



OFFICE OF THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE KANDLA
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A	File No.	S/10-82/Adj/COMMR/Sonam/2018-19
B	Order-in-Original No.	KND-CUSTM-000-COM-16-2019-20
C	Document Identification No.	20200171ML00006R3CA3
D	Passed by	Shri Sanjay Kumar Agarwal Pr. Commissioner, Custom House, Kandla.
E	Date of order	28.01.2020
F	Date of issue	28.01.2020
G	Show Cause Notice Nos. & Date	Show Cause Notice F.No.DRI/JRU/INQ-9/2008 dated 09.12.2009 issued by Additional Director General, DRI Zonal Unit, Ahmedabad
H	Noticee(s)/ Co-Noticee(s)	1. M/s.Sonam Industries, Morbi 2. Shri Jayesh C. Shah, Partner of M/s.Sonam Industries, Morbi

१. इस मूल आदेश की प्रति निःशुल्क प्रदान की जाती है।

1. This Order-in-Original is granted to the concerned free of charge.

२. इस मूल आदेश से अपने को व्यथित महसूस करने वाला कोई भी व्यक्ति, सीमा शुल्क अधिनियम १९६२ की धारा १२९ए(१) (ए) और सीमा शुल्क (अपील) नियमावली, १९८२ के नियम ६(१) के तहत, प्रपत्र सीए-३ में, चार प्रतियों में

सीमा शुल्क, केन्द्रीय उत्पाद एवं सेवा कर अपीलीय न्यायाधिकरण,
वेस्ट जोनल बेंच, दूसरी मंजिल, बाहुमली भवन असारवा,
गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद-३८०००४

के समक्ष अपील कर सकता है।

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

Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench,
2nd Floor, Bahumali Bhavan Asarwa,
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

३. इस तरह की अपील इस मूल आदेश को सौंपे जाने की तारीख से ६० दिन के अंदर दायर कर दी जानी चाहिए।

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

४. ऐसे मामलों में जहां ड्यूटी, ब्याज, जुर्माना अथवा दंड की मांग रू.५/- लाख (रूपए पाँच लाख) या उससे कम की गई है ऐसे मामले में अपील रू.१०००/- के शुल्क के साथ; जहां ड्यूटी, ब्याज, जुर्माना अथवा दंड की मांग रू.५/- लाख (रूपए पाँच लाख) या उससे अधिक लेकिन रू.५०/- लाख (रूपए पचास लाख) कम की गई है ऐसे मामले में अपील रू.५०००/- के शुल्क के साथ; और ड्यूटी, ब्याज, जुर्माना अथवा दंड की मांग रू.५०/- लाख (रूपए पचास लाख) या उससे अधिक की गई है ऐसे मामले में अपील रू.१००००/- के शुल्क के साथ होनी चाहिए। यह शुल्क जहां बेंच स्थित हो ऐसी किसी भी राष्ट्रीयकृत बैंक की शाखा पर तैयार किया गए बैंक ड्राफ्ट के माध्यम से ट्रिब्यूनल की बेंच के सहायक रजिस्ट्रार के पक्ष में भुगतान करना होगा।

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

५. अपील न्यायालय शुल्क अधिनियम १८७० के मद-६, अनुसूची-I के तहत रू.५/- (रूपए पाँच) के स्टाम्प के साथ होनी चाहिए और जहां इस मूल आदेश की प्रति संलग्न की गई हो ऐसे मामलों में रू.०.५०/- (रूपए पचास पैसे) के स्टाम्प के साथ होनी चाहिए।

5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act'1870.

६. ड्यूटी, जुर्माना अथवा दंड आदि के भुगतान के प्रमाण अपील मेमो के साथ संलग्न किया जाना चाहिए।

6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.

७. अपील जमा करते समय, सीमा शुल्क (अपील) नियमावली, १९८२ और सेसटेट (प्रक्रिया) नियम १९८२ का सभी प्रकार से पालन किया जाना चाहिए।

7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

BRIEF FACT OF THE CASE:

An intelligence was received that M/s.Sonam Industries situated at 2, Lati Plot, Time Tower, Morbi (for the sake of brevity hereinafter referred to as "M/s.Sonam") having IEC Number 2405001411 were importing Compact Fluorescent Lamps (CFL) from China, in semi-knock down condition (SKD) in different consignments at different ports by declaring the same as components of CFL, to evade Anti dumping duty (ADD) leviable under the Customs Notification No.138/2002-Cus dated 10.12.2002.

2 During the course of investigation, Officers of DRI Regional Unit, Jamnagar had summoned Shri Jayesh Chhabildas Shah, Partner of M/s.Sonam to give statement and to produce the import documents.

2.1 DRI Officers had recorded statement of Shri Jayesh Chhabildas Shah, partner of M/s.Sonam under Section 108 of the Customs Act'1962 wherein he, *interalia* admitted/deposed that,-

- i. *He was one of the Partners of M/s. Sonam.*
- ii. *They had imported only two consignments of the components of CFL, one consignment at Kandla and the second consignment at Mundra during July, 2005.*
- iii. *Their firm was engaged in the assembling of Compact Fluorescent Lamp (CFL) which was non-functional since beginning of the year 2006.*
- iv. *He further stated that he and his other Partner Shri Ambarambhai Bhalodia visited China in February, 2005 and enquired about the suppliers of components of CFL in Shenzhen province of China and finally placed order with M/s.Shenzhen Ku-Wan Enterprises Co. Ltd., China.*
- v. *They negotiated the price of components individually i.e. glass tube (with plastic base), Populated Printed Circuit Board (PCB) and lamp holder (with metal cap).*
- vi. *Produced documents of importation of two consignments of CFL from the above said supplier under Bills of Entry No.1357/07.07.2005 (Mundra) and 006990/12.07.2005 (Kandla) and assured to produce the original documents which were filed with the customs authorities at the time of import within a week's time.*
- vii. *On being asked about the copy of the contract No.KW050122P dated 22.03.2005 referred in the packing list of B/E No.1357/07.07.2005 and commercial invoice of the goods imported under B/E No.006990/12.07.2005 at Kandla, he assured to produce the same within a week's time.*
- viii. *As regards terms and conditions of payment, he submitted that part payment was to be made in advance and the balance amount was to be paid against the documents; that he would check books of accounts and furnish the details later while producing the import documents.*
- ix. *On being asked about the assembling process of the components of CFL to make complete CFL, he deposed that he did not remember the assembling process in detail but assured to confirm the same and present the details of the assembling undertaken at their unit at the earliest.*
- x. *He also stated that he did not give any specific instruction to the overseas supplier to supply the goods at any particular port but conveyed them that either Kandla or Mundra port would be convenient;*
- xi. *that he did not know the meaning of SKD/CKD condition;*
- xii. *that they did not procure any components of CFL from local market for making complete CFL.*

- xiii. *On further being asked, he stated that they used to exchange the correspondence through e-mail with the suppliers of China and assured to produce the copies of e-mails along with import documents.*
- xiv. *He thereafter submitted copy of his passport and a copy of invoice No.KW 05 E 0122P dated 25.04.2005 filed with the B/E No.6990/12.07.2005 under letter dated 23.09.2008.*

2.2 Further, statement of Shri Jayesh Chhabildas Shah, partner of M/s.Sonam was recorded on 19.11.2008 under Section 108 of the Customs Act'1962 and produced following documents (as below) duly attested by him during the course of recording statement.

- i. *Submitted the following documents:*
 1. *B/E No.1357/07.07.2005 (triplicate copy)*
 2. *B/L bearing No.NCLCWN629116 dated May/18/05.(RUD-4)*
 3. *Commercial invoice No.KWO5E0122T dated 25.04.2005 (Xerox copy) (RUD-5)*
 4. *Packing List of inv.No.KWO5E0122T dated 25.04.2005 (Xerox copy) (RUD-6)*
 5. *Packing list bearing contract No.KWO5E0122P dated 22.03.2005 indicating item No/specs, NW., G.W., Qty/Ctn, Total Qty, Total Ctns, Total N.W., Total G.W., package and Measure (Xerox copy)*
 6. *B/E No.6990/12.07.2005 (triplicate copy)*
 7. *B/L bearing No.HLCUSHK050514929 dated 7.05.2005 (RUD-9)*
 8. *Commercial invoice No.KWO5E0122P dated 25.04.2005 (Xerox copy)*
 9. *Packing list of invoice No.KWO5E0122P dated. 25.04.2005 (Xerox copy).*

In his statement, he interalia stated that:

- ii. *On being asked about the other documents which he assured to produce in his earlier statement, he stated that original invoice No.KWO5E0122P dated 25.04.2005 filed with the B/E No.6990/12.07.2005 was misplaced; hence it could not be presented; that regarding copy of contract No.KWO5E0122P dated 22.03.2005 referred in the packing list of B/E No.1357 dated 07.07.2005, it was verified from their records and confirmed that there was no written contract made between them and the supplier and it referred to the Commercial invoice number only.*
- iii. *As regards print-outs of the e-mail correspondences exchanged between the supplier and M/s.Sonam Industries, Morbi, he informed that no such print-outs were found in their office files and in the original files of the Bills of Entry; that due to passage of time he didn't exactly remember whether e-mails were exchanged for import of components of CFL at the material time or otherwise.*
- iv. *He further submitted that no written order was placed for the consignments of CFL covered under the above referred two Bills of Entry as the order was placed in person while on tour.*
- v. *During the course of recording statement dated 19.11.2008, he also produced the statement of account of IndusInd Bank, Morbi for the relevant period, describing therein transactions made by M/s.Sonam Industries, Morbi from the company's current account duly attested by him.*
- vi. *He further explained that one time payment made to M/s.Shenzhen Ku-Wan Enterprises Co. Ltd., China is USD 65722 in respect of the components of CFL imported under above referred two Bs/E; that there were two invoices; one for USD 35987 (B/E No.6990/12.07.2005) and the other for USD 29735 (B/E*

No.1357/07.07.2005); that the payment was released against both the invoices on 07.07.2005.

- vii. On being asked about the assembling process of CFL in their unit, he deposed that the CFLs were assembled by soldering four wires of the tube to the PCB and two wires to the lamp holder at the respective places in the PCB; that thereafter, the said three components were press fitted by jigs and tools; that then the same were packed in the respective paper boxes according to their wattage. He further admitted that it is true that by assembling the three components mentioned above, a CFL can be manufactured; that however, before making it marketable, it has to pass through various manufacturing and testing process, such as, soldering of PCB with holder and tube with PCB and also testing of lux-lumens, wattage, operating voltage, ampere rating etc.; that even before assembling of above said three components, each of them was physically inspected and the faulty parts were rejected before assembling.
- viii. On further being asked, he admitted that except the components imported by them, they did not require any other imported or indigenous component/part for assembling the CFL in their unit; that their brand name was "Sonani" and the same along with technical specifications of the CFL was being printed/embossed on the plastic body of CFL (lamp Holder) by the supplier before exporting the same to India. To a specific question that mere assembling of all the three components i.e Populated PCB, Lamp holder with wire and glass tube with base, an article emerges, which is consisting of all characteristics of a complete CFL, he replied in affirmative. On further being asked as to whether he agreed that M/s.Sonam Industries had imported CFL in semi knock down condition (SKD) under the guise of import of components from China under bills of entry nos.1357/07.07.2005 and 6990/12.07.2005, as was evident from the process of assembling of CFL in their factory and from the investigation so far conducted since no other part/ component was required to assemble a CFL being marketed by their firm and thus the components were classifiable as CFL under CTH No.85393110, he stated that he did not agree to the above, as what they imported, were the components of CFL and not complete CFL; that as such, the same could not be classified under CTH No.85393110; that since they had imported glass with base at Mundra and Populated PCB + lamp holder with wire at Kandla under two separate Bills of Entry at different times, they thought that it cannot be said to be an import of complete CFL in SKD condition; that it was further clarified that before making the assembled CFL marketable, it had to pass through certain electrical tests of lux-lumens, wattage, operating voltage, ampere rating, etc. It appeared from the documents produced that the glass tube covered under B/E 1357/07.07.2005 were classified under CTH No.9405910 and PCB + lamp holder covered under B/E No.6990/12.07.2005 were classified under CTH No.85393190 instead of classifying the same as CFL under CTH No.85393110.
- ix. On being asked about it, Shri Jayesh C. Shah explained that it was their first and last import of the components of CFL; that before filing the Bills of Entry, they inquired through the local trade circle and were given to understand that the glass tubes were classifiable under CTH No.9405910 and PCB + lamp holder were classifiable under CTH No.85393190, and accordingly, they advised their CHA to file the Bills of Entry.
- x. On further being questioned whether he knew that Anti-Dumping Duty was leviable on import of CFL from China, except from M/s.Philips & Yarning Lighting Co. Ltd., China at the material time under Notification No.138/2002-Cus dated 20.12.2002, he replied that as far as what he learnt from the local trade circle, was that Anti Dumping Duty was leviable only on import of complete CFL from China

and not on the components/parts of CFL. He was then shown Govt. Publication of the Customs Tariff Act'1975. Rule 2(a) of General Rules for Interpretation of Customs Tariff Act'1975, reads as under:

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

2.3 In his further statement dated 30.09.2009, Shri Jayesh C. Shah amongst other things, inter alia, stated that he had seen and read both his previous statements dated 14.08.2008 and 19.11.2008 and confirmed the contents deposited therein; on being asked as to why manual B/E was filed while the EDI system was operative in respect of documentation of import and export from Kandla and Mundra, he stated that it was learnt from his CHA, that due to problems in EDI system, Custom House used to receive manual and EDI B/E till 2006 and hence, the subject B/E was filed manually and also added that even as at present time, in case of system failure, Custom House is receiving manual Bills of Entry; that on further being questioned whether he had imported CFL/components of CFL except for the goods covered under B/E No.6990/12.07.2005 at Kandla and B/E No.1357/07.07.2005 at Mundra at any ports of India and whether B/E was filed either manually or through EDI, he stated that except for the above two consignments they have not imported the goods in question at any other ports. He further assured that if any other imports of CFL/components of CFL in the name of M/s.Sonam Industries were detected by the department in future, they would be liable for appropriate penal action for the same.

3. M/s.Sonam had imported the following components of CFL under the cover of Bills of Entry as shown under,-

Imports at Kandla Port

Sr. No.	Bill of Entry No.& Date	Description of the Goods	CTH	Qty in Pcs	Name of the Supplier/Exporter
1	6990 12.07.2005	1 pcs Walt Test Machine, PCB+Holder, parts of Holder	85399090	113000	Shenzhen Ku-Wan Enterprises Co. Ltd., Shenzhen, China

Imports at Mundra Port

Sr. No.	Bill of Entry No.& Date	Description of the Goods	CTH	Qty in Pcs	Name of the Supplier/Exporter
1	1357 07.07.2005	Glass Tubes for CFLs of different Watts	94059100	88000	Shenzhen Ku-Wan Enterprises Co. Ltd., Shenzhen, China

4. Scrutiny of the documents produced by Shri Jayesh C. Shah, Partner of M/s.Sonam Industries, Morbi revealed that M/s.Sonam had imported so called CFL parts under the cover of two Bills of Entry No.6690/12.07.2005 & 1357/07.07.2005 respectively. PCB + lamp Holder were imported under B/E No.6690/12.07.20005 and glass tubes were imported under B/E No.1357/07.07.05. Shri Jayesh C. Shah, Partner

had admitted in his statement dated 19.11.2008 that no other components were required to assemble a complete CFL and the CFLs so assembled were marketed in their brand name i.e. "Sonam".

5. It is alleged that CFL imported in SKD (unassembled condition) which were used for manufacture of CFL were chargeable to Anti Dumping Duty in view of the Notification No.138/2002-Cus dated 10.12.2002, read with Rule 2(a) of the General Rules for the Interpretation to the First Schedule – Import Tariff. Thus, it appeared that M/s.Sonam placed order for import of complete CFL in SKD condition viz. (i) Glass Tube and (ii) PCB + Holder.

5.1. It is evident from the depositions of Shri Jayesh C. Shah, Partner of M/s.Sonam, recorded under Section 108 of the Customs Act'1962 that they assembled CFL by using the parts namely Glass Tube with base and PCB with metal cap, which were imported by them, by mere soldering of wire and press assembling to get the CFL operational. Even the logo of their brand name and technical specifications of each CFL was pre-printed by the supplier of China before shipment of so called components. It is also revealed that the said firm had been adopting the practice for placing order for import of complete CFL in SKD condition viz. (i) Glass Tube and (ii) PCB + holder, with intention to evade Anti Dumping duty, by adopting fraudulent modus operandi and had imported glass tubes at Mundra port and PCB + holder at Kandla from the same supplier of China, so that the Customs authorities may not be able to detect import of CFL in SKD condition.

6. M/s.Sonam had adopted fraudulent modus operandi and thus suppressed the facts from the Customs authorities at Kandla & Mundra about their import of CFL in unassembled SKD condition, and thereby fraudulently imported 88000 units of CFL in unassembled SKD condition and classified as parts/components of CFL under CTH 85399090/ 94059100. Thus, they had imported the impugned goods by splitting them into two consignments at different ports. Accordingly, M/s.Sonam had suppressed the material facts that the import of components was nothing but import of CFL in SKD condition.

7. In view of the above, it appeared that M/s.Sonam had imported CFL in SKD condition by splitting the consignments and importing glass tubes at Mundra and PCB + Holders at Kandla Port and mis-declared the same as components of CFL. The said import of CFL in SKD condition is nothing but import of CFL falling under CTH No.85393110 as per Rule 2(a) of GIR, as simple assembling of these components make a complete CFL, which do not require any additional part/component. Even their brand name "Sonam" and wattage description required for marketing that CFL in market, were also pre-printed by exporter in China. The above said fraudulent modus operandi was adopted by M/s.Sonam with the malafide intention of avoiding detection of import of CFL in SKD condition by Customs authorities and to evade the payment of Anti-Dumping Duty of Rs.90,38,280/- which was recoverable from them, as per Notification No.138/2002-Cus dated 10.12.2002.

8. M/s.Sonam had thus acted in conscious disregard to their statutory obligations and deliberately suppressed the material facts as regards to correct description and classification of aforesaid goods, and they adopted the fraudulent modus operandi to

import 88000 of CFL in SKD condition from two different ports i.e. Mundra and Kandla. For this act and omission on the part of M/s.Sonam made them liable for penalty under Section 114 A of the Customs Act'1962 besides penalty under section 112(a) of the Customs Act'1962.

9. In terms of Section 46(4) of the Customs Act'1962, the importer while presenting a bill of entry shall, at the foot thereof, make and subscribe to a declaration as to the truth of the contents of such bill of entry relating to the imported goods. However, the importer had mis-declared the goods in the Bills of Entry with regard to description and classification as they imported CFL in SKD condition between two ports by mis-declaring the same as components of CFL falling under CTH 85399090 and 94059100, and thereby contravened the provisions of Section 46 of the Customs Act'1962. Further, M/s.Sonam, with *malafide* intention, by adopting the above said fraudulent modus operandi, evaded payment of Anti-Dumping Duty, which was leviable on 88000 pieces of CFL imported in the SKD condition. This act of omission or commission on the part of M/s.Sonam had rendered the said 88000 pcs of CFL valued at Rs.1,20,45,000/- (imported at Kandla vide B/E No.6690/12.07.2005 and at Mundra vide B/E No.1357/07.07.2005) in SKD condition liable for confiscation under the provisions of Section 111(m) of the Customs Act'1962.

10. It is evident that the orders were placed by the importer for import of CFL in SKD condition with the Chinese supplier by M/s.Sonam. Perusal of commercial invoice raised by the supplier company i.e. M/s.Shenzhen Ku-Wan Enterprises Co. Ltd., China revealed that both the consignments of so called parts and components of CFL, were consigned under one invoice, split into two. The consignment of glass tubes for CFL was imported at Mundra vide B/E No.1357/07.07.2005, for which invoice No.KW05E0122T dated 25.04.2005 was raised by the above supplier. The consignment of PCB + holder for CFL was imported at Kandla vide B/E No.6990/12.07.2005 which was covered under invoice No.KWO5E0122P dated 25.04.2005. This clearly indicates that invoice No.KWO5E0122 dated 25.04.2005 was split into two parts, one for glass tubes and the other for PCB + holder. Thus, it transpired beyond doubt that the importer had imported CFL in SKD condition under the guise of components in a systematic fraudulent manner with the help of the supplier to evade payment of appropriate Anti Dumping Duty. Shri Jayesh C. Shah appeared to have entered into a contract No.KWO5E0122P dated 22.03.2005 with the supplier and had also exchanged e-mails of the same. He, vide his statement dated 14.08.2008, had assured to produce the same. However, he failed to produce the above documents. He, thus, willfully suppressed the vital evidence, which would have otherwise proved beyond doubt that the import of CFL was in SKD condition. Because of the suppression of this material fact with an intention to evade payment of duty on the part of M/s.Sonam, proviso to Section 28(1) of the Customs Act'1962 squarely attracted for invoking the extended period.

11. Shri Jayesh C. Shah, Partner of M/s.Sonam, was concerned in taking decision as regards placing of orders with the Chinese supplier for glass tube and PCB + holder for CFL. He was, prima facie, the person responsible for the affairs of the company in relation to the import of the impugned goods at the material time, and CFL in SKD condition were imported at Kandla & Mundra. Thus, it is evident that Shri Jayesh C.

Shah was knowingly concerned himself in mis-representation of the facts to the Customs authorities as regards description, classification of the subject goods and declaring them as components of CFL. He was knowingly concerned with the fraudulent import of goods in question and he was the main person/brain behind, in adopting the said fraudulent modus operandi for avoiding the detection of import of CFL in SKD condition by the Customs authorities and mis-classifying the same under CTH 85399090 with the intention to evade the Anti-Dumping Duty payable on CFL imported in SKD condition by M/s.Sonam. The goods were classifiable under Tariff Heading 85393110. In the light of facts and circumstances as discussed herein above, Shri Jayesh C. Shah was liable to penal action under the provisions of Section 112(a) of the Customs Act'1962.

12. In view of the above, Show Cause Notice F.No.DRI/JRU/INQ-9/2008 dated 09.12.2009 had been issued by the Additional Director General, DRI Zonal Unit, Ahmedabad, calling upon M/s.Sonam Industries situated at 2, Lati Plot, Time Tower, Morbi to show cause to the Commissioner of Customs, Custom House, Kandla, as to why:

- (i) 88000 pcs of CFL totally valued at Rs.1,20,45,000/- imported and already cleared by them at Kandla & Mundra ports under the cover of Bills of Entry No.6690/12.07.20005 & 1357/07.07.05, should not be held liable for confiscation under Section 111(m) of the Customs Act'1962. Since, the goods are not available for confiscation why fine in lieu of confiscation should not be imposed upon them under Section 125 of the Customs Act'1962.
- (ii) Classification of 88000 pcs of CFL imported and cleared by them under the cover of Bills of Entry No.6690/12.07.20005 & 1357/07.07.05 should not be rejected and re-classified under CTH 85393110 in terms of Rule 2(a) of General Rules for Interpretation of Customs Tariff Act'1975;
- (iii) Anti Dumping Duty of Rs.90,38,280/- (Rupees Ninety Lakh Thirty Eight Thousand and Two Hundred Eighty only) as detailed in Annexure 'A' to the show cause notice, should not be demanded and recovered from them under the proviso to Section 28(1) of the Customs Act'1962, read with Section 9A(8) of the Customs Tariff Act'1975.
- (iv) Interest should not be recovered from them under Section 28AB of the Customs Act'1962, read with Section 9A(8) of the Customs Tariff Act, 1975.
- (v) Penalty should not be imposed upon them under Section 114A of the Customs Act'1962, read with Section 9A(8) of the Customs Tariff Act'1975.
- (vi) Penalty should not be imposed upon them under Section 112(a) of the Customs Act'1962, read with Section 9A(8) of the Customs Tariff Act'1975.

12.1 Further, the above Show cause notice dated 09.12.2009 also proposed to impose penalty under Section 112(a) of the Customs Act'1962, read with Section 9A(8) of the Customs Tariff Act'1975, upon Shri Jayesh C. Shah, Partner of M/s.Sonam.

APPOINTMENT OF COMMON ADJUDICATING AUTHORITY (CAA):

13. In the instant case, the imports were effected through Kandla & Mundra Ports. Therefore, clarification was sought as to whether the Commissioner of Customs, Kandla can adjudicate the case or otherwise. It was informed by Principal Additional Director General, DRI, AZU, Ahmedabad that the matter of appointment of Common Adjudicating Authority with the Principal Director General, DRI, New Delhi, who vide their letter F.No.DRI/HQ-CI-50D/Misc-104/2018-CI dated 19.09.2019 have clarified that in view of Para 2(e) of the CBEC Circular No.18/2015-Cus dated 09.06.2015 issued from F.No.450/145/2014-Cus.IV, the instance case continues to be single adjudicating authority case and falls outside the scope for appointment of CAA. The Commissioner of Customs, Kandla may proceed with the adjudication of the case. Accordingly, I take up the case for adjudication.

DEFENCE REPLY:

14. M/s.Sonam filed their written replies to the above referred SCN vide letters dated 05.06.2010 & 20.11.2019, inter-alia submitting that-

14.1.1 It needs to be appreciated that anti dumping duty is imposed by the Ministry of Finance, Department of Revenue, New Delhi, on recommendation of Designated Authority. So far as CFL (Compact Fluorescent Lamp) is concerned, following Notifications were issued by the Designated Authority wherein imposition of anti dumping duty was recommended. :-

Notification No & Date issued by DGAD	Product under Investigation.
Final Findings Notification No.34/1/2001- DGAD dated 14.11.2002.	“The product involved in the petition is Compact Fluorescent Lamp (CFL) originating in or exported from China PR and Hong Kong. The product is classified under Customs Tariff Heading 85.39.31 under HS Classification and 85.39.31.00 under Indian Customs Tariff Classification. The classification is, however, indicating only and in no way binding on the present investigation. The product covered under this investigation is Compact Fluorescent Discharge Lamps (CFL) with one or more glass tubes and which have all lighting elements, all electronic components and cap integrated in the lamp foot. Compact Fluorescent lamps without choke or ballast are also included.”
Final Findings Notification No.14/1/2007- DGAD dated 27.02.2009.	3. The product under consideration is Compact fluorescent lamps with or without ballast/control gear/choke, whether or not assembled, <u>either in CKD or SKD conditions</u> . Unassembled CFL without ballast/control gear/choke comprises of sealed tubular shell with or without lamp base. Finished compact fluorescent lamps are (i) integrated type with built in ballast / control gears / choke and (ii) non-integrated type without built in control gears/ballast/choke

14.1.2 Recommendations made in the above Final Findings Notifications issued by the DGAD were accepted and following Customs Notifications were issued by the CBEC:-

Notification issued by Designated Authority recommending therein imposition of anti dumping duty.	Notification issued by Ministry of Finance Department of Revenue, New Delhi, imposing definitive anti dumping duty.
Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002.	138/2002-Cus dated 10.12.2002.
Final Findings Notification No.14/1/2007-DGAD dated 27.02.2009.	55/2009-Cus dated 26.05.2009

14.1.3.1 Under Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002 Designated Authority has not recommended imposition of anti dumping duty on CFL in CKD / SKD condition, whereas in Final Findings Notification No.14/1/2007-DGAD dated 27.02.2009, Designated Authority has recommended imposition of anti dumping duty on CFL in CKD / SKD condition also.

14.1.3.2 Accordingly, on the basis of recommendation of Designated Authority under Notification No.138/2002-Cus dated 10.12.2002, Ministry of Finance, Department of Revenue has not imposed anti dumping duty on CFL in CKD / SKD condition whereas under Notification No.55/2009-Cus dated 26.05.2009, Ministry of Finance, Department of Revenue has imposed anti dumping duty on CFL in CKD / SKD condition.

14.1.3.3 Designated Authority is obliged to play within four walls of description of "PRODUCT UNDER INVESTIGATION" while recommending imposition of anti dumping duty. Once recommendation is accepted, Ministry of Finance and Department of Revenue, New Delhi, has no option, except to impose anti dumping duty on very product which has been recommended by the DGAD. No deviation is permissible.

Seen against above backdrop, conclusion is inescapable that;

1. Anti Dumping Duty is not imposable on CFL in CKD /SKD condition under Notification No.138/2002-Cus dated 10.12.2002 because it does not cover in its ambit CFL in CKD / SKD condition.
2. Anti Dumping Duty is imposable under Notification No.55/2009-Cus dated 26.05.2009 on CFL in CKD / SKD condition because it covers in its ambit CFL in CKD / SKD condition also.

14.1.4.1 Reliance by the department on paragraph No.2.1 of Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002 vide Paragraph No.7 of impugned Show Cause Notice is mis-placed and unwarranted.

14.1.4.2 Under paragraph No.2.1 of the above Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002 some participants in the investigation have expressed their views as under:

“The exporters are reported to be resorting to the following methods of circumvention:

(a) They export products in CKD / SKD condition. They export bulb / glass part and the choke / plastic parts separately, i.e. in the case of CFLs without choke, the glass tube and the cap are imported separately. Upon importation, the tube is inserted into the cap and the CFL without choke is ready for sale. Similarly, in the case of CFL with choke.”

14.1.4.3 Designated Authority was not impressed by the above views only because “Product under investigation” did not cover CFL in CKD / SKD condition. Designated Authority did not deem it fit to amend description of “Product under investigation”, so as to cover CFL in CKD / SKD condition also. It is also pertinent to note that “margin of dumping” was determined only in respect of complete CFL and not in respect of CFL in CKD / SKD condition.

14.1.4.4 In the same way, reliance was placed on Paragraph 3, 11.2 and 17 of the said notification, but none of the paragraph refers components of CFL but refers only complete CFL.

14.2 Complete, ready-to-use CFL alone is liable to Anti Dumping Duty. ---
Parts / Components of CFL are not liable to Anti-Dumping Duty.

14.2.1 The Central Government in exercise of power conferred under Section 9A(1) and 9A(5) of the Customs Tariff Act'1975, had issued Notification No.138/2002-Cus dated 10.12.2002. This Notification was issued consequent to the final findings of Designated Authority as published in the Gazette dated 14.11.2001. In the Intimation Notification, Preliminary Notification and Final Findings Notification, the product has been described as under:-

“The product involved in the petition is Compact Fluorescent Lamp (CFL) originating in or exported from China PR and Hong Kong. The product is classified under Customs Tariff Heading 85.39.31 under HS Classification and 85.39.31.00 under Indian Customs Tariff Classification. The classification is, however, indicating only and in no way binding on the present investigation. The product covered under this investigation is Compact Fluorescent Discharge Lamps (CFL) with one or more glass tubes and which have all lighting elements, all electronic components and cap integrated in the lamp foot. Compact Fluorescent lamps without choke or ballast are also included.”

14.2.2 It is, therefore, quite clear that only complete CFL which is classifiable under sub-heading 85393110 was a product under investigation by the Designated Authority in order to impose Anti Dumping Duty when imported from or originated in China or Hongkong and not its component or parts.

14.2.3 The subsequent investigation and data provided by the domestic industry and exporter pertained to Compact Fluorescent Lamps alone. The whole scheme envisaged in Section 9A of Customs Tariff Act'1975 read with Customs Tariff (Identification, Assessment & Collection of Anti Dumping Duty on dumped articles and for Determination of Injury) Rules, 1995, covers a particular article only. The whole process of determining "domestic industry", "margin of dumping" "export price" "normal value" "injury", "initiation", "investigation", etc. is in relation to a particular article liable for anti dumping duty. The Designated Authority identified "CFL" alone as an article liable for Anti Dumping Duty. The Designated Authority did not identify "CFL in CKD / SKD condition" or "parts and components of CFL" as an article liable for Anti Dumping Duty. This whole process cannot be subverted by resorting to Rule 2(a) of GIR.

14.2.4 The domestic industry brought to the notice of DGAD that CFL in CKD and SKD were imported to avoid Anti Dumping Duty, as is evident from the following para :-

"2.1. Views of Domestic Industry.

*The exporters are reported to be resorting to the following methods of circumvention:
(a) They export the product in CKD/SKD condition. They export bulb/glass part and the choke/plastic parts separately, i.e. in the case of CFLs without choke, the glass tube and the cap are imported separately. Upon importation, the tube is inserted into the cap and the CFL without choke is ready for sale. Similarly, in the case of CFL with choke."*

14.2.5 It is significant to note that even after taking cognizance of the above views, DGAD did not recommend imposition of anti dumping duty on "CFL in CKD or SKD condition" or "Parts of CFL" in its proposal to the Ministry of Finance, Department of Revenue, New Delhi.

14.2.6 The above submission is supported by clarification dated 1.5.2006 issued by DGAD pursuant to letter dated 4.4.2006 by M/s.Khaitan Electrics Ltd. The DGAD clarified as follows:

"(a) Anti-Dumping Duties were recommended / imposed on the following two types of CFLs :

- i) Complete, ready to use compact fluorescent lamps wherein choke is integrated within the lamp.*
- ii) Complete, ready to use compact fluorescent lamps wherein choke is external.*

(b) Anti dumping duties were not recommended on parts/components of CFL.

(c) "CFL with choke is complete ready to use compact fluorescent lamps wherein choke is an internal part.

(d) *CFL without choke as defined in the final findings is complete ready to use compact fluorescent lamps wherein choke would be external part."*

14.2.7 Obviously, the parts and components imported by us are not complete much less ready-to-use CFLs. Undisputedly, these parts and components cannot be bought and sold as complete and ready-to use-CFLs.

14.2.8 Concurring with the clarification dated 01.05.2006 issued by the DGAD, CBEC under its letter No.528/53/2007-Cus(TU) dated 25th October, 2007, has clarified as under :-

a) *Anti Dumping Duty imposed vide notification No.138/2002-Customs dated 10.12.2002 does not apply to the parts / components of CFL.*

b) *DGAD has recommended imposition of anti dumping duty only on (i) Complete, ready to use compact fluorescent lamps wherein choke is integrated within the lamp (ii) Complete, ready to use compact fluorescent lamps wherein choke is external.*

c) *All pending assessments, if any, may be finalized accordingly in view of above clarification.*

14.2.9 In the following rulings, Apex Court has held that Circulars issued by the Board are binding on the department. Therefore, in the instant case, department cannot brush under carpet the Circulars issued by the Board.

Name of parties.	Reference.
Collector v. Jayant Dalal Pvt. Ltd.	1996 (88) E.L.T. 638 (S.C.)
Collector v. Usha Martin Industries Ltd.	1997 (94) E.L.T. 460 (S.C.)
Commissioner v. Dhiren Chemical Industries	2002 (139) E.L.T. 3 (S.C.)
Commissioner v. Indian Oil Corporation Ltd	2004 (165) E.L.T. 257 (S.C.)
Commissioner v. Kores (India) Ltd.	1997 (89) E.L.T. 441 (S.C.)
Dabur India Ltd. v. Commissioner	2003 (157) E.L.T. 129 (S.C.)
Paper Products Ltd. v. Commissioner	1999 (112) E.L.T. 765 (S.C.)
Ranadey Micronutrients v. Collector	1996 (87) E.L.T. 19 (S.C.)

14.2.10 This submission makes it amply clear by the fresh Final Findings Notification No.14/1/2007-DGAD dated 27.02.2009 which states that the product under investigation is CFL whether or not assembled, either in CKD or SKD condition. Customs Notification No.55/2009-Cus dated 26.05.2009 issued on the basis of above Final Findings Notification also states that the product under investigation is CFL whether or not assembled, either in CKD or SKD condition. In the instant case, relevant notification is Notification No.138/2002-Cus dated 10.12.2002, and in light of the above facts, parts / components of CFL imported by us are not liable for anti-dumping duty under the said Notification No.138/2002-Cus dated 10.12.2002.

14.2.11 It is not as if the DGAD has not recommended Anti Dumping Duty on any product in SKD condition. The DGAD had vide Final Findings Notification dated 23.7.2003 recommended definitive Anti Dumping Duty on all

imports of Non Brass Metal Flashlight either in compact or in SKD conditions on types ranging from 2 cell small, 2 cell large, 3 cell large (exclusive of the value of batteries, if any) falling under Customs Heading 851310 originating in or exported from Peoples Republic of China.

14.2.12 In view of the above, CFL in CKD or SKD condition or parts/components of CFL are not covered by Notification No; 138/2002-Cus dated 10.12.2002, and hence, the proposal to impose Anti Dumping Duty in the current Show Cause Notice is liable to be dropped.

14.3 The issue is settled by latest judgment of CESTAT, Ahmedabad, in Anchor Daewoo's case. Supreme Court has not granted Stay Order on operation of this judgement.

14.3.1 The assessee in Anchor Daewoo Industries Ltd. V/s. C.C. Kandla – 2007 (214 ELT 230 (Tri.Ahmd.) imported 1,80,000 pieces of gas filled glass tubes and 1,80,000 pieces of Electronic Parts (PCBs) through two Bills of Entry at Kandla Port. A show cause Notice dated 25.7.2006 was issued to the Assessee, proposing to invoke Rule 2(a) of GIR and imposing anti-dumping duty on such parts. The Commissioner of Customs, Kandla, passed order-in-original dated 31.1.2007, confirming the proposals in the show cause notice. On appeal, the CESTAT, Ahmedabad held that parts of CFL are not covered by the Anti Dumping Duty Notification No.138/2002-Cus dated 10.12.2002. The CESTAT, Ahmedabad, relied upon clarification dated 01.05.2006 of DGAD supra.

14.3.2 In fact our case is on much stronger footing when compared with Anchor's case, since our firm has not presented identical number of parts for assessment to customs authorities at one port as done by ANCHOR.

14.3.3 The above judgment has been followed by Tribunal in Wipro Ltd. V/s. CC., Chennai – 2007 (217) ELT 558 (T).

14.3.4 Similar view was held by Tribunal in Philips India Ltd., Vs. Commissioner of Customs, Mumbai – 2004 (166) ELT 49 (T). The Tribunal held that parts of CFL are not covered by Notification No.128/2001-Cus dated 21.12.2001. This judgment of Tribunal was applied in the case of Plaza Lamps & Tubes Ltd. Vs. Commissioner of Customs – 2007 (207) ELT 182 (Del.)

14.3.5 In view of the above, CFL in CKD or SKD condition or Parts of CFL are not covered by Notification No.138/2002-Cus dated 10.12.2002, and, hence, the show cause notice is liable to be dropped on this ground itself.

14.4 Reliance on Rule 2(a) of General Interpretative Rules (GIR) is incorrect.

14.4.1.1 To fasten anti-dumping duty liability the department has placed reliance on General Rules for the interpretation of the first Schedule to the Customs Tariff Act' 1975 which reads as under.

14.4.1.2 Classification of goods in this Schedule shall be governed by the following principles:

"1.

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

14.4.2 The aforesaid provisions to classify an article as complete or finished article, would apply only when at the time of import, the article is presented for assessment. In the present case, the article, as presented at the time of assessment before the customs authorities at Kandla Port is "PCB & Holder". The article as presented before the Customs Authorities at Mundra Port is "Glass Tube". None of the aforesaid articles as presented before the respective Customs Authorities can be treated as incomplete or unfinished CFL has the essential character of the complete or finished article. To be more specific, it is submitted that at Kandla port, goods presented before the proper officer of the Customs for the purpose of assessment were "PCB & Holder", and by any stretch of imagination, it cannot be said that such incomplete or unfinished have the essential character of the complete or finished article. In the same way, at Mundra port, goods presented before the proper officer of the customs for the purpose of assessment were "Glass Tube", and by any stretch of imagination, it cannot be said that such incomplete or unfinished have the essential character of the complete or finished article. As stated in para supra, even if for the sake of argument, it is accepted that all the parts are imported at a place, then also it cannot be said that goods were imported in CKD or SKD condition and capable of being used as CFL without any process, as such parts are subject to process of soldering, testing, packing etc.

14.4.3.1 In the case of Pollar Appliances Ltd. V/s. Commissioner of Customs, New Delhi, reported in 2001(127) E.L.T. 448 (Tri.Del), it was held as under :-

"Components not presented in unassembled condition, imports having been made at different points of time in different vessels or aircrafts – Components not having essential character of complete or finished articles at the time of import – Rule 2(a) of Interpretative Rules not applicable."

14.4.3.2 Appeal preferred by the department was dismissed by the Supreme Court vide 2002 (142) ELT A.180 (SC).

14.4.3.3 In the case of Trident Television Pvt. Ltd., v/s. Collector of Customs – 1990 (45) ELT 24 (Cal), it was held as under:-

“Spare parts and components of different items imported by different consignments – Revenue’s plea of complete T.V. sets having been imported in SKD condition not maintainable.”

14.4.4 Hence, the proposal to change the classification by invoking Rule 2(a) of GIR is totally not correct.

14.5 Circular of Board, support the aforesaid submission.

14.5.1 In Circular No.39/2005 dated 3.10.2005, the Board considered the issue of extending the benefit of Notification No.21/2002-Cus dated 1.3.2002 (Sr. No.276) to the import of computer castings and power supply. Even when the importer had imported chassis and power supply as separate units in the same consignment and to be fitted after their clearance thereof, it was decided that the goods have to be classified in the form as presented and Rule 2(a) of GIR cannot be applied for the sake of allowing / disallowing the benefit of Notification, unless the exemption of Notification is based on the classification of items under a particular heading of Customs Tariff. Central Board of Excise & Customs in this circular also noted that there are several rulings of CESTAT that for the sake of denial of benefit of a Notification, Rule 2(a) of GIR cannot be invoked. The relevant portion of the Circular dated 3.10.2005 issued by CBEC is as under:-

“I am directed to say that a dispute regarding extension of benefit of Notification 21/2002-Cus, dated 1-3-2002, Sl. No.276 to computer casing and power supply unit imported together, has been brought to the notice of the Board.

2. *Under Sr. No.276 (which has subsequently been withdrawn w.e.f. 1-3-2005) of the C.N. 21/2002-Cus dated 1-3-2002, all parts of the machines of heading 8471, other than PPCBs, motherboards and power supply units attracted a concessional rate of duty @ 5%. In case the computer casing / chassis is pre-fitted with the power supply unit, it was not eligible for the benefit of the said entry of the notification and the rate of basic customs duty on the same use to be 15%. However, some importers had imported the chassis and the power supply as separate units in the same consignment. These units were meant to be fitted together after the clearance thereof, but in form as presented, these were not assembled. The point of dispute is whether cases where computer casing / chassis and power supply unit were imported in a form not fitted together as an assembly, but separately in the same consignment, the benefit of Notification No.21/2002-Cus, dated 1-3-2002, (vide S.No.276) can be denied by applying rule 2(a) of the General Rules for the Interpretation of the First Schedule (GIR).*

3. *This matter was discussed in the Tariff Conference of Chief Commissioners of Customs held at Visakhapatnam on 25th and 26th September, 2003. (Agenda Item A-17).*

4. *The Conference noted that there are several rulings of CESTAT that for the sake of denial of the benefit of a notification, Rule 2(a) cannot be invoked.*

5. *The Board had accepted the decision of the Conference. Accordingly, it is clarified that the goods have to be classified in the form as presented and rule 2(a) of*

the GIR cannot be applied for the sake of allowing / disallowing the benefit of a notification, unless the exemption notification is based on classification of the item under a particular heading of the Customs Tariff. For the purpose of classification, Rule 2(a) of the General Rules of Interpretation could be applied.”

14.5.2 In view of the aforesaid circular issued by the Board, even when the unassembled items are imported under the same consignment, the interpretative Rule 2(a) cannot be invoked, unless the items in question are presented together for assessment. In the present case, the goods, in question, were imported under different Bills of Entry at two different ports, and therefore, they were not presented to the same customs authority at the time of importation. Hence, Rule 2(a) of GIR cannot be invoked.

14.5.3 In view of the above, reliance placed on Rule 2(a) of GIR is misplaced and unwarranted. Hence, the proposal to demand Anti Dumping Duty is not correct.

14.6 Rule 2(a) not borrowed under Section 9A of Customs Tariff Act'1975.

14.6.1 It is submitted that Rule 2(a) of GIR has not been borrowed for the purpose of imposing Anti Dumping Duty under Section 9A of Customs Tariff Act'1975. Hence, invoking Rule 2(a) of GIR for Anti Dumping proceedings is not correct.

14.7 DISCLOSURE STATEMENT issued by the DGAD under Notification No.14/1/2007-DGAD dated 13th February, 2009, in accordance with Rule 16 of the Customs Tariff (Identification, Assessment and Collection of Any-Dumping Duty on Dumped Articles and for determination of Injury) Rules, 1995.

14.7.1 Attention is invited to Paragraph No.11 contained in Non-Confidential Version of DISCLOSURE STATEMENT which is reproduced below for easy reference:-

“11. With regard to the decisions of the Hon'ble Courts in India, The Authority notes that these decisions relate to dispute arising out of previous imposition of anti dumping duties. The product under consideration in the previous case was “ready to use” CFL and therefore question that arose for consideration by the Hon'ble Court were whether CFL in the form of sealed glass tabular shells (with filament or with other components) can constitute “ready to use” CFL, attracting anti dumping duties. The Courts have held that these would not attract anti dumping duties, as the duties were imposed only on “ready to use” CFL. However, what is relevant in the present case is whether Authority is justified in including an incomplete CFL within the scope of product under consideration. The Authority notes that the Hon'ble Courts have not at any point of time held that incomplete CFL cannot be included within the scope of the product under consideration. The Authority also notes that the domestic industry filed the petition, requesting imposition of anti dumping duties on these incomplete CFL on the grounds that, with the imposition of anti dumping duties earlier on ready to use CFL, the market of CFL witnessed large scale imports of incomplete CFL in the form of imports of sealed glass tabular

shells, whether or not processed further (with or without filaments), thus causing continued injury to the domestic industry. The Authority also notes that the domestic industry earlier stated that they are not seeking extension of anti dumping duties as they intend to include other components of CFL or incomplete CFL within the scope of the product under consideration and such inclusion was possible only through a fresh petition.”

14.7.2 Under above paragraph, DGAD has acknowledged that previous Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002, did cover “ready to use CFL” only. It did not cover “incomplete CFL”. DGAD has further acknowledged that the domestic industry earlier stated that they are not seeking extension of anti dumping duties as they intend to include other components of CFL or incomplete CFL within the scope of the product under consideration and such inclusion was possible only through a fresh petition.

14.7.3 From the above, it is quite clear that in the light of the above circumstances, DGAD was left with no alternative to cover “incomplete CFL” and “CFL in CKD / SKD condition” in fresh Final Findings Notification No.14/1/2007-DGAD dated 27.02.2009. The above Disclosure Statement accepts, in no uncertain terms, that “incomplete CFL” or “CFL in CKD / SKD conditions were not covered under “PRODUCT UNDER CONSIDERATION” in previous Final Findings Notification No.34/1/2001-DGAD dated 14.11.2002, on which reliance has been placed under paragraph No.7 of Show Cause Notice.

14.7.4 From Harmonious reading of both Final Findings Notifications referred to above, and views expressed by the DGAD in “Disclosure Statement”, it is abundantly clear that “Incomplete CFL” or “CFL in CKD / SKD condition” are outside the purview of Notification No.138/2002-Cus dated 10.12.2002.

14.8 Anti Dumping Duty is imposable only on article which was subject matter of investigation after being identified by DGAD.

14.8.1 In the case of ANDHRA PETROCHEMICALS LTD. Versus DESIGNATED AUTHORITY 2006 (201) E.L.T. 481 (Tri. - Del.), it was held as under:-

“Anti-dumping duty - ‘Article under consideration’ - Section 9A(1) of Customs Tariff Act’1975 - Expression “article” in Section 9A(1) ibid includes only the article on which anti-dumping duty may be imposed and not any other article which may be a like article to such identified article - Anti-dumping duty imposable only on article which is subject matter of investigation after being identified for purpose under Rule 4(1)(b) of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 and not on any other article, which may be a like article - Definition of expression ‘like article’ under Rule 2(d) ibid cannot be projected in Section 9A(1) ibid for purpose of giving any enlarged meaning to an article which upon its importation into India may be subjected to anti-dumping duty. [para 13]”

14.8.2 In the instant case, Notification No.138/2002-Cus dated 10.12.2002 has been invoked. During the relevant period covered under present show cause

notice, Notification No.55/2009-Cus dated 26.5.2009 was not in existence. In order to come to the conclusion as to whether “parts of CFL” or “CFL in CKD / SKD condition” were covered under Notification No.138/2002-Cus or not, one will have to travel through following notifications :-

Notification No. & Date.	Article which was subject matter of investigation after being identified by DGAD and on which anti dumping duty is imposed.
Notification No.138/2002-Cus dated 10.12.2002	Compact Fluorescent Lamps (CFL) falling under sub-heading 8539.31 originating in, or exported from People’s Republic of China and Hong Kong, and imported into India
Notification No.55/2009-Cus dated 26.5.2009.	Compact Fluorescent Lamps (CFL) with or without ballast or control gear or choke, whether or not assembled, either in completely knocked down or semi knocked down condition falling under heading 8539 originating in, or exported from China PR, Sri Lanka and Vietnam (hereinafter referred to as the subject countries),

14.8.3 From the above ruling of ANDHRA PETROCHEMICALS LTD., it is abundantly clear that anti dumping duty is imposed only on the article which was subject matter of investigation after being identified by DGAD for the purpose of levy of anti dumping duty. Following crucial conditions are to be satisfied for the purpose of levy of anti dumping duty:-

- a) article should be subject matter of investigation after being identified by DGAD. and
- b) article should be exported from China P.R. and
- c) article should be imported from China P.R.

14.8.4.1 In the instant case, it was only CFL which was subject matter of investigation by DGAD and not parts of CFL or CFL in CKD/ SKD condition. CFL has not been exported from China P.R. but Parts of CFL have been exported from China P.R. Therefore, Notification No.138/2002-Cus dated 10.12.2002 is not applicable in the present case.

14.8.4.2 Admittedly, parts of CFL or CFL in CKD / SKD conditions were subject matter of investigation so far as Notification No.55/2009-Cus dated 26/5/2009, is concerned. Therefore, “CFL in CKD / SKD condition” is covered under Notification No.55/2009-Cus dated 26/5/2009.

14.8.4.3 We also rely upon ruling rendered in the case of Commissioner of Customs, Amritsar Versus Sharman Woolen Mills – 2009 (244) ELT 485 (Tri. Del.) wherein it has been held as under paragraph 7 :-

“We are dealing with the case of levy of anti dumping duty by a Notification issued by the Central Government under Section 9A (2) of the Customs Tariff Act on the basis of the findings of the designated authority. This levy is imposed after detailed investigation as prescribed under special law and after hearing the concerned parties including the importer, domestic industries and the exporter and other interested

parties. The levy cannot be based on implication. The levy is clearly on acrylic fibre. Customs Tariff 5501 at 4 digit level refers to acrylic tow and 5503 refers to acrylic fibre. Therefore, there is conscious distinction between the acrylic tow and acrylic fibre. Notwithstanding the fact that sub-headings 5501.30 and 5503.30 have been mentioned in the notification, the levy is only on import of acrylic fibre. It cannot be extended to acrylic tow by any implications.

14.8.4.4 In the instant case, Anti dumping duty is imposed on “ready to use complete CFL” and not on “parts of CFL” or “CFL in CKD / SKD conditions”. When Notification itself does not cover within its ambit “CFL in CKD / SKD conditions”, or “parts of CFL”, question of levy of Anti Dumping Duty does not arise at all.

14.8.4.5 Seen against above backdrop, Show Cause Notice merits to be set aside.

14.9 Even otherwise quantification of anti-dumping duty amount is erroneous – Part of CFL imported were for manufacture of CFL without Choke

14.9.1 Without admitting any thing it is further submitted that though we have never imported complete CFL and imported components /parts of CFL, it is nowhere alleged or found any evidence by the investigations that same were with Choke. However, while quantifying the amount of antidumping duty in Annexure – A to the impugned show cause notice the amount mentioned in Column No.5 of the table given under Paragraph 1 of Notification No.138/2002-Cus dated 10.12.2002 i.e. 3.125 US \$ is taken.

14.9.2 It is also fact and on record that imported parts contains PCB (Printed Circuit Board) which merits classification under tariff sub-heading No.853990 90 of the first Schedule to the Customs Tariff Act'1975, whereas chokes are classifiable under tariff 85045010 of the First Schedule to the Customs Tariff Act'1975. Even if for the sake of argument it is assumed that the said PCB is considered as Populated Printed Circuit Board then also same is classifiable under 8542 39 00 of the First Schedule to the Customs Tariff Act'1975. It is worth to mention here that when CFL are with choke, no PCB is used for manufacture of CFL. It means the CFLs which were manufactured by us, were without choke types. Therefore, while computing antidumping duty, the amount of 3.125 US \$ taken by the investigation is totally wrong.

14.9.3 Therefore, in place of 3.125 US \$ actually as per the said table given under paragraph 2 of the said Notification No.138/2002-Cus dated 10.12.2002 amount 1.256 US \$ was required to be taken. Thus, amount of anti-dumping duty comes to Rs.18,34,406/- instead of Rs.90,38,280/-

14.10 Seizure is 'SINE QUA NON' to confiscation – CFL valued at Rs.1,20,45,000/- was never seized.

14.10.1.1 It is submitted that the department has never seized the goods under question. Goods were allowed to be cleared on payment of appropriate duty of customs by the proper officer of the customs by making any order for 'out of customs charge' under Section 47(1) of the Customs Act'1962. It is clearly stated in the impugned show cause notice that the goods are not available for confiscation, and as such why fine in lieu of confiscation should not be imposed under Section 125 of the Customs Act'1962.

14.10.1.2 Seizure is pre-requisite for making any order of confiscation. In this regard attention is invited towards the provisions of Section 110 of the Customs Act'1962, according to which, if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

14.10.1.3 Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

14.10.1.4 Therefore, provisions of Section 110 *ibid* very much provides for seizure of goods which are liable to confiscation and when and what types of goods are liable to confiscation are provided under Section 111 and Section 113 of the Customs Act'1962. As per the provisions of Section 125 of the Customs Act'1962, when the owner of the goods is not known, an option to pay fine in lieu of confiscation may be given to the person from whose possession or custody such goods have been seized.

14.10.1.5 On going through the various provisions as discussed in para supra your honour will appreciate that without seizure nothing can be confiscated. Your honour will also appreciate the fact that if there is no seizure, goods is not available for confiscation and if the adjudicating authority orders for confiscation of goods and gives an option to pay fine in lieu of confiscation, and the importer does not exercise this option within stipulated time, then situation will be that ownership of the goods will lie with the Government. The goods which are not available or may not be in existence at all at the time of order of confiscation, will make such order on paper without any effect.

14.10.1.6 Without prejudice to above, it is further submitted that as per provisions of Section 125(2) *ibid*, option to redeem the goods on payment of fine can be exercised by either owner of the goods or the person from whose possession or custody goods were seized. The goods were not seized because the goods were not available due to sale after clearance from the customs. In these circumstances, we are not the owner of the goods which have been sold and were not seized due to sale of those goods, and therefore, an option to redeem the seized goods cannot be given to us.

14.10.1.7 The word 'confiscation' implies appropriation consequential to seizure. (Kindly refer Para 5 of Chapter 25 of CBEC's Customs Manual).

14.10.1.8 Without admitting anything and to be more elaborative it is to further state that confiscation without seizure will lead to an illogical situation. If order for confiscation of sold CFL valued at Rs.1,20,45,000/- under Section 111(m) of the Customs Act'1962 with an option to pay fine in lieu of the confiscation as provided under Section 125(1) of the Customs Act'1962 is passed and same is not opted by the person to whom such offer is made, what will be situation? Goods will become property of Government consequent upon non availment of option to redeem the goods. It means ownership of confiscated goods will lie with the Government (as per provisions of Section 126(1)) but without possession. Once the goods are not available for confiscation, that too, without any provisional release bond supported by any kind of security, such order will remain on paper and no possession can be taken of goods as provided under Section 126(2) *ibid.* Thus, on harmonious reading of all the above cited provisions, it is abundantly clear that seizure is pre-requisite for making an order of confiscation.

14.10.1.9 Therefore, it will be appreciated that without seizure of the goods it cannot be confiscated. Our above views find support from the following judgments of Hon'ble High Court and Tribunal.

14.10.1.10 Hon'ble High Court of Andhra Pradesh in the case of Appellate CC & CE Vs T.N. Khambati reported in 1988 (37) ELT (37) (A.P) held that –

“Seizure, confiscation and penalty - Seizure and confiscation are inter-connected Sections 110 and 124 of the Customs Act'1962. -

There cannot be confiscation without seizure. Confiscation is only forfeiture of the goods in favour of the State. Before that, articles are taken possession of by the authorities of the State. Without that possession or control over that possession, there cannot be any confiscation. [AIR 1975 Mad. 43; 16 Guj. LR. 119 and AIR 1975 P & H 130 dissented from]. [paras 7, 9 & 13]

8. We are not persuaded to accept this contention of the learned Counsel. In the first place, it is difficult, nay impossible, to postulate confiscation without seizing any goods. Seizure, in our opinion, necessarily forms part of confiscation. That is why the Act has always connected the idea of confiscation with search and seizure. We have already given a resume of the material sections, viz. Sections 100 and 110. Section 100 enables the officer to search any person any only if he has reason to believe that that person has secreted about his person any goods liable to confiscation or any documents relating thereto.”

14.10.1.11 COMMISSIONER OF CUSTOMS, KANDLA Versus SAHIL TRENDS - 2004 (177) E.L.T. 732 (Tri. - Del.)

*“Confiscation and redemption fine - Customs - Goods being not seized under Section 110 of Customs Act'1962, not liable for confiscation - Accordingly, redemption fine not imposable - Section 125 *ibid.* - The occasion for imposition of redemption fine can arise only if the goods are seized under Section 110. In the impugned order,*

though the goods have been held to be liable for confiscation there was no seizure of the goods. Consequently there was no order to confiscate the goods. Unless the goods are seized there cannot be any confiscation thereof. [para 3]”

14.10.1.12 The issue is now put to the rest by the Larger Bench of Hon'ble Tribunal in recent judgment in the case of Shiv Kripa Ispat Pvt. Ltd. Vs. Commissioner of Central Excise & Customs, Nasik and Commissioner of Customs, Mumbai Vs. Rishi Ship Breakers – reported in 2009-TIOL-388-CESTAT-MUM-LB that

“Redemption fine could not be imposed in the absence of the goods which had already been released by the Customs Authorities to the importer without execution of any bond/undertaking by the latter.”

14.10.1.13 In view of the above, it is crystal clear that no order for confiscation of sold goods can be made.

14.10.2.1 Even otherwise goods which were allowed to be cleared for home consumption, as provided under Section 47(1) of the Customs Act'1962, such goods are no more imported goods within the meaning of Section 2(25) of the Customs Act'1962. Section 2(25) *ibid* defines “imported goods” which reads as under:

“imported goods” means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

14.10.2.2 Section 111 *ibid* provides confiscation of improperly imported goods. The said section further states that the goods brought from a place outside India shall be liable to confiscation. It means imported goods shall be liable to confiscation under Section 111(m) of the Customs Act'1962. As per the provisions of Section 2(25) of the Customs Act'1962, goods cleared for home consumption are no more imported goods. CFL cleared from the customs are no more imported goods, hence not liable to confiscation under Section 111(m) *ibid*.

14.11 Provisions of seizure, confiscation and penalty under Section 112 of the Customs Act'1962 not made applicable to Anti-dumping duty under Section 9A(8) of the Customs Tariff Act'1975

14.11.1.1 Even otherwise proposal to hold the goods liable to confiscation and imposition of fine in lieu of confiscation is without any authority of law.

14.11.1.2 In this regard, attention is invited towards the provisions of Section 9A(8) *ibid* which reads as under:

“The provisions of the Customs Act'1962 and the rules and regulations made thereunder, relating to, the date for determination of rate of duty, non levy, short levy, refunds, interest, appeals, offences, and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that act.”

14.11.1.3 Plain reading of the above provisions clearly reveal that power of seizure, confiscation and imposition of fine in lieu of confiscation and imposition of penalty under Section 112 of the Customs Act'1962 are not made applicable to the duty chargeable under Section 9A. Only penalty under Section 114A of the Customs Act'1962 which is imposed in relation to duties leviable under the Customs Act'1962 can be made applicable to duty leviable under Section 9A *ibid* and no other provision in relation to penalty can be made applicable to duty leviable under that section, as same are not imposed in relation to duties leviable under the Customs Act'1962.

14.11.1.4 Our above contentions find support from the language used in Section 112(a) and 112(b) of the Customs Act'1962, which reads as under:

*“SECTION 112. Penalty for improper importation of goods, etc. – Any person, -
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,
shall be liable, -
.....”*

14.11.2.1 No Penalty can be imposed under Section 112 when penalty under Section 114A imposed.

14.11.2.2 It is proposed to impose penalty under Section 114A as well as Section 112 of the Customs Act'1962.

14.11.2.3 Even otherwise, as per 5th proviso to Section 114A *ibid*, where any penalty has been levied upon person liable to pay duty as determined under Section 28(2) *ibid* under the section 114A, no penalty shall be levied under section 112 or section 114.

14.11.2.4 In the instant case, penalty equal to the duty is proposed upon our firm under Section 114A of the Customs Act'1962. Hence no penalty can be imposed under Section 112 upon us.

14.12 No suppression of facts or mis-declaration of imported goods. - Extended period not invokable.

14.12.1 Under Paragraph No.14(ii) of the Show Cause Notice, we have been asked to show cause as to why classification of imported goods should not be changed to Item No.85393110 in terms of Rule 2(a) of General Rules for Interpretation of First Schedule of the Customs Tariff Act'1975.

14.12.2.1 Our firm has classified the goods according to its own concept and understanding. Onus is ultimately cast on the customs authorities to classify the imported goods strictly in accordance with the law.

14.12.2.2 In the case of 2008 (230) E.L.T. 7 (S.C.)- COMMISSIONER OF CENTRAL EXCISE, DELHI Versus ISHAAN RESEARCH LAB (P) LTD., it has been held as under :-

“Demand - Limitation - Extended period - Dispute prevailed in the matter of classification of products - Appellants cannot be held guilty of suppression or mis-statement hence charge of suppression not sustainable - Proviso to Section 11A(1) of Central Excise Act’1944 not applicable.

14.12.2.3 In the instant case, dispute has prevailed in the matter of classification of imported goods. In terms of the above ruling, extended period is not invocable.

14.12.3.1 Invocation of Proviso to Section 28(1) of Customs Act’1962, under paragraph 12 of the Show Cause Notice is not correct. Last line of Paragraph No.12 of Show cause notice reads as under:-

“Because of the suppression of this material fact with an intention to evade payment of duty on the part of M/s.Sonam Industries, proviso to Section 28(1) of the Customs Act’1962, squarely attracted for invoking the extended period.”

14.12.3.2 The expression “with an intention to evade” is conspicuous by its absence in proviso to Section 28(1) ibid. Laws do not permit the Department to re-write proviso to Section 28(1) ibid by adding the above expression.

14.12.3.3 Once it is held that there was no suppression etc., show cause notice is time barred, and therefore, show cause notice proposing demand of anti-dumping duty with an equal penalty under Section 114A ibid does not survive.

14.13 Even otherwise Show Cause Notice is time-barred.

14.13.1 With recording of Statement of Shri Jayesh C. Shah, Partner, Sonam Industries, Morbi, under Section 108 of Customs Act’1962, investigation of DIR stands completed on 19/11/2008 by DIR. Show Cause Notice ought to have been issued before 19/05/2009. Show Cause Notice has been issued on 9/12/2009. The said Demand Notice was received by us on 16/12/2009. Therefore, Demand Notice is time-barred in terms of the following decision:-

14.13.2 KATHIRAVAN PIPES LTD. Versus COMMISSIONER OF C. EX., COIMBATORE, - 2002 (147) E.L.T. 1266 (Tri. - Chennai) wherein it has been held as under :-

“Demand - Limitation - Show cause notice having been issued beyond six months from date of completion of investigation by Department, demand hit by time bar -

Section 11A of Central Excises Act'1944. [1995 (75) E.L.T. 377 (Tribunal); 1996 (82) E.L.T. 323 (Tribunal); 1987 (32) E.L.T. 124 (Tribunal) relied on]. [para 11]"

14.14 Notification No.138/200-Cus dated 10.12.2002 expired on 20.12.2006 – Present proceedings are not maintainable.

14.14.1 The present show cause notice seeks levy of anti-dumping duty in terms of Notification No.138/2002-Cus dated 10.12.2002. This notification was effective from 21.12.2001 i.e. from the date of imposition of provisional anti dumping duty, vide Notification No.138/2001. In view of Section 9A (5), the anti dumping duty levied vide Notification No.138/2002-Cus dated 10.12.2002 cease to have effect after the expiration of five years from 21.12.2001. In other words, this notification has expired on 10.12.2006.

14.14.2.1 It is submitted that the legal effect of expiry of the Notification No.138/2002-Cus is, on or after this date (i.e. 21.12.2006) and it is as if this notification has never been enacted. Except in respect of the things that are past in nature and closed on or after 20.12.2006, it is as if this notification have never been issued. Consequently, the present show cause notice dated 9.12.2009 seeking to impose anti-dumping duty in terms of Notification No.138/2002-Cus dated 10.12.2002 is entirely mis-conceived in law and not sustainable.

14.14.2.2 In this regard, attention is invited towards the provisions of the Customs Tariff Act'1975. The said Act does not provide any saving clause like Section 12 of the Customs Tariff Act'1975 and Section 159A of the Customs Act'1962. Both the said sections provide saving clauses for the Indian Tariff Act'1934 and the Indian Tariff (Amendment) Act'1949 and the Customs Act'1962, but no such provisions for saving clause are made for the Customs Tariff Act'1975.

14.15 No interest is payable.

14.15.1 In view of submissions made supra, since no anti-dumping duty is payable, question of payment of interest does not arise.

14.16 No penalty can be imposed upon me under Section 112 (a) of the Customs Act'1962

14.16.1 As discussed in para supra 17 that provisions of penalty under Section 112 of the Customs Act'1962 are not borrowed in the provisions of the Customs Tariff Act'1975, no penalty can be imposed upon me being a Partner of the firm under Section 112(a) of the Customs Act'1962.

14.16.2.1 As discussed in para supra neither goods are liable to confiscation, nor am I required to pay any differential duty. Therefore, no penalty can be imposed under section 112(a) of the Customs Act'1962.

14.16.2.2 For imposition of penalty under Section 112, it must be proved beyond doubt that in which manner I had dealt with the goods which may render such goods liable to confiscation or with reasonable belief that the same were liable to confiscation, as provided under Section 112(a) and 112(b); but in the instant case, there is not a slightest whisper in the SCN about my dealing with goods in any of the manner described under sub-section (a) or (b) of Section 112 ibid. Therefore, no penalty can be imposed under any of the sub-section of Section 112 ibid.

14.16.2.3 It is also a settled position of law that for imposition of penalty under Section 112 ibid goods must be liable to confiscation and person who had dealt with such goods in the manner prescribed under Section 112(b) ibid must have reason to believe that the same are liable to confiscation. In the instant case, it is nowhere alleged in the SCN that in what manner I had dealt with such goods and I had reason to believe that goods were liable to confiscation. In support of this, he rely upon following judicial rulings:

14.16.2.4 PAPER SUPPLIERS Versus COMMISSIONER OF CUSTOMS, KANDLA - 2002 (147) E.L.T. 101 (Tri. - Mumbai)

“Penalty - Customs - Goods not deliberately undervalued by appellants - Goods shipped only after cancellation of contract in pursuance of appellant’s demand - Appellant having no knowledge or reason to believe that contract price wrong or incorrect - Penalty not imposable - Section 112 of Customs Act’1962. [Per Majority : S/Shri Gowri Shankar, Member (T) and J.H. Joglekar, Member (T)]. - There is nothing to show that the importer has deliberately undervalued the goods. While, strictly speaking, the goods could not be said to have been shipped in terms of the contract, it appears from the last fax of the supplier that the shipment was made in pursuance of the demand made by the appellant to supply the goods. There is nothing to show that the appellant knew as had reason to believe, that this price was wrong or incorrect, or that he attempted to evade duty. On the facts of this case, therefore, no penalty was imposable. [para 13]”

14.16.2.5 VISWANATH DEWRA Versus COMMISSIONER OF CUSTOMS, WEST BENGAL - 2001 (137) E.L.T. 967 (Tri. - Kolkata)

“Penalty on vague observation not sustainable - Positive act and responsibility for the act or omission which rendered the goods liable to confiscation is required - Only observation made by adjudicating authority that appellant’s involvement in the case cannot be ruled out - Penalty cannot be awarded on such vague observation - Section 112 of Customs Act’1962. [para 6]”

15.1 Based on the above submissions, it was prayed that the demand show cause notice is liable to be quashed.

DISCUSSION AND FINDINGS:

15.1 I have carefully gone through the Show Cause Notices, records of the cases, written submissions filed by the Noticees as well as submissions made at the time of Personal Hearing.

15.2 In the instant case, following issues are to be decided:

1. Whether in the facts and circumstances of the case, the impugned imported goods are Complete, ready to use compact fluorescent lamps (CFL) or otherwise?
2. Whether prior to issuance of notification No.55/2009-Cus dated 26.05.2009, anti-dumping duty was leviable on CFLs imported in CKD/SKD condition or otherwise?

16.1 From the impugned SCNs, defense submissions of the noticees and records available before me, I find that they have imported goods describing as PCB + Holders & Glass Tube and classifying mostly under the CTH 85399090 & 9405910. The impugned goods have been cleared through two different ports namely Kandla & Mundra Port at different point of times.

16.2 Therefore, it is not in dispute that the noticees have imported the parts/components of CFLs. In the DRI investigation, a case has been made out that the noticees have imported parts & components in such a manner that it can be termed as import of CFLs in SKD condition. Thus, the first issue is answered that the noticee have not imported the complete ready to use CFLs.

17.1 On second issue, I find that the issue is no more res-integra and decided by the Hon'ble CESTAT (214) ELT 230 (Tri.-Ahmd.) vide order dated 18.05.2007 wherein CESTAT has held that imported goods are parts of CFL and they are not liable for imposition of anti-dumping duty as per the office memorandum. Relevant paras are reproduced hereunder-

"7. The anti-dumping duty is imposed on the goods which are dumped into India by Directorate General, Anti-Dumping and Allied Duty. On complete investigation of the complaint of dumping of a specified article, a Notification No.138/02-Cus, dated 10-12-02 was issued by the Ministry of Finance, Deptt. of Revenue, on recommendation by the DGAD for imposition of anti-dumping duty on the "Compact fluorescent lamp with or without choke". It is seen from the notification that the specified article on which definitive anti-dumping duty was imposed was a complete compact fluorescent lamp and not on a semi-knocked down condition of CFL. It is also seen from the records that DGAD imposes anti-dumping duty on the SKD condition of the specified article as and when it comes to the conclusion that even the parts are also dumped into India. (Notification No.125/2002-Cus, dated 13-8-03 on non-brass metal flash light). On this factual understanding of the imposition of definitive anti-dumping duty, we proceed ahead to decide the issue in this case. It is on record that appellants had imported parts of CFL. The parts have been found as has been declared by the appellant. We find that the parts the condition in which they were imported could in itself, may not answer to the description of a complete CFL. There is no evidence put on record by the authorities, as to whether the sample being tested by them in the Customs laboratory in order to ascertain whether these parts in themselves can be considered as a complete CFL. In the absence of any such evidence, we find that the process of manufacture (as explained by the advocate from the record) would be required to be undertaken on these parts to make these parts as a complete CFL, this is not controverted by the Revenue."

9. *It can be noticed from the above reproduced office memorandum, the authority that recommends imposition of definitive anti-dumping duty, have clearly indicated in the above memoranda that (a)(i), (ii) that the anti-dumping duty were recommended on ready to use compact fluorescent lamp, whether chokes are integrated within the lamp or whether the choke is external. It is to be understood that the authority which recommends anti-dumping duty has clearly indicated that the anti-dumping duty has to be imposed only on ready to use CFL. It is not brought on record by the Revenue in this case that the goods imported by the appellant and which were sought to be cleared are "ready to use" compact fluorescent lamps. In the absence of any evidence to suggest that the imported goods were ready to use CFL, we have hold that imported goods are parts of CFL and they are not liable for imposition of anti-dumping duty as per the office memorandum (as reproduced above)."*

14. *Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any."*

17.2 Aggrieved by the above order of the Hon'ble CESTAT, the department had preferred an appeal with the Supreme Court of India. The appeal was dismissed by the Hon'ble Apex Court [Commissioner Vs. Anchor Daewoo Inds. Ltd. – 2016 (331) ELT A138 (SC)] and held that,-

"In the present case, we find that what was imported was glass parts of lamp making, electronics parts of lamp making and not Compact Fluorescent Lamp.

Admittedly, insofar as the parts are concerned, no anti-dumping duty could be charged.

We, thus, do not find any infirmity in the order passed by the Customs, Excise and Service Tax Appellate Tribunal."

17.3 I find that in the case before CESTAT referred supra, the importer had filed two separate bills of entry for import of "Glass Parts of Lamp Making" and "Electronic Parts for Lamp Making" at Kandla Port and department had considered it as import of a complete Compact Fluorescent Lamps, and thereby confirmed demand of anti-dumping duty. Hon'ble Apex Court while upholding the order of Hon'ble Tribunal has given clear findings that what was imported was glass parts of lamp making, electronic parts of lamp making and not Compact Fluorescent Lamp, and therefore, no anti-dumping duty could be charged. The facts of the case before me are similar to the referred case, except in case before me that the parts have been imported at Kandla as well as Mundra. Therefore, relying upon the CESTAT's order affirmed by the Hon'ble Supreme Court, the anti dumping duty cannot demanded on parts / components of CFLs even if considered as import under SKD condition for period prior to issuance of notification No.55/2009-Cus dated 26.05.2009 when CFLs in CKD/SKD condition were also covered under the ambit of levy of anti dumping duty.

17.4 Before parting on the issue, it is pertinent to refer to the case of Samay Electronics (P) Ltd. Vs. C.C.(Import)/(General), Mumbai – 2015 (328) ELT 238 (Tri. Mumbai), wherein the Hon'ble tribunal (relevant para) has held as under,-

"2. The appellants are M/s.Samay Electronics Pvt. Ltd., M/s.Wipro Limited, M/s.Amar Energy Systems, M/s.Shell & Pearl Ceramics Ltd., M/s.Sunora Electronics Industries and their partners/employees. The issue involved in all these appeals is common and it relates to levy of anti dumping duty on Compact Fluorescent Lamps (CFL) imported from China in SKD form and in different consignments and at different ports. The facts involved in each of these cases are discussed below:-

(1) Samay Electronics Pvt. Ltd.: During the period from November 2004 to February 2007, M/s.Samay Electronics Pvt. Ltd. ('Samay' in short) had imported 106 consignments of CFL from China in SKD form without payment of anti dumping duty leviable on CFL vide Customs Notification No.138/2002-Cus, dated 20-12-2002.

(a) As part of the investigation, officers of the DRI, Ahmedabad visited the office and factory premises of M/s.Samay on 28-11-2006. During the visit, it was found that M/s.Samay was importing glass tubes with base from China at Kandla port and holders with wire and populated PCBs for CFL at Mumbai. The CFLs were being assembled at their factory by soldering the above goods. All the components put together, constituted CFL in SKD form and as per Rule 2(a) of the General Interpretative Rules of the Customs Tariff Act'1975, the same merited classification as CFL under CTH 8539 3110 and not as components of CFL under CTH 8539 9010 as claimed by the appellant. During the investigation 158257 pieces of CFL of different watts in SKD condition was seized by the officers under a panchanama dated 28-11-2006 as it appeared that the same were liable to confiscation.

5.7 In respect of imports made by M/s.Samay Electronics, both Shri Vasantbhai Chunibhai Patel, Chief Engineer and Shri Rameshbhai Patel, Director have admitted that they assembled CFL by simply soldering the glass tubes with base imported at Kandla and holders with wire and populated PCB imported at Mumbai and they did not use any other material other than the imported components. It is also an admitted position that imports were managed by the appellant-firm by negotiating with various manufacturers in China, it is also revealed that the entire CFL in SKD condition have been supplied under the same number and date of invoice. However, a suffix to the said invoices were added as K & M in respect of consignments imported at Kandla port representing 'K' and consignments imported at Mumbai port representing 'M'. Suppliers of the goods were the same in all the cases. In the present case, it is seen that in one of the imports, the same vessel carried both these consignments and a part of the consignment was unloaded at Mumbai and the balance at Kandla. In other words, the order was placed by M/s.Samay Electronics for complete CFL and they were also transported by the same vessel. Only the consignments were artificially split up, part of which was offloaded at Mumbai and the balance at Kandla. Quantity of parts imported at Mumbai was matching with the quantity imported at Kandla and these consignments complemented each other so as to constitute a complete CFL.

5.18 In these circumstances, we are of the considered view that the goods imported by the three appellants, namely, M/s.Samay Electronics Pvt. Ltd., M/s.Wipro Ltd., and M/s.Amar Energy Systems merits classification as CFL in SKD/CKD form falling under Chapter 85 of the Customs Tariff Act and, therefore, they were correctly leviable to anti-dumping duty in terms of Notification 128/2002".

17.5 On judicial analysis of decisions of both the cases i.e. Samay Electronics (P) Ltd. Vs. C.C.(Import)/(General), Mumbai – 2015 (328) ELT 238 (Tri. Mumbai) and the


decision of Hon'ble Apex Court in the case of Anchor Daewoo Inds. Ltd., it is observed that the Hon'ble Tribunal, Mumbai had passed the decision on **20.01.2015**. However, the Hon'ble Apex Court in the case of Anchor Daewoo Inds. Ltd had decided the issue on **04.11.2015**. I find that the decision of the Hon'ble Apex Court dated 04.11.2015 was not available before Hon'ble Tribunal, Mumbai. Therefore, the order passed by the Hon'ble Tribunal, Mumbai is no more good in law.

17.6 Once the issue of levy of anti dumping duty is settled in favour of the noticee, the allegation of mis-declaration in this regard will also not hold good, and therefore, I hold that the impugned goods are not liable for confiscation under Section 111 of the Customs Act'1962 and consequent penalties under Section 114A or Section 112 of the Customs Act'1962 cannot be imposed on M/s.Sonam or their Partner.

18. In view of the above, I pass the following order:

ORDER

19. I hereby drop the proceedings initiated vide show cause notice F.No.DRI/JRU/INQ-9/2008 dated 09.12.2009 issued by the Additional Director General, DRI Zonal Unit, Ahmedabad.


(**Sanjay Kumar Agarwal**)
Chief Commissioner (In situ),
Custom House, Kandla

F.No.S/10-82/Adj/COMMR/Sonam/2018-19

Kandla, Date:28.01.2020.

BY RPAD/ SPEED POST:

To,

1. M/s.Sonam Industries, 2, Lati Plot, Time Tower, Morbi - 363641.	2. Shri Jayesh C. Shah, Partner of M/s.Sonam Industries, 2, Lati Plot, Time Tower, Morbi - 363641
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Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Additional Director General, DRI, Ahmedabad Zonal Unit, Ahmedabad
3. The Deputy Commissioner (RRA), Customs House, Kandla.
4. The Deputy/Assistant Commissioner (Recovery), Customs House, Kandla.
5. EDI Section, Customs House, Kandla.
- ✓ 6. Guard file.