods are to be liable for confiscation under Section 111(m) of the Customs Act, 1962. However, since the goods cleared are not physically available for confiscation, this provision has not been invoked.

1.10.13. It is further seen that, CFCL, for their acts of omission and/or commission, which resulted in short levy of duty and rendered the goods to be held liable for confiscation under Section 111(m), also have rendered themselves liable to penalty under section 112(a) of the Customs Act, 1962. However, since the Section 111(m) has not been invoked provisions of Section 112 have also not been invoked.

1.10.14. As the appropriate Customs duty in respect of the goods imported and cleared in the manner aforesaid was not levied or was short levied by reason of wilful mis-statement and suppression of facts as discussed above, M/s CFCL is also liable for imposition of penalty under Section 114A of the Customs Act, 1962.

1.10.15. Further, M/s CFCL, have contravened the provisions of Rule 11 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in as much as they failed to furnish truthful declaration therein, disclosing full and accurate details relating to the value of imported goods and also Section 46 of the Customs Act, 1962, by not declaring the said lighterage /barging charges incurred, while presenting the Bill of Entry for clearance of goods. Therefore, they are also liable for imposition of penalty under Section 114AA of the Customs Act, 1962.

SHOW CAUSE

2. In this case, the imports have taken place through Kandla Port, Kakinada Port, Hazira Port and Vizag Ports. Accordingly, the Show Cause Notice has been made answerable to the respective Adjudicating Authorities in respect of the imports at each Port.

2.1. In view of the above discussions and facts M/s Chambal Fertilisers & Chemicals Ltd., Gadepan, Dist. Kota, Rajasthan -325208 were called upon vide Notice F. No. DRI/MZU/D/INT-35/2017(Chambal) dated 14.03.2018 by the Additional Director, DRI, MZU, Mumbai to Show Cause to :-

2.1.1. The Additional / Joint Commissioner of Customs, Custom House, Near Balaji Temple, Kandla -370201, within 30 days of receipt of the above notice as to why:-

- (i) Differential duty amounting to Rs. 7,31,639/- (Rupees Seven Lakh Thirty One Thousand Six Hundred Thirty Nine Only), as detailed in Annexure- A1 and Annexure-B1 to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 1,81,061/- (Rupees One Lakh Eighty One Thousand Sixty One Only), as detailed in Annexure- A1 and Annexure-B1 to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.
- (v) amount of Rs. 10,22,446/- (Rupees Ten Lakh Twenty Two Thousand Four Hundred Forty Six Only) voluntarily deposited by M/s CFCL during the course of investigation, (on account of clearances through Kandla Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or. penalties, if any imposed in these proceedings.

2.1.2. The Additional / Joint Commissioner of Customs, Custom House, Port Road, Kakinada - 533007, within 30 days of receipt of the above notice as to why:-

- (i) Differential duty amounting to Rs. 36,837/- (Rupees Thirty Six Thousand Eight Hundred Thirty Seven Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 17,145/- (Rupees Seventeen Thousand One Hundred Forty Five Only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.

- (v) amount of Rs.59,508/- (Rupees Fifty Nine Thousand Five hundred Eight Only) voluntarily deposited by M/s CFCL during the course of investigation, (on account of clearances through Kakinada Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings.

2.1.3. The Additional / Joint Commissioner of Customs, Vizag Custom House, Port Area, Vishakapatnam, Andhra Pradesh- 530035, within 30 days of receipt of the above notice as to why:-

- (i) Differential duty amounting to Rs. 35,920/- (Rupees Thirty Five Thousand Nine Hundred Twenty Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 13,105/- (Rupees Thirteen Thousand One Hundred Five Only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.
- (v) amount of Rs. 54,413/- (Rupees Fifty Four Thousand Four Hundred Thirteen Only) voluntarily deposited by M/s CFCL during the course of investigation, (on account of clearances through Vizag Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings.

2.1.4. The Additional / Joint Commissioner of Customs, Customs Division Surat, 2nd Floor Urmi Complex, Nr. Sanghvi Hospital, Sagrampura, Surat 395004 within 30 days of receipt of the above notice as to why:-

- (i) Differential duty amounting to Rs. 3245/- (Rupees Three Thousand Two Hundred Forty Five Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 1328/- (Rupees One Thousand Three Hundred Twenty Eight only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.

- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962
- (v) amount of Rs. 5060/- (Rupees Five Thousand Sixty Only) voluntarily deposited by M/s CFCL during the course of investigation, (on account of clearances through Hazira Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings

DEFENCE REPLY AND PERSONAL HEARING

3. Pursuant to the issuance of Show Cause Notice to M/s Chambal Fertilisers & Chemicals Ltd., Kota (Rajasthan), they, vide their letters dated 28.02.2019 addressed to respective Adjudicating Authorities, have sought to conclude the proceedings in terms of Section 28(6) of the Customs Act, 1962. The Deputy Director, DRI, MZU, Mumbai vide letter dated 12.03.2019 have also informed to all four adjudicating authorities that during the course of investigation, the noticee had paid the entire duty demand along with interest. Further, the noticee during the course of investigation, had also paid 15% of the duty amount, towards penalty, as provided under Section 28(5) *ibid*, and vide their letter dated 18.01.2018 had stated that they would seek closure of the proceedings in terms of Section 28(6) *ibid*, on receipt of the SCN. M/s. CFCL, vide their letters dated 28.02.2019, have *inter alia* submitted as follows:-

1. *They have paid the entire duty liability and interest, as demanded in the Show Cause Notice.*
2. *Non-inclusion of Lighterage / Barging charges and vessel demurrage charges in the assessable value during clearance was unintentional and it happened as they were unaware of the provisions of law.*
3. *They do not want to contest the Show Cause Notice. They have already mentioned this earlier vide their letter dated 18.01.2018 addressed to DRI.*
4. *Accordingly, as provided under Section 28(5) of the Customs Act, 1962, they have already paid 15% of duty amount towards penalty.*
5. *Therefore, as mentioned in Para-17 of the Show Cause Notice, they are exercising the option of closure of proceedings as provided for under Section 28(6) of the Customs Act, 1962.*
6. *They do not want any personal hearing in the matter.*
7. *They have also voluntarily paid the amount towards their liability beyond five years, which may be appropriated accordingly.*
8. *In view of the above, they have prayed that the proceedings in respect of the Show Cause Notice may please be concluded as provided under Section 28(6) of the Customs Act, 1962.*

DISCUSSION AND FINDINGS

4. Before going into the merit and demerit of the case, it is pertinent to mention here that the Board (Additional Director, Directorate of Revenue Intelligence) vide Notification No.39/2019-Customs(N.T.)/CAA/DRI) dated 29.08.2019 (case mentioned at Sr. No. 11 in the Table given in the notification) has appointed the Additional Commissioner of Customs, Kandla Custom House, Kutch as a Common Adjudicating Authority. Show Cause Notice in this case is answerable to the Joint/Additional Commissioner of Customs (i) Custom House Kandla (ii) Custom House, Port Road, Kakinada (iii) Custom House, Port Area, Visakhapatnam and (iv) Customs Division Surat, Sangampura, Surat. Further, the Deputy Director, DRI, MZU, Mumbai vide letter dated 12.09.2019 have also informed that the Joint/Additional Commissioner of Customs, Custom House Kandla has been appointed as the Common Adjudicating Authority in this case. Further, as they have already informed vide their letter dated 12.03.2019 that the noticee vide his letter dated 28.02.2019, addressed to respective Adjudicating Authorities, had sought to conclude the proceedings in terms of Section 28(6) of the Customs Act, 1962. Accordingly, the SCN is taken into consideration for adjudication.

5. I have carefully gone through the entire records of the case including the Show Cause Notice dated 15.02.2019, relied upon documents under the Show Cause Notice, facts of the case and the submissions made by M/s Chambal Fertilisers & Chemicals Ltd., Kota (Rajasthan). In the instant case, CFCL vide their letter dated 28.02.2019, addressed to respective Adjudicating Authorities, have requested to conclude the proceedings in terms of Section 28(6) of the Customs Act, 1962 and **they do not want personal hearing in the matter**, as they have voluntarily paid the entire amount of customs duty with appropriate interest and also paid an amount equal to 15% of duty amount towards penalty as provided under Section 28(5) of the Customs Act, 1962 during investigation. I find that during the course of investigation, CFCL, voluntarily deposited a total sum of Rs.46,89,185.00 towards differential customs duty, interest and penalty of 15% of the duty amount as provided under section 28(5) *ibid*, stating that they would seek closure of the proceedings in terms of Section 28(6) *ibid*, on receipt of Show Cause Notice. Custom House wise detail of above said payment is mentioned at para 10 of the Show Cause Notice. Thus, the principle of natural justice has been completed.

5.1. Further, I find that vide para 17 of the Show Cause Notice, CFCL, have been informed that, they have the right to opt for closure of these proceedings under section 28(6) of the Customs Act, 1962. As mentioned at para 7.6 of the Show Cause Notice, CFCL, vide their letters dated 18.01.2018, had informed that they have made payment of duty amount,

interest payable thereon under section 28AA of the Customs Act, 1962 and the penalty equal to fifteen percent of the duty in terms of section 28(5) of the Customs Act, 1962 and accordingly would seek closure of proceedings under section 28(6) of the Customs Act, 1962.

6. I find that issue in the present case pertains to short payment of customs duty on account of non-inclusion of certain elements of costs for arriving at the assessable value of the goods for the purpose of payment of customs duty in as much as CFCL had not taken in to account the barging /lighterage charges incurred towards transport of bulk from mother vessel at midstream/ anchorage to the landmass/wharf and also ship demurrage charges incurred on the chartered vessels in the assessable value for payment of duty. Thereby, they had contravened the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, read with Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Therefore, the goods should be considered to have been imported without payment of proper duty of Customs attracting provision of section 28 (4) of the Customs Act, 1962, for recovery of such duty short paid. Custom House wise Detail of differential duty is shown in Annexure A1(with respect to lighterage/barging) and Annexure B1(with respect vessel demurrage) to the Show Cause Notice, which is recoverable from the said importer under the extended period provisions as per Section 28(4) of the Customs Act, 1962. Accordingly, Show Cause Notice has been issued which shows Custom House wise detail of differential customs duty and made answerable to the adjudicating authorities of the respective Custom Houses. Detail of the same is give below:-

6.1. In respect of Custom House Kandla:-

- (i) Differential duty amounting to Rs. 7,31,639/- (Rupees Seven Lakh Thirty One Thousand Six Hundred Thirty Nine Only), as detailed in Annexure- A1 and Annexure-B1 to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 1,81,061/- (Rupees One Lakh Eighty One Thousand Sixty One Only), as detailed in Annexure- A1 and Annexure-B1 to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.
- (v) amount of Rs. 10,22,446/- (Rupees Ten Lakh Twenty Two Thousand Four Hundred Forty Six Only) voluntarily deposited by CFCL during the course of investigation, (on account of clearances through Kandla Port) should not be

appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings.

6.2. In respect of Custom House, Port Road, Kakinada:-

- (i) Differential duty amounting to Rs. 36,837/- (Rupees Thirty Six Thousand Eight Hundred Thirty Seven Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 17,145/- (Rupees Seventeen Thousand One Hundred Forty Five Only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.
- (v) amount of Rs.59,508/- (Rupees Fifty Nine Thousand Five hundred Eight Only) voluntarily deposited by CFCL during the course of investigation, (on account of clearances through Kakinada Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings.

6.3. In respect of Custom House, Port Area, Vishakapatnam, Andhra Pradesh:-

- (i) Differential duty amounting to Rs. 35,920/- (Rupees Thirty Five Thousand Nine Hundred Twenty Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 13,105/- (Rupees Thirteen Thousand One Hundred Five Only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962.
- (v) amount of Rs. 54,413/- (Rupees Fifty Four Thousand Four Hundred Thirteen Only) voluntarily deposited by CFCL during the course of investigation, (on account of clearances through Vizag Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings.

6.4. In respect of Customs Division Surat, 2nd Floor Urmi Complex, Nr. Sanghvi Hospital, Sagrampura, Surat:-

- (i) Differential duty amounting to Rs. 3245/- (Rupees Three Thousand Two Hundred Forty Five Only), as detailed in Annexure 'B1' to the above Notice, should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act, 1962.
- (ii) Interest payable of Rs 1328/- (Rupees One Thousand Three Hundred Twenty Eight only), as detailed in Annexure 'B1' to the above notice, should not be demanded and recovered under Section 28AA of the Customs Act, 1962.
- (iii) penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (iv) penalty should not be imposed on them under Section 114AA of the Customs Act, 1962
- (v) amount of Rs. 5060/- (Rupees Five Thousand Sixty Only) voluntarily deposited by CFCL during the course of investigation, (on account of clearances through Hazira Port) should not be appropriated towards the above demand of differential duty, interest and fine and/or penalties, if any imposed in these proceedings

7. Now, I, as a Common Adjudicating Authority, have to decide the issue for all adjudicating authorities of other Custom Houses to whom the Show Cause Notice was made answerable. The crux of the case is that customs duty had been short paid on the goods imported by CFCL, as the expenses incurred towards lighterage /barging charges, as well as vessel demurrage charges had not been included in the assessable value for payment of duty.

8. I find that CFCL, had contravened the provisions of Sections 14, 17 & 46 of the Customs Act, 1962, read with Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, by not declaring certain elements of costs for arriving at the assessable value of the goods for the purpose of payment of customs duty in as much as they had not accounted for barging /lighterage charges incurred towards transport of bulk cargo i.e. Mono Ammonium Phosphate (MAP), Di Ammonium Phosphate (DAP), Muriate of Potash, etc from mother vessel at midstream/ anchorage to the landmass/wharf and also ship demurrage charges incurred on the chartered vessels in the Assessable value for payment of duty.

9. I find that CFCL, submitted relevant import documents as well as the boat notes of respective shipments in case of lighterage and it was seen that during the period 2012-13

till 31.08.2017, a total quantity of 184603 MTs had been subjected to barging /lighterage, in case 22 shipments/vessels of bulk cargo consisting of Di Ammonium Phosphate (DAP), Muriate of Potash (MOP). The details of these consignments are as per **Annexure –A** to the Show Cause Notice. Likewise, in case of vessel demurrage charges, M/s CFCL, submitted relevant import documents along with the Credit notes issued by them to their overseas suppliers on account of demurrage charges paid by them. It was submitted by M/s CFCL that during the period 2010 to 2015, in case of 26 shipments of Di-Ammonium Phosphate (DAP), Muriate of Potash (MOP) and NPK cleared from various ports viz. Hazira, Kakinada, Kandla, Mundra and Vizag, they had paid demurrage charges. The details of these consignments are as per **Annexure –B** to the Show Cause Notice.

10. I find that CFCL, had discharged partial cargo in case of some of the bulk cargo consignments imported and cleared by them at Kandla Port, at midstream /anchorage by deploying barges i.e the cargo is unloaded from the mother vessel, which is anchored at midstream, into the barges and then the cargo is brought to the landmass /wharf by these barges. For this activity CFCL had employed M/s Rishi Shipping, Gandhidham, who had handled their cargo from midstream till landmass /wharf and that CFCL, had not included these barging / lighterage charges in the Assessable Value for payment of customs duty. Intelligence also further suggested that CFCL had incurred ship demurrage charges on the imports of bulk cargo at various ports and that they had not accounted for these charges in the assessable Value for payment of custom duty.

11. Further, I also find that the duty has been short paid as per detailed in **Annexure A2** (with respect to lighterage/barging) and **Annexure B2** (with respect vessel demurrage) to the Show Cause Notice for the period of beyond five years. The amount of differential duty for the goods imported beyond five years period, as detailed therein was not paid or short paid due to willful mis-statement and suppression of facts by CFCL. Section 28(4) of the Customs Act, 1962, provides that where an importer has by reasons of collusion, willful misstatement or suppression of facts, had not paid any duty which has not been levied or has been short levied, then the demand could be issued within five years from the relevant date. However, it does not bar voluntary deposit of self-admitted duty for any imports beyond five years to be adjusted for duty and interest leviable against the said imports.

12. I find that during investigation, CFCL, voluntarily deposited a total sum of Rs. 46,89,185/- (Rupees Forty Six Lakh Eighty Nine Thousand One Hundred Eighty Five Only) towards the differential duty, interest and penalty of 15% of the duty amount as provided for under Section 28(5) of the Customs Act, 1962. Further, vide their letter dated 28.02.2019, addressed to respective Adjudicating Authorities, they have requested for

closure of the proceedings in terms of Section 28(6) of the Customs Act, 1962 and they have also submitted that:-

- (i) They have paid the entire duty liability and interest as demanded in the SCN.
- (ii) Non-inclusion of Lighterage/Barging charges and vessel demurrage charges in the assessable value during clearance was unintentional and it happened as they were unaware of the provisions of law.
- (iii) They do not want to contest the show cause notice. They have already mentioned this earlier vide their letter dated 18.01.2018 addressed to DRI.
- (iv) Accordingly, as provided under Section 28(5) of Customs Act, 1962, they have already paid 15% of duty amount towards penalty.
- (v) Therefore, as mentioned in para-17 of SCN, they are exercising the option of closure of proceedings as provided for under Section 28(6) *ibid*.
- (vi) They do not want any personal hearing in the matter.
- (vii) They have also voluntarily paid the amount towards their liability beyond five years, which may be appropriated accordingly.
- (viii) In view of above, they have prayed that the proceedings in respect of the show cause notice may be concluded, as provided under Section 28(6) *ibid*.

13. I find that CFCL had worked out the duty payable by them on lighterage/ barging charges and demurrage charges on chartered vessels and informed the department vide their letter dated 16.11.2017 that they had voluntarily paid an amount of Rs. 22,65,562/- towards differential duty along with interest (duty payable Rs. 14,24,258/- and Interest Rs. 8,41,304/-. Total Rs. 22,65,562/-) payable on the lighterage/ barging charges with a penalty of Rs. 2,13,639/- being 15% of the duty amount (15% of Rs 14,24,258/-), as provided under Section 28(5) of Customs Act, 1962. They had also voluntarily paid an amount of Rs. 20,50,525/- towards differential duty along with interest (duty payable Rs. 10,63,062/- and Interest Rs 9,87,463/- Total Rs. 20,50,525-) payable on the vessel demurrage charges and penalty of Rs. 1,59,460/- being 15% of the duty amount (15% of Rs 10,63,062/-), as provided for under Section 28(5) *ibid*.

Thus, in view of above, I find that in both the cases i.e. lighterage /barging charges as well as demurrage on chartered vessels, total amount of Rs.46,89,185/- towards the differential duty with interest and penalty had voluntarily been paid by CFCL which also includes Rs.35,47,759/- payable beyond five years period. The same is appropriated against the liability pertains to the earlier period as requested by CFCL vide their letter dated 28.02.2019.

14. I further find that in the SCN, there is proposal for appropriation and adjustment of the entire amount of Rs.11,41,427/- paid by the importer towards differential duty, interest and penalty for five years period . Port-wise detail of the same is reproduced as under:-

Port	Customs Duty (Rs.)	Interest (Rs.)	Penalty i.e.15% of duty amt. (Rs.)	Total amount paid (Rs.)	Details shown in Annexure to the SCN
Kandla	731639	181061	109746	1022446	Annexure 'A1' & 'B1'
Kakinada	36837	17145	5526	59508	Annexure 'B1'
Vizag	35920	13105	5388	54413	Annexure 'B1'
Hazira	3245	1328	487	5060	Annexure 'B1'
	807641	212639	121147	1141427	

It is observed that the importer M/s. CFCL accepting and admitting their omission, have deposited the aforesaid amount of Rs.11,41,427/- towards their customs duty liability with applicable interest thereupon and penalty after initiation of investigation by DRI. They did not come forward to pay such duty voluntarily on their own. Had the DRI not investigated the matter, the said duty evasion would have remained undetected due to suppression of facts by them. Thus, considering the facts available on record, the said amount of Rs.11,41,427/- paid by the importer M/s. CFCL as detailed in above table are liable for appropriation and adjustment towards payment of such customs duty, interest and penalty.

15. I find that in the show cause notice in addition to demand of differential duty and interest, imposition of penalty under Section 114A of the Customs Act, 1962 and under Section 114AA ibid has also been proposed. Whereas, CFCL had admitted their mistake and voluntarily worked out and paid the duty payable by them and informed the department vide their letter dated 16.11.2017 as provided under Section 28(5) of Customs Act, 1962. Further, vide their letter dated 28.02.2019, addressed to respective Adjudicating Authorities, they have requested to conclude the proceedings in terms of Section 28(6) of the Customs Act, 1962. Therefore, no penalty under Section 114A and 114AA of the Customs Act, 1962 is imposable.

16. Before reaching at the final conclusion, I would like to deal with the issue of deemed conclusion as sought by CFCL(noticee), which has been envisaged under Section 28(6)(i) of the Customs Act, 1962. Vide section 22 of the Taxation Laws (Amendment) Act, 2006 (29 of 2006) a provision was inserted in the Section 28 of the Customs Act, 1962 to provide for deemed conclusion of proceedings once the person to whom a demand of duty notice has been issued has paid all dues. Subsequently vide Finance Act, 2011; section 28 was substituted with a new Section 28. The provisions governing deemed conclusion of proceedings are stated in proviso to sub-section (2) and in clause (i) of sub-section (6) respectively of the present Section 28 of the Customs Act, 1962. The text of the two provisions is reproduced below: Proviso to sub-section (2) :-

"Provided that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of subsection (1) shall be deemed to be concluded" Clause (i) of sub-section (6) "that the duty with interest and penalty has been paid in full, then, proceedings in respect of such person or other persons to whom the notice is served under subsection (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein"

The quantum of penalty amount to be paid under the said deemed conclusion proceedings was retained at 25% of the duty amount. However, vide Finance Act, 2015 the penalty payable under Section 28 was reduced to 15%.

Further, the Board vide Circular No.11/2016-Cus dated 15.03.2016 at para (6) clarified that the cases involving seizure of goods under Section 110 of the Customs Act, or cases where confiscation provisions under sections 111, 113, 115, 118, 119, 120 and 121 are invoked, would be out of purview of this Circular.

17. I find that in the present SCN the provisions of Section 111 for confiscation of the goods have not been invoked as the goods were not available for confiscation. Moreover, as mentioned at Para-17 of the SCN, CFCL have been informed that they have the right to opt for closure of these proceedings under Section 28(6) of the Customs Act, 1962. Therefore, I am inclined to consider the noticee's request to conclude the proceedings initiated under the present SCN in terms of Section 28(6) of the Customs Act, 1962. Further, while passing the order, I also rely on the following case laws:-

(a) 2018(362) E.L.T. 316(Tri. Delhi) in the case of Rohit Sakhuja Vs. C.C.(ICD TKD) (Import), New Delhi.

(b) Commissioner Vs. Finesse Creation Inc – 2010(255) E.L.T.A120(S.C.)

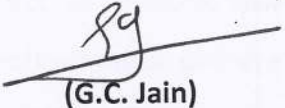
18. In view of the foregoing discussions and findings, I pass the following order:-

ORDER

M/s CFCL has paid the entire differential duty along with interest demanded under Section 28(4) and Section 28AA, respectively, of the Customs Act, 1962, vide the present Show Cause Notice and they have also paid the penalty equal to fifteen per cent of the duty demanded in the notice as provided under Section 28(5) of the Customs Act, 1962, therefore, no penalty under Section 114A and Section 114AA of the Customs Act, 1962 is

imposable. I order to confirm the demand of duty and interest demanded in the SCN and order to appropriate the total amount of Rs. 11,41,427/- paid by M/s CFCL against duty of Rs. 8,07,641/-, interest of Rs. 2,12,639/- and penalty of Rs. 1,21,147/-. Hence, the proceedings initiated in the Show Cause Notice F. No. DRI/MZU/D/INT-35/2017(Chambal) dated 15.02.2019 against M/s. Chambal Fertilisers & Chemicals Ltd., Gadepan, Dist. Kota (Rajasthan) having IEC No. 1390000028 are hereby ordered to be concluded in terms of the provisions of Section 28(5) and 28(6) of the Customs Act, 1962.

19. This order is issued without prejudice to any other action that may be taken against the noticee or against any other person(s) mentioned in the notice, under the provisions of the Customs Act, 1962, and / or any other law for the time being in force, in the Republic of India.


(G.C. Jain)
Additional Commissioner,
Custom House, Kandla
Dated: 23.01.2020

F.No. S/10-80/Adj/ADC/CFCL/18-19

To,
M/s Chambal Fertilisers & Chemicals Ltd,
Gadepan, Dist. Kota,
Rajasthan -325208.

Copy to:

- 1) The Chief Commissioner (in –situ), Customs, Kandla.
- 2) The Additional / Joint Commissioner of Customs, Custom House, Port Road, Kakinada – 533007.
- 3) The Additional / Joint Commissioner of Customs, Vizag Custom House, Port Area, Vishakapatnam, Andhra Pradesh- 530035
- 4) The Additional / Joint Commissioner of Customs, Customs Division Surat, 2nd Floor Urmi Complex, Nr. Sanghvi Hospital, Sagrampura, Surat 395004.
- 5) The Additional Director, DRI, MZU, 13, Vithaldas Thackersey Marg, New Marine Lines, Mumbai – 400 020.
- 6) The Deputy Commissioner (RRA) Customs Kandla.
- 7) The Assistant Commissioner (Recovery), CH, Kandla.
- 8) Guard File