



सीमा शुल्क आयुक्त का कार्यालय,  
नवीन सीमा शुल्क भवन, नया कांडला  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)  
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E	Date of order	13.02.2020
F	Date of issue	13.02.2020
G	SCN No. & Date	SCN F.No DRI/MZU/D/INT-35/2017(NFCL) dated 27.09.2019
H	Noticee(s)/Co-Noticee(s)	M/s. Nagarjuna Fertilizers & Chemicals Ltd., Door No.8-2-248, Nagarjuna Hills, Punjagutta, Hyderabad, Telangana-500082

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**  
**7<sup>th</sup> Floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad - 380 009.”**
3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।  
Appeal shall be filed within sixty days from the date of communication of this order.
4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-  
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by –
  - (i) उक्त अपील की एक प्रति और  
A copy of the appeal, and
  - (ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।  
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.
5. अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।  
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
6. अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), 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. Nagarjuna Fertilizers & Chemicals Ltd. (hereinafter referred to also as NFCL), (IEC 0311032834), having their registered office at Door No.8-2-248, Nagarjuna Hills, Punjagutta, Hyderabad, Telangana-500082, were engaged in the import of Urea, Di Ammonium Phosphate (DAP), Muriate of Potash, NPK Complexes etc, in bulk. They were also engaged in the manufacture of Fertilisers and were having their plant at Kakinada.

2. Intelligence developed by Mumbai Zonal Unit of the Directorate of Revenue Intelligence (hereinafter referred to as DRI), indicated that M/s NFCL, had not been declaring certain elements of costs for arriving at the assessable value of the imported 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 Urea and other bulk Fertilizers from mother vessel at midstream/ anchorage to the landmass/wharf) as well as the ship demurrage charges (incurred on the chartered vessels), in the assessable value for payment of duty and thereby evaded payment of customs duty.

3. Intelligence developed further suggested that, in case of bulk cargo consignments M/s NFCL had discharged partial cargo at midstream /anchorage at Kandla Port, by deploying barges i.e the cargo was unloaded from the mother vessel, which was anchored at midstream, into the barges and then the cargo was brought to the landmass /wharf by these barges. M/s NFCL had employed M/s Rishi Shipping, Gandhidam, to handle their cargo from midstream till landmass /wharf and that M/s NFCL had made payment for barging / lighterage to M/s Rishi Shipping, Gandhidam. However it appeared that M/s NFCL had not included barging / lighterage charges in the Assessable Value for payment of customs duty. Intelligence also further suggested that NFCL 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.

4. 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.

4.1. Further, the Boards Circular No 38/2007-Customs, dated 9.10.2007 interalia 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.”*

5. Therefore, it appeared that, the charges incurred for transportation of cargo from midstream or anchorage to the landmass as well as ship demurrage charges were required to be included 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 are covered under clause (b) of Rule 10 (2) of the said Rules.

6. Based on the above intelligence, investigations were initiated against M/s Nagarjuna Fertilisers & Chemicals Ltd and summons were issued to NFCL on 18.07.2017. M/s NFCL sought time to submit the information and subsequently, Shri K.V.R. Acharyulu, Dy. General Manager Taxation of NFCL, appeared on 28.09.2017 and his statement was recorded.

**7. STATEMENTS UNDER SECTION 108 OF THE CUSTOMS ACT, 1962.**

**7.1** Statement of Shri K.V.R. Acharyulu , Dy. General Manager Taxation of NFCL, was recorded under Section 108 of the Customs Act, 1962, on 28.09.2017. **(RUD-1)**. In his statement Shri K.V.R. Acharyulu interalia stated that:-

- i. After completion of his M. Com in the year 1996 from Andhra University, he completed Bachelor of Law. He was also Associate Member of the Institute of Cost and Management Accountants, Kolkatta, (ACMA). He joined M/s Nagarjuna Fertilizers & Chemicals Ltd, in the year 2008 and was working in the capacity of Deputy General Manager -Taxation. He looked after all taxation matters of M/s NFCL.
- ii. M/s Nagarjuna Fertilizers & Chemicals Ltd, were into manufacturing and trading of Fertilisers and Micro-irrigation Equipments; that they were having their fertiliser plant at Kakinada and Micro-irrigation Equipment plant at Nacharam, Hyderabad. They were also importers of Fertilisers like Urea, Di Ammonium Phosphate (DAP), Muriate of Potash (MOP) i.e NPK Complexes.
- iii. They had been importing the said items i.e Fertilisers like Urea, Di Ammonium Phosphate (DAP), Muriate of Potash (MOP) in bulk mostly through Kandla, Krishnapatnam, Vishakapatnam & Gangavaram Ports; that they had also imported very small quantity from Tuticorin Port, during the year 2011-12.
- iv. On being asked as to whether any of these bulk imports were discharged at midstream or at anchorage, he stated that as he was aware in some cases at Kandla Port, partial cargo might have been discharged at midstream through barges; that in case of other ports i.e Krishnapatnam and Vishakapatnam as he remembered in one or two cases, lighterage /barging operations might had been taken place; that in case of Gangavaram Port no lighterage operations had taken place, as sufficient draft was available there. In case of Tuticorin port, the import quantity was very small and therefore might not had subjected to any lighterage; that however, he would check and produce all the details of the import consignments from all the ports, 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 yes, they might had incurred barging / lighterage charges on the discharge of cargo on the said shipments from the mother vessel at midstream; that he 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 they had not included the barging / lighterage charges on the discharge of bulk cargo from the mother vessel at midstream for payment of customs duty.
- vii. 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 included 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 required to be included in the value of imported goods for payment of customs duty.
- viii. He further stated that, the barging /lighterage charges should have been included by them in the assessable value for payment of duty; that they were not aware of the said provisions and therefore the same were not included in the cost while paying the customs duty; that the error was unintentional on their part and they will work out the duty payable and will deposit the same.
- ix. On being asked he further stated that they had employed M/s Rishi Shipping as their handling agent for their shipments at Kandla Port; that as regards other ports, there might had been lighterage operations in case of one or two consignments; that he would verify and produce all the details within two weeks along with the copies of the invoices and relevant records.

7.2 M/s NFCL also vide letter dated 28.09.2017 (**RUD-2**) submitted that, delay in submission of information was caused due to their employee Mr. P.S.R Murthy, who had been handling this matter had suddenly indisposed with severe and massive cardiac problem and therefore he could not attend the issue in time. That on his partial recovery they could elicit some data and that took time for their attending to the summons. That they had engaged M/s Rishi Shipping as their stevedoring agent at Kandla and as per the agreements entered with M/s Rishi Shipping they had entrusted the agent with the task of discharging the cargo and taking decision of using the barges depending upon the berthing prospects, port congestion, priority etc. Accordingly the agent was to use his own discretion for usage of barges for discharging the cargo; that relevant bills of entry covered in the subject proceedings were duly and finally assessed by the customs authorities complying



with the CCR and the EDI requirements. As such the issue of inclusion of barge charges in assessable value of the imported goods somehow missed their attention resulting in the short payment of duty. That their management had taken a conscious decision to pay the differential duty on barge charges along with applicable interest; that the initial non-payment of customs duty on the barge charges was basically attributable to lack of information and also since no such information was sought for by the customs authorities at the time of assessment. That there was absolutely no intention to evade any legal/lawful payments on the part of the management. That the fact may well be appreciated and the invocations of penal provisions may not be resorted to. That, they intend to avail the provisions of Section 28(5) and 28(6) of the Customs Act, 1962, by paying the duty along with applicable interest and penalty of 15% of the amount demanded.

**7.3** M/s NFCL, further vide letter dated 30.10.2017 (**RUD-3**), submitted that they had been importing bulk fertilisers through Kandla Port, Krishnapatnam Port, Gangavaram Port and Vizag Ports during the period 2012-13 to 2016-17. That, they affirmatively state that during the said period no barging /lighterage operations were taken place in all other ports except Kandla Port and one consignment in Vizag Port. That, as stated by them in their statement dated 28.09.2017, they were working out the differential customs duty payable on the barge /lighterage charges and that the same would be furnished in due course. That in the meanwhile they were paying an amount of Rs 50 Lakhs towards differential customs duty liability. They submitted a Demand Draft No.634076 dated 27.10.2017 drawn on State Bank of India, favouring Commissioner of Customs Kandla Port, towards their duty/interest liability in respect of barging/lighterage charges at Kandla Port. They further stated that as regards demurrage charges incurred by them on the chartered vessels they would be submitting the details shortly.

**7.4.** M/s NFCL, further vide letter dated 18.12.2017 (**RUD-4**), submitted two more demand drafts i.e. Demand draft No. 112469 dated 16.12.2017 for Rs 32,13,766 /- and Demand Draft No 112468 dated 16.12.2017 for Rs 2,80,269/- towards differential duty payable by them on lighterage /barge charges for the clearances at Kandla and Vizag Ports respectively. They also submitted the details of lighterage /barging charges incurred by them during the period 2012-13 to 2016-17. They further submitted that the balance amount of differential customs duty pertaining to ship demurrage charges will be paid by them in due course.

**7.5.** M/s NFCL, vide letter dated 30.01.2018, (**RUD-5**) submitted details of ship demurrage charges incurred by them for the period from 2012-13, at the four ports i.e. Krishnapatnam, Kandla, Vizag and Gangavaram Ports and also submitted following demand drafts towards differential duty and interest payable by them.

Sr No.	DD No.	Date	Amount in Rs	Drawn on (Bank)	On account of clearances from (Port)
1	634628	24-01-2018	47,25,499/-	SBI	Krishnapatnam
2	634595	18-01-2018	4,36,868/-	SBI	Vizag
3	634596	18-01-2018	11,58,479/-	SBI	Kandla
4	634597	18-01-2018	17,56,717/-	SBI	Gangavaram
5	634598	18-01-2018	20,00,000/-	SBI	Krishnapatnam
		<b>Total</b>	<b>1,00,77,563/-</b>		

7.6 Subsequently, M/s NFCL, vide letter dated 10.08.2018, (RUD-6), submitted detailed worksheet showing the differential duty and interest payable by them on the lighterage /barging charges for the clearances subjected to lighterage at Kandla and Vizag ports during the period 2012 to March 2016. They also submitted that, post 31.03.2016, there were no bulk imports subjected to lighterage. They further mentioned that, as per the detailed worksheet a total of Rs 55,88,678/- is payable by them towards differential duty and an amount of Rs 32,56,017/ is payable towards interest covering Kandla and Vizag ports. The total amount payable worked out to Rs 88,44,695/-. They further stated that, they had already paid an amount of Rs 84.94 Lakhs earlier, and submitted demand Drafts No. 805035 dated 8.8.2018 and Demand Draft No 805034 dated 8.8.2018 for Rs 2,96,662/- and Rs 53,998/- (total amount paid Rs 3,50,660/-) respectively payable at Kandla and Vizag ports. They further stated that the differential duty/interest voluntarily paid by them also included the duty payable beyond five years period. That as stated by them the non inclusion of lighterage/barging charges in the assessable value during the clearance was unintentional and accordingly they had taken a conscious decision and had voluntarily paid the duty along with the applicable rate of interest for the period September 2012 to till date. They further stated that they would also pay an amount of 15% of the duty amount as penalty as provided for under Section 28(5) of the Customs Act, 1962. They further stated that they would not be contesting the issue and would seek closure of proceedings as provided for under section 28(6) of the Customs Act, 1962. They further requested that the differential duty and interest amount voluntarily paid by them for the period beyond 5 years may please be appropriated accordingly.

7.7 Accordingly, M/s NFCL vide letter dated 18.03.2019, (RUD -7 ) submitted demand draft No. 054548 dated 16.03.2019 for Rs. 4,51,638/- towards penalty on account of lighterage and barging charges.

7.8. In case of duty on ship demurrage charges M/s NFCL, vide letter dated 16-08-2018, (RUD-8) submitted as under;

- i. They had incurred ship demurrage charges in respect of shipments cleared through four ports viz. Krishnapatnam, Gangavaram, Vizag and Kandla during the period 2012-17.
- ii. They were in receipt of Show Cause Notice from Joint Commissioner, Customs House, Krishnapatnam Port, in respect of non payment of duty on ship demurrage charges for the clearances pertaining to Krishnapatnam Port covering periods from 2010-14.
- iii. In fact they were not agreeable towards duty liability on ship demurrage charges as envisaged in the said SCN and therefore had contested the matter before the Adjudicating Authorities.
- iv. However the Adjudicating Authority had confirmed that demand vide Adjudication order dated 29-03-2016, vide OIO No. KPCH/CPC/JC/18/15-16 passed by the Joint Commissioner, Custom House, Krishnapatnam, duly raising a demand of Rs. 44.04 lakhs.
- v. Subsequently they had filed Appeal before the Commissioner (Vizag –Appeals II) vide Appeal No. 31/2016 –(V) CUS dated 09.05.2016 after pre depositing an amount of Rs 3.30 Lakhs.
- vi. However subsequent to DRI-Mumbai inquiry and proceedings therewith, they were convinced that ship demurrage charges are subject to customs duty as provided in Rule 10 (2) of the Customs Valuation Rules, 2007 and accordingly they had made the voluntary payment of Rs 1,00,77,563/- on account of differential duty and interest payable on ship demurrage charges as per the details tabulated below.

Sr. No	Name of the Port	Payment made towards duty and interest on ship demurrage charges (Rs)
1	Krishnapatnam	67,25,499/-
2	Kandla	11,58,479/-
3	Gangavaram	17,56,717/-
4	Vizag	4,36,868/-
	<b>Total</b>	<b>1,00,77,563/-</b>

- vii. They have disclosed the above fact of payment of duty by them before the DRI Mumbai to Commissioner (Appeals), forming part of their submissions and made a prayer for waiver of penalty duly admitting their duty liability.
- viii. The voluntary duty paid by them as cited above, interalia included the demand amount of Rs 44.04. Lakhs as per Adjudication Order dated 29.03.2016.

- ix. Currently they had taken a stand that customs duty shall be paid on ship demurrage charges if any incurred by them and they were complying with the same for the purpose of determination of assessable value under Customs Act.
- x. They enclosed relevant worksheets showing the details of differential customs duty along with interest payable thereon on ship demurrage charges including the clearances which were forming part of the Adjudication Order cited above.
- xi. That they were in the process of paying balance amount payable and also would submit relevant calculation sheets in due course.

M/s NFCL enclosed the copies of the SCN, OIO and Appeal papers as cited by them in their above letter and requested to consider the said facts in the further proceedings.

**7.9** In continuation with their letter dated 16.08.2018, M/s NFCL vide letter dated 07.01.2019 (**RUD-9**) further submitted as under;

- i. They had preferred appeal before the Commissioner (Vizag –Appeals II) vide Appeal No. 31/2016 –(V) CUS dated 09.05.2016 duly pre depositing an amount of Rs 3.30 Lakhs, against the OIO dated 29.03.2016 passed by the Joint Commissioner, Customs House, Krishnapatnam Port, towards payment of duty on ship demurrage charges, duly raising a demand of Rs. 44.04 Lakhs duty and an equal amount of penalty.
- ii. However subsequent to DRI-Mumbai inquiry and proceedings therewith, they were convinced that ship demurrage charges are subject to customs duty and accordingly they had made the voluntary payment of Rs 1,11,27,649/- on account of the same.
- iii. They had disclosed the above fact of payment of duty by them before the DRI Mumbai to Commissioner (Appeals), forming part of their submissions and made a prayer for waiver of penalty duly admitting their duty liability.
- iv. Commissioner (Appeals) has upheld the demand as well as the penalty as per the OIO.
- v. Subsequent to DRI investigation they have taken a stand that demurrage charges forms part of the Assessable Value and accordingly they have been paying customs duty on all their clearances wherever there any incurrence of demurrage.
- vi. As regards duty and interest payable on the demurrage charges for the earlier clearances which took place in four ports they have already paid the same which also included the clearances covered under Show Cause Notice and consequential Adjudication Order dated 29.03.2016.

- vii. That they would be preferring appeal before the Honourable CESTAT, Hyderabad, shortly praying for waiver /reduction of Penalty as regards subject order in Appeal. That they would furnish DRI a copy of their Appeal.
- viii. As regard the demurrage charges pertaining to other ports, as they have already paid the differential customs duty along with applicable interest thereon and also considering the fact that they agree to pay the penalty of 15% in terms of Section 28(5) of the Customs Act, 1962, they humbly request that the matter may kindly be considered for closure in terms of Section 28(6) of the Customs Act, 1962, for all the clearances except those which were covered by the Adjudication Order dated 29.03.2016, the proceedings of which are in appeal before the Honourable CESTAT Hyderabad, where they have prayed for waiver of penalty.

**7.10** M/s NFCL, vide letter dated 29.03.2019, **(RUD-10)** submitted that they have preferred appeal before the Honourable CESTAT, Hyderabad, against the order of the Commissioner Appeals requesting for waiver/reduction of penalty in respect of duty on ship demurrage charges for the clearances done through Krishnapatnam Port. They enclosed copy of their appeal before CESTAT. **They further submitted that as regards ship demurrage charges pertaining to other ports (other than Krishnapatnam Port) as they have already paid the differential duty along with the applicable interest thereon and also considering the fact that they agree to pay the penalty of 15% in terms of Section 28(5) of the Customs Act, 1962, they humbly request that the matter may kindly be considered for closure in terms of Section 28(6) of the Customs Act, 1962, for all the clearances except those which were covered by the Adjudication Order dated 29.03.2016, the proceedings of which are in appeal before the Honourable CESTAT Hyderabad, where they have prayed for waiver of penalty.**

They also enclosed two Challans i.e for Rs. 5,75,044/- and Rs. 4,75,042/- towards balance payment of customs duty and interest made by them for ship demurrages at Krishnapatnam Port.

**7.11.** Subsequent to the above, M/s NFCL, vide letter dated 07.08.2019, **(RUD-11)** submitted as under:

i. As regards duty on lighterage /barging is concerned they have paid the entire duty, interest and penalty amount as provided for under Section 28(5) of Customs Act, 1962 and had further stated that they would not be contesting this issue and would seek closure of proceedings in terms of Section 28(6) of Customs Act, 1962.

ii. In this regard further **they wish to seek closure of the proceedings under Section 28(5) and 28 (6) of the Customs Act, 1962, without seeking the issuance of formal**

**Show Cause Notice;** that they were doing so in reliance upon the Hon'ble Supreme Court's decision in Commissioner of Customs Bombay Vs Virgo Steel and Ors, Bombay (AIR 2002 SCC 1745) as well as in accordance with Clause 9.1 of the Master Circular on Show Cause Notice, Adjudication and Recovery dated 10-03-2017 ( F.No. 96//1/2017-CX.1) and the clarification dated 18.08.2015 (F No. 137/46/2015-Service Tax ) which also clarifies on a similar issue.

iii. Further, as informed vide their letter dated 29.03.2019, in case of duty on vessel demurrage charges they had paid the applicable duty and interest thereon and had requested for closure of the matter for all clearances except those occurred at Krishnapatnam Port which were covered by adjudication order dated 29.03.2016, wherein an appeal exclusively for waiver of penalty, before CESTAT, Hyderabad, is pending. **They requested that even demurrage issue may also be closed without issue of formal Show Cause Notice. That they agree to pay the penalty of 15% in terms of Section 28(5) and 28 (6) of the Customs Act, 1962 on the differential duty on the demurrage charges.**

iv. **That on the basis of the above and in the interest of bringing the matter to closure, they requested that the matter may kindly be closed without issue of Show Cause Notice.**

7.12. Subsequent to the above, M/s NFCL, vide letter dated 23.09.2019 (RUD- 12) submitted that according to their earlier submission they have paid the balance amount towards differential duty and interest at Krishnapatnam, Vizag and Gangavaram Ports towards vessel demurrage charges. The details were as under.

Name of the Port	Amount deposited	On account of	Challan details.
Krishnapatnam	Rs. 1,16,906/-	Duty/Interest	485/2019-20 dated 23.09.2019
Gangavaram	Rs. 1,35,646/-	Duty/Interest	DD No 26433 dated 20.09.2019
Vizag	Rs. 60,938/-	Duty/Interest	DD No 26432 dated 20.09.2019
Total Paid	Rs. 3,13,490/-		

They further stated that as per their letter dated 29.03.2019, they have also paid penalty of 15% in terms of Section 28(5) and 28 (6) of the Customs Act, 1962 on the differential duty on the demurrage charges.

The details were as under.

Name of the Port	Amount deposited	On account of	Challan details.
Vizag	Rs. 45,075/-	Penalty	DD No 26431 dated 20.09.2019
Gangavaram	Rs. 863/-	Penalty	DD No 26430 dated 20.09.2019
Total Paid	Rs. 45,938/-		

They further stated that the differential duty/interest voluntarily paid by them both on account of lighterage charges as well as vessel demurrage charges also included the duty payable beyond five years period. They further requested that the differential duty and interest amount voluntarily paid by them for the period beyond 5 years may please be appropriated accordingly and that, as requested by them vide their letter dated 07.08.2019, both the issues i.e lighterage as well as vessel demurrage charges may be closed without issue of formal Show Cause Notice.

#### 8. ANALYSIS OF DOCUMENTS:

8.1. M/s NFCL, 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. Alongwith the documents NFCL also submitted the detailed worksheets showing the differential customs duty payable by them on the barging /lighterage charges. They also submitted that rate of barging charged by M/s Rishi Shipping to them was constant at Rs.50/-PMT for the entire period from 2012 till 2016 and that there was no midstream discharge beyond 2016. They also submitted three sample bills of lighterage each for every vessel raised by their stevedoring agent (M/s Rishi Shipping) during the relevant period.

8.2. From the documents submitted by M/s NFCL, it was seen that, during the period September 2012 to March 2016, in case of 46 consignments of Urea, DAP, NPK cleared at Kandla Port, they had been charged lighterage/barging charges by M/s Rishi Shipping, Kandla, who were their handling agent. From the copies of contracts produced by M/s NFCL, it was seen that the consolidated rates for clearance of cargo from the ship and by road as well as rail despatches included uniform barging charges of Rs 50/- PMT. The said rate of Rs 50/- PMT, was constant in respect of all the contracts covering the period 2012 to March 2016. Accordingly, M/s Rishi Shipping, had charged barging charges @Rs 50/-PMT on the entire quantity cleared in accordance with the said contracts. The total barging/ lighterage charges incurred by M/s NFCL, in case of these 46 consignments amounted to Rs.

86118187/- . In case of Vizag Port, as submitted by M/s NFCL, in case of only one vessel i.e Wadi Feron, which had cleared during September, 2012, they had incurred total lighterage /barging charges of Rs. 28,98,329/-. As per the detailed worksheet submitted by M/s NFCL, total of Rs 55,88,678/- was payable by them towards differential duty and an amount of Rs 32,56,017/- was payable towards interest covering Kandla and Vizag ports. The total amount payable towards duty and interest worked out to Rs 88,44,695/-. The details of the said consignments are detailed in **Annexure-'A'** to the Show Cause Notice.

**8.3** Similarly, in case of vessel demurrage charges, M/s NFCL submitted relevant import documents along with the relevant documents, on account of demurrage charges paid by them. It was submitted by M/s NFCL that during the period 2012 to 2016 in case of 42 vessels/shipments of Fertilisers, cleared from cleared from four ports i.e Krishnapatnam, Kandla, Gangavaram and Vizag Ports they had incurred demurrage charges. From the relevant import documents it was seen that M/s NFCL had not included these charges in the Assessable Value while paying the customs duty. As per the detailed worksheet submitted by M/s NFCL, total of Rs 58,11,171/- was payable by them towards differential duty and an amount of Rs 44,37,693/- was payable towards interest covering the aforesaid four ports. The total amount payable towards duty and interest worked out to Rs 1,02,58,866/-. The details of the said consignments are detailed in **Annexure-'B'** to the Show Cause Notice.

**8.4** These charges were being incurred towards barging/ lighterage charges, as well as vessel demurrage charges and appear to be includible in the assessable value for payment of customs duty, in terms of Rule 10 (2) (a) of the Customs Valuation Rules, 2007. As per 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 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. Shri K.V.R. Acharyulu, Dy General Manager-Taxation of M/s NFCL, in his statement recorded on 28.09.2017, under Section 108 of the Customs Act, 1962, had admitted that the barging /lighterage charges as well as vessel demurrage charges should have been included by them in the assessable value for payment of duty and that the error was unintentional on their part. M/s NFCL had submitted that the differential duty/interest voluntarily paid by them both on account of lighterage charges as well as vessel demurrage charges also included the duty payable beyond five years period and had further requested that the differential duty and interest amount voluntarily paid by them for the period beyond 5 years may please be appropriated accordingly. M/s NFCL vide letter dated 07.08.2019 as well as letter dated 23.09.2019, had also stated that they wish to seek closure of the proceedings under Section 28(5) and 28 (6) of the Customs Act, 1962, without seeking the issuance of formal Show Cause Notice. The duty and interest payable



and which has been fully paid by NFCL towards lighterage and vessel demurrage charges beyond five years period is detailed in Annexure A2 and Annexure B2 to this report respectively. Likewise, the duty alongwith interest payable and fully paid by M/s NFCL towards lighterage as well as vessel demurrage charges is shown in Annexure A1 and B1 to this report respectively. In case of Krishnapatnam Port, the shipments within five years period have also been covered in the SCN issued and adjudicated vide OIO No. KPCH/CPC/JC/18/15-16 dated 29.03.2016, passed by the Joint Commissioner, Custom House, Krishnapatnam. Therefore, these clearances have been mentioned separately in Annexure B2 at Sr No. 35 to 37 and have been excluded from the duty demanded. Therefore, the total duty and interest payable within the period of five years in case of lighterage and vessel demurrage charges as detailed in Annexure A1 and B1 works out to Rs.33,17,173/-(duty) and Rs. 13,55,985/- (interest) Total Rs. 46,73,158/-.

**8.5** As stated in case of the consignments cleared from Krishnapatnam Port, Sr No. 2 to 18 of Annexure B2 (falling beyond five years period) and Sr No. 35 to 37 of Annexure B2 (falling within five years period) are part of SCN already issued and adjudicated vide OIO No. KPCH/CPC/JC/18/15-16 dated 29.03.2016 passed by the Joint Commissioner, Custom House, Krishnapatnam. M/s NFCL had submitted that they have filed appeal before CESTAT, praying only for waiver/reduction of penalty and have no contention against duty and interest payable on vessel demurrage charges. Accordingly, since these consignments are part of SCN already issued, the same needs to be excluded, while computing the differential duty on vessel demurrage charges, falling within five years period. Accordingly, the same have been shown separately at Sr No. 35 to 37 in Annexure B2 of the Show Cause Notice.

## **9. LEGAL PROVISIONS & DISCUSSION.**

**9.1.** 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 interalia states:-

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

*Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services,*

*including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf."*

9.2. 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;"*

9.3. 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."*

9.4. 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 includes 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 a 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 Section 14 of the Customs Act, 1962. The said Rules define 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.

9.5. 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 the onus of the importer to declare such costs to the Customs for proper assessment of assessable value and payment of Customs duty.

9.6. From a combined reading of the provisions of statute as aforesaid, it appeared 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.

9.7. 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.**

9.8. 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 <sup>3</sup>[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.**

9.9. M/s NFCL, therefore, appeared to 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 had 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, had led to mis-declaration of the value of imported goods, which ultimately resulted in short payment of Customs duty.

**9.10. 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.*

9.11. It appeared that, as provided for under Section 17 of the Customs Act 1962, after introduction of self assessment under the Customs Act, more faith is bestowed on the importer and therefore, the departmental 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, appear invocable in this case.

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

**9.12.1 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.*

**9.12.2. 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.*

**9.12.3 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.*

**10. VOLUNTARY PAYMENT OF DUTY, INTEREST & PENALTY.**

During the course of investigation, NFCL, voluntarily deposited a total sum of Rs. **2,07,83,410/- (Rupees Two Crore Seven Lakh Eighty Three Thousand Four Hundred Ten 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 and that the issue may be closed without issue of formal Show Cause Notice. The details of the payments are as under:-

Sr No	DD No	Date	Bank	Amount	Challan details	on account of	Port
1	634076	27.10.2017	State Bank of India	50,00,000	Kandla /challan No RD-55 dated 10.11.2017	Lighterage	Kandla
2	112469	16.12.2017	UCO Bank	32,13,766	Kandla /challan No RD-63 dated 28.12.2017	Lighterage	Kandla
3	805035	08.08.2018	UCO Bank	2,96,662	Kandla /challan No 765 dated 24.09.2018	Lighterage	Kandla
4	634596	18-01-2018	SBI	11,58,479	Kandla /challan No RD-71 dated 16.02.2018	Demurrage	Kandla
5	54548	16-03-2019	IDBI Bank	4,51,638	Kandla /challan No RD-66 dated 22.04.2019	Lighterage	Kandla
		<b>Total Kandla</b>		<b>101,20,545</b>			
6	112468	16.12.2017	UCO Bank	2,80,269	Vishakapatnam /challan No CM-413 dated 27.12.2017	Lighterage	Vizag
7	805034	08.08.2018	UCO Bank	53,998	Vishakapatnam /challan No. CM - 214 dated 14.09.2018	Lighterage	Vizag
8	26432	20.09.2019	IDBI Bank	60,938	Vizag duty/int	Demurrage	Vizag
9	634595	18-01-2018	SBI	4,36,868	CM-228 dated 12.02.2018 for Rs 2193585/-	Demurrage	Vizag
10	26431	20.09.2019	IDBI	45,075	Vizag penalty	Demurrage	Vizag
		<b>Total Vizag</b>		<b>8,77,148</b>			

11	634597	18-01-2018	SBI	17,56,717	CM-228 dated 12.02.2018 for Rs 2193585/-	Demurrage	Ganga varam
12	26433	20.09.2019	IDBI	1,35,646	GPL Duty/int	Demurrage	Ganga varam
13	26430	20.09.2019	IDBI	863	GPL penalty	Demurrage	Ganga varam
		<b>Total Gangavaram</b>		<b>18,93,226</b>			
14	634598	18-01-2018	SBI	20,00,000	Krishnapatnam /challan No 279	Demurrage	Krishn apatn am
15	634628	24-01-2018	SBI	47,25,499	dated 21.02.2018 for Rs 6725499/-	Demurrage	Krishn apatn am
16	788420	20-12-2018	Corporat ion Bank	5,75,044	Krishnapatnam/c hallan No1393 dated 03.01.2019	Demurrage	Krishn apatn am
17	788435	27-12-2018	Corporat ion Bank	4,75,042	Krishnapatnam /challan No 1395 dated 03.01.2019	Demurrage	Krishn apatn am
18	004188	20.09.2019	IDBI	1,16,906	KPL-Duty/Int	Demurrage	Krishn apatn am
		<b>Total Krishnapatnam</b>		<b>78,92,491</b>			
<b>Grand Total</b>				<b>207,83,410</b>			

## 11. SUMMARY OF INVESTIGATION.

From the foregoing, it was appeared that:

**11.1** M/s Nagarjuna Fertilizers & Chemicals Ltd, having their registered office at Door No.8-2-248, Nagarjuna Hills, Punjagutta, Hyderabad, Telangana-500082, were engaged in the import of Urea, Di Ammonium Phosphate (DAP), Muriate of Potash, NPK Complexes etc, in bulk. They were also engaged in the manufacture of Fertilisers and were having their plant at Kakinada. M/s NFCL had not been declaring certain elements of costs for arriving at the assessable value of the imported 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 Urea and other bulk Fertilizers from mother vessel at midstream/ anchorage to the landmass/wharf) as well as the ship demurrage charges (incurred on the chartered vessels), in the assessable value for payment of duty and thereby evaded payment of customs duty.

M/s NFCL had employed M/s Rishi Shipping, Gandhidam, to handle their cargo from midstream till landmass /wharf (i.e the cargo was unloaded from the mother vessel, which was anchored at midstream, into the barges and then the cargo was brought to the landmass /wharf by these barges) and M/s NFCL, had not included these barging / lighterage charges in the Assessable Value for payment of customs duty. Further M/s NFCL had incurred ship demurrage charges on the imports of fertilizers in bulk at Kandla, Krishnapatnam, Gangavaram and Vizag Ports and that they had not included these charges in the Assessable Value for payment of custom duty.

**11.2** The charges incurred towards lighterage /barging charges as well as ship demurrage charges, form 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. 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.

**11.3** During the statement recorded under Section 108 of the Customs Act, 1962, on 28.9.2017, Shri K.V.R. Acharyulu, Dy. General Manager Taxation NFCL, stated that, they had employed M/s Rishi Shipping at Kandla Port, as their handling agents for their import consignments their handling agent for their shipments at Kandla Port and that as regards other ports, there might had been lighterage operations in case of one or two consignments which he would verify and produce all the details. Further, M/s NFCL vide letter dated 28.09.2017 submitted that, they had engaged M/s Rishi Shipping as their stevedoring agent at Kandla and as per the agreements entered with M/s Rishi Shipping they had entrusted the agent with the task of discharging the cargo and taking decision of using the barges depending upon the berthing prospects, port congestion, priority etc; that accordingly the agent was to use his own discretion for usage of barges for discharging the cargo; that as such the issue of inclusion of barge charges in assessable value of the imported goods somehow missed their attention resulting in the short payment of duty; that their management had taken a conscious decision to pay the differential duty on barge charges along with applicable interest; that they intend to avail the provisions of Section 28(5) and 28(6) of the Customs Act, 1962, by paying the duty along with applicable interest and penalty of 15% of the amount demanded.

**11.4** M/s NFCL, further vide letter dated 30.10.2017, submitted that they had been importing bulk fertilisers through Kandla Port, Krishnapatnam Port, Gangavaram Port and Vizag Ports during the period 2012-13 to 2016-17. That, during the said period no barging



/lighterage operations were taken place in all other ports except Kandla Port and one consignment in Vizag Port. They meanwhile voluntarily deposited the amounts towards duty and interest payable by them on the lighterage charges. The total amount payable worked out to Rs 88,44,695/-. They further stated that the differential duty/interest voluntarily paid by them also included the duty payable beyond five years period. They further stated that they would also pay an amount of 15% of the duty amount as penalty as provided for under Section 28(5) of the Customs Act, 1962. They further stated that they would not be contesting the issue and would seek closure of proceedings as provided for under section 28(6) of the Customs Act, 1962. They further requested that the differential duty and interest amount voluntarily paid by them for the period beyond 5 years may please be appropriated accordingly. Subsequently, M/s NFCL vide letter dated 18.03.2019, submitted demand draft No. 054548 dated 16.03.2019 for Rs. 4,51,638/- towards penalty on account of lighterage and barging charges.

11.5. As regards vessel demurrage charges, M/s NFCL, vide letter dated 30.01.2018, submitted details of ship demurrage charges incurred by them for the period from 2012-13, at the four ports i.e. Krishnapatnam, Kandla, Vizag and Gangavaram Ports and also submitted following demand drafts towards differential duty and interest payable by them.

Sr No.	DD No.	Date	Amount in Rs	Drawn on (Bank)	On account of clearances from (Port)
1	634628	24-01-2018	47,25,499/-	SBI	Krishnapatnam
2	634595	18-01-2018	4,36,868/-	SBI	Vizag
3	634596	18-01-2018	11,58,479/-	SBI	Kandla
4	634597	18-01-2018	17,56,717/-	SBI	Gangavaram
5	634598	18-01-2018	20,00,000/-	SBI	Krishnapatnam
		<b>Total</b>	<b>1,00,77,563/-</b>		

In this respect, M/s NFCL, further submitted that, they had incurred ship demurrage charges in respect of shipments cleared through four ports viz. Krishnapatnam, Gangavaram, Vizag and Kandla during the period 2012-17; that they were in receipt of Show Cause Notice from Joint Commissioner, Customs House, Krishnapatnam Port, in respect of non payment of duty on ship demurrage charges for the clearances pertaining to Krishnapatnam Port, covering periods from 2010-14; that at that point they were not agreeable towards duty liability on ship demurrage charges as envisaged in the said SCN and therefore had contested the matter before the Adjudicating Authorities; that the

Adjudicating Authority had confirmed that demand vide Adjudication order dated 29-03-2016, vide OIO No. KPCH/CPC/JC/18/15-16 passed by the Joint Commissioner, Custom House, Krishnapatnam, duly raising a demand of Rs. 44.04 lakhs; that subsequently they had filed Appeal before the Commissioner (Vizag –Appeals II) vide Appeal No. 31/2016 –(V) CUS dated 09.05.2016 duly pre depositing an amount of Rs 3.30 Lakhs; that subsequent to DRI-Mumbai inquiry however, they were convinced that the ship demurrage charges were subject to customs duty as provided in Rule 10 (2) of the Customs Valuation Rules, 2007 and accordingly they had made the voluntary payment of Rs 1,00,77,563/- on account of differential duty and interest payable on ship demurrage charges, which also included the duty confirmed under aforesaid OIO, at Krishnapatnam Port; that they have preferred appeal before the Honourable CESTAT, Hyderabad, in the said matter only for waiver/reduction of penalty. They enclosed copy of their appeal before CESTAT.

**11.6.** Subsequently, M/s NFCL, vide letter dated 07.08.2019, submitted that as regards duty on lighterage /barging is concerned they have paid the entire duty, interest and penalty amount as provided for under Section 28(5) of Customs Act, 1962 and had further stated that they will not be contesting this issue and would seek closure of proceedings in terms of Section 28(5) and 28 (6) of the Customs Act, 1962, without seeking the issuance of formal Show Cause Notice; that they were doing so in reliance upon the Hon'ble Supreme Court's decision in Commissioner of Customs Bombay Vs Virgo Steel and Ors, Bombay (AIR 2002 SCC 1745) as well as in accordance with Clause 9.1 of the Master Circular on Show Cause Notice, Adjudication and Recovery dated 10-03-2017 ( F.No. 96//1/2017-CX.1) and the clarification dated 18.08.2015 (F No. 137/46/2015-Service Tax ) which also clarifies on a similar issue; that even demurrage issue may also be closed without issue of formal Show Cause Notice.

**11.7** M/s NFCL, further vide letter dated 23.09.2019, also paid an amount of Rs 3,59,428/- towards balance duty/interest as well as penalty payable on vessel demurrage charges. They further stated that the differential duty/interest voluntarily paid by them both on account of lighterage charges as well as vessel demurrage charges also included the duty payable beyond five years period. They further requested that the differential duty and interest amount voluntarily paid by them for the period beyond 5 years may please be appropriated accordingly and that as requested by them vide their letter dated 07.08.2019, both the issues i.e Lighterage as well as vessel demurrage charges may be closed without issue of formal Show Cause Notice.

**11.8.** From the documents submitted by M/s NFCL, that, it was seen that, during the period September 2012 to March 2016, in case of 46 consignments of Urea, DAP, NPK cleared at Kandla Port, and in case of one vessel at Vizag Port they had incurred lighterage

/barging charges. As per the detailed worksheet submitted by M/s NFCL, total of Rs 55,88,678/- was payable by them towards differential duty and an amount of Rs 32,56,017/- was payable towards interest covering imports at Kandla and Vizag ports. The total amount payable towards duty and interest worked out to Rs 88,44,695/-. The details of the said consignments are detailed in **Annexure-'A'** to the Show Cause Notice. Similarly, in case of vessel demurrage charges, it was submitted by M/s NFCL that during the period 2012 to 2016 in case of 42 vessels/shipments of Fertilisers, cleared from four ports i.e Krishnapatnam, Kandla, Gangavaram and Vizag, they had incurred demurrage charges. As per the detailed worksheet submitted by M/s NFCL, total of Rs 58,11,171/- was payable by them towards differential duty and an amount of Rs 44,37,693/- was payable towards interest covering the aforesaid four ports. The total amount payable towards duty and interest worked out to Rs 1,02,58,866/-. The details of the said consignments are detailed in **Annexure-'B'** to the Show Cause Notice. The duty and interest payable and which has been fully paid by NFCL towards lighterage and vessel demurrage charges beyond five years period is detailed in Annexure A2 and Annexure B2 to the SCN respectively. Likewise, the duty along with interest payable and fully paid by M/s NFCL towards lighterage as well as vessel demurrage charges is shown in Annexure A1 and B1 to this SCN respectively. In case of Krishnapatnam Port, the shipments within five years period have also been covered in the SCN issued and adjudicated vide OIO No. KPCH/CPC/JC/18/15-16 dated 29.03.2016, passed by the Joint Commissioner, Custom House, Krishnapatnam. Therefore, these clearances have been mentioned separately in Annexure B2 at Sr No. 35 to 37 and have been excluded from the duty demanded.

**11.9** As provided for under Section 17 of the Customs Act 1962, after 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, appeared invokable in this case.

**11.10.** It appeared that Customs duty had been short paid on the goods so imported by NFCL, 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 alongwith the duty payable thereon are detailed in **Annexure A1(with respect to lighterage/barging)** and **Annexure B1(with respect vessel demmuration)** to the Show Cause Notice, which appeared to be recoverable from the said importer under the extended period provisions as per Section 28(4) of the Customs Act, 1962.

**11.11** Further, the demand of duty from M/s NFCL as detailed **Annexure A2(with respect to lighterage/barging)** and **Annexure B2(with respect vessel demmuration)** to the notice is beyond the period of five years. The amount of differential duty for the goods imported beyond five years period, as detailed therein, appeared to have been not paid or short paid due to wilful mis-statement and suppression of facts by M/s NFCL. 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 appear to 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 appears liable to be adjusted against the duty and interest recoverable for the period beyond five years. M/s NFCL vide their letters dated 10.08.2018 and 23.09.2019, have 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 amounts voluntarily paid by M/s NFCL towards duty liability/interest for the period beyond five years as detailed in **Annexure A2** and **Annexure B2** (apart from the shipments cleared from Krishnapatnam Port, which are covered under OIO No. KPCH/CPC/JC/18/15-16 dated 29.03.2016 passed by the Joint Commissioner, Custom House, Krishnapatnam), to this notice, is, proposed to be adjusted out of the voluntary payments made by them as mentioned in para 10 of the notice.

**11.12** Further, the details of consignments alongwith 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 demmuration)** to the Show Cause Notice. Therefore, an amount of **Rs. 33,17,173/- (Rupees Thirty Three Lakh Seventeen Thousand One Hundred Seventy Three Only)**, as detailed in the said Annexure 'A1' and

**Annexure 'B1'**, on account of differential duty payable on lighterage/barging charges and vessel demurrage charges respectively, appeared recoverable from the said importer under the extended period provisions as per Section 28(4) of the Customs Act, 1962. It further appeared that, such non-payment of duty of Customs, also attract interest under section 28AA of the Customs Act, 1962 and therefore interest of **Rs 13,55,985/- (Rupees Thirteen Lakh Fifty Five Thousand Nine Hundred Eighty Five 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.

**11.13.** It was further appeared that, the goods imported by M/s NFCL, as detailed in **Annexure 'A1' & 'B1'**, to this 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 appear to be liable for confiscation under Section 111(m) of the Customs Act, 1962.

**11.14.** 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 NFCL was also appeared to be liable for penalty under Section 114A of the Customs Act, 1962.

#### **SHOW CAUSE**

**12.** In this case, the imports have taken place through Kandla, Vizag and Gangavaram Ports. As regards Gangavaram Port, the same falls within the jurisdiction of Vizag Port. Accordingly, the Show Cause Notice has been made answerable to the respective Adjudicating Authorities.

**12.1.** In view of the above discussions and facts M/s Nagarjuna Fertilisers & Chemicals Ltd, having their registered office at Door No.8-2-248, Nagarjuna Hills, Punjagutta, Hyderabad, Telangana-500082 were called upon vide Notice F.No.DRI/MZU/D/INT-35/2017(NFCL) date: 27/09/2019 by the Joint Director, DRI, MZU, Mumbai to Show Cause to :-

**12.1.1.** **The Additional / Joint Commissioner of Customs, Custom House, Near Balaji Temple, Kandla -370201** as to why:-

- (i) The impugned goods cleared under Bills of Entries as detailed in **Annexure-A1** to this Show Cause Notice, should not be held liable for confiscation

under section 111(m) of the Customs Act, 1962. However, the goods are not available for confiscation having been disposed off after import.

- (ii) Differential duty amounting to **Rs. 30,10,922/- (Rupees Thirty Lakh Ten Thousand Nine Hundred Twenty Two Only)** as detailed in **Annexure- A1** to this Notice, should not be paid by them under the provisions of Section 28(4) of the Customs Act, 1962.
- (iii) Interest of **Rs 12,50,921/- (Rupees Twelve Lakh Fifty Thousand Nine Hundred Twenty One Only)**, as detailed in **Annexure- A1** to this notice, should not be paid by them under Section 28AA of the Customs Act, 1962.
- (iv) penalty should not be levied on them under Section 114A of the Customs Act, 1962.
- (v) amount of **Rs. 47,13,481/- (Rupees Forty Seven Lakh Thirteen Thousand Four Hundred Eighty One Only)** voluntarily deposited by M/s NFCL during the course of investigation, should not be appropriated towards the above liability of differential duty, interest and fine and/or penalties, if any levied in these proceedings.

**12.1.2. The Additional / Joint Commissioner of Customs, Vizag Custom House, Port Area, Vishakapatnam, Andhra Pradesh- 530035 as to why:-**

- (i) The impugned goods cleared under Bills of Entries as detailed in **Annexure- B1** to this Show Cause Notice, should not be held liable for confiscation under section 111(m) of the Customs Act, 1962. However, the goods are not available for confiscation having been disposed off after import.
- (ii) Differential duty amounting to **Rs. 3,06,251/- (Rupees Three Lakh Six Thousand Two Hundred Fifty One Only)** as detailed in **Annexure- B1** to this Notice, should not be paid by them under the provisions of Section 28(4) of the Customs Act, 1962.
- (iii) Interest of **Rs 1,05,064/- (Rupees One Lakh Five Thousand Sixty Four Only)**, as detailed in **Annexure- B1** to this notice, should not be paid by them under Section 28AA of the Customs Act, 1962.
- (iv) penalty should not be levied on them under Section 114A of the Customs Act, 1962.
- (v) amount of **Rs. 4,57,253/- (Rupees Four Lakh Fifty Seven Thousand Two Hundred Fifty Three Only)** voluntarily deposited by M/s NFCL during the course of investigation, should not be appropriated towards the above

liability of differential duty, interest and fine and/or penalties, if any levied in these proceedings.

#### DEFENCE REPLY AND PERSONAL HEARING

13. Pursuant to the issuance of Show Cause Notice to M/s. Nagarjuna Fertilizers & Chemicals Ltd., they ,vide their letters dated 03.10.2019 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 03.10.2019 have also informed to both 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 letters dated 10.08.2018 and 23.09.2019 had stated that they would seek closure of the proceedings in terms of Section 28(6) ibid, on receipt of the SCN. M/s. NFCL, vide their letters dated 03.10.2019, 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 10.08.2018 and 23.09.2019 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

14. 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.59/2019-Customs(N.T.)/CAA/DRI) dated 06.11.2019 (case mentioned at Sr. No. 1 in the Table given in the notification) has appointed the Joint/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 and (ii) Vizag Custom House, Visakhapatnam. Further, the Deputy Director, DRI, MZU, Mumbai vide letter dated 27.11.2019 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 03.10.2019 that the noticee vide his letter dated 03.10.2019, 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.

15. I have carefully gone through the entire records of the case including the Show Cause Notice dated 27.09.2019, relied upon documents under the Show Cause Notice, facts of the case and the submissions made by M/s Nagarjuna Fertilisers & Chemicals Ltd. In the instant case, NFCL 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, NFCL, voluntarily deposited a total sum of Rs. 2,07,83,410/- 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.

15.1. Further, I find that vide para 17 of the Show Cause Notice, NFCL, 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, NFCL, vide their letters dated 10.08.2018, 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.

16. 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 NFCL 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:-

**16.1. In respect of Custom House Kandla:-**

- (i) The impugned goods cleared under Bills of Entries as detailed in **Annexure-A1** to the Show Cause Notice, should not be held liable for confiscation under section 111(m) of the Customs Act, 1962. However, the goods are not available for confiscation having been disposed off after import.
- (ii) Differential duty amounting to **Rs. 30,10,922/- (Rupees Thirty Lakh Ten Thousand Nine Hundred Twenty Two Only)** as detailed in **Annexure- A1** to the Notice, should not be paid by them under the provisions of Section 28(4) of the Customs Act, 1962.
- (iii) Interest of **Rs 12,50,921/- (Rupees Twelve Lakh Fifty Thousand Nine Hundred Twenty One Only)**, as detailed in **Annexure- A1** to the notice, should not be paid by them under Section 28AA of the Customs Act, 1962.
- (iv) penalty should not be levied on them under Section 114A of the Customs Act, 1962.

- (v) amount of **Rs. 47,13,481/- (Rupees Forty Seven Lakh Thirteen Thousand Four Hundred Eighty One Only)** voluntarily deposited by M/s NFCL during the course of investigation, should not be appropriated towards the above liability of differential duty, interest and fine and/or penalties, if any levied in these proceedings.

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

- (i) The impugned goods cleared under Bills of Entries as detailed in **Annexure-B1** to this Show Cause Notice, should not be held liable for confiscation under section 111(m) of the Customs Act, 1962. However, the goods are not available for confiscation having been disposed off after import.
- (ii) Differential duty amounting to **Rs. 3,06,251/- (Rupees Three Lakh Six Thousand Two Hundred Fifty One Only)** as detailed in **Annexure- B1** to the Notice, should not be paid by them under the provisions of Section 28(4) of the Customs Act, 1962.
- (iii) Interest of **Rs 1,05,064/- (Rupees One Lakh Five Thousand Sixty Four Only)**, as detailed in **Annexure- B1** to the notice, should not be paid by them under Section 28AA of the Customs Act, 1962.
- (iv) penalty should not be levied on them under Section 114A of the Customs Act, 1962.
- (v) amount of **Rs. 4,57,253/- (Rupees Four Lakh Fifty Seven Thousand Two Hundred Fifty Three Only)** voluntarily deposited by M/s NFCL during the course of investigation, should not be appropriated towards the above liability of differential duty, interest and fine and/or penalties, if any levied in these proceedings.

**17.** 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 NFCL, 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.

**18.** I find that NFCL, 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 Urea and other bulk fertilizers 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.

19. I find that M/s NFCL , submitted relevant import documents from which, it was seen that, during the period September 2012 to March 2016, in case of 46 consignments of Urea, DAP, NPK cleared at Kandla Port, and in case of one vessel at Vizag Port they had incurred lighterage /barging charges. As per the detailed worksheet submitted by M/s NFCL, total of Rs 55,88,678/- was payable by them towards differential duty and an amount of Rs 32,56,017/- was payable towards interest covering imports at Kandla and Vizag ports. The total amount payable towards duty and interest worked out to Rs 88,44,695/-. The details of the said consignments are detailed in **Annexure-'A'** to the Show Cause Notice. Similarly, in case of vessel demurrage charges, it was submitted by M/s NFCL that during the period 2012 to 2016 in case of 42 vessels/shipments of Fertilisers, cleared from four ports i.e Krishnapatnam, Kandla, Gangavaram and Vizag, they had incurred demurrage charges. As per the detailed worksheet submitted by M/s NFCL, total of Rs 58,11,171/- was payable by them towards differential duty and an amount of Rs 44,37,693/- was payable towards interest covering the aforesaid four ports. The total amount payable towards duty and interest worked out to Rs 1,02,58,866/-. The details of the said consignments are detailed in **Annexure-'B'** to the Show Cause Notice. The duty and interest payable and which has been fully paid by NFCL towards lighterage and vessel demurrage charges beyond five years period is detailed in Annexure A2 and Annexure B2 to the SCN respectively. Likewise, the duty along with interest payable and fully paid by M/s NFCL towards lighterage as well as vessel demurrage charges is shown in Annexure A1 and B1 to the SCN respectively. In case of Krishnapatnam Port, the shipments within five years period have also been covered in the SCN issued and adjudicated vide OIO No. KPCH/CPC/JC/18/15-16 dated 29.03.2016, passed by the Joint Commissioner, Custom House, Krishnapatnam. Therefore, these clearances have been mentioned separately in Annexure B2 at Sr No. 35 to 37 and have been excluded from the duty demanded.

20. I find that subsequent to DRI-Mumbai inquiry, M/s NFCL were convinced that the ship demurrage charges were subject to customs duty as provided in Rule 10 (2) of the Customs Valuation Rules, 2007 and accordingly they had made the voluntary payment of Rs 1,00,77,563/- on account of differential duty and interest payable on ship demurrage charges, which also included the duty confirmed under aforesaid OIO, at Krishnapatnam Port. M/s NFCL had preferred appeal against the above said OIO before the Commissioner(Appeals), who upheld the impugned OIO. They have preferred appeal against the OIA before Hon'ble CESTAT, Hyderabad, only for waiver/reduction of penalty.

21. 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 NFCL. 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.

22. I find that during investigation, NFCL, voluntarily deposited a total sum of Rs. 2,07,83,410/- (Rupees Two Crore Seven Lakh Eighty Three Thousand Four Hundred Ten 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 03.10.2019, 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*.

23. I find that NFCL had worked out the duty payable by them on lighterage/ barging charges and demurrage charges on chartered vessels and informed the department that they had voluntarily paid an amount of Rs. 2,07,83,410/-/- towards the differential duty with interest payable on the lighterage/ barging charges and on the vessel demurrage

charges along with penalty of 15% of the duty amount as provided for under Section 28(5) ibid. The present SCN has been issued for demand of differential duty with interest and also proposed to impose penalty. I further find that in the SCN, there is proposal for appropriation and adjustment of the entire amount of Rs.51,70,734/- voluntarily deposited by M/s NFCL during the course of investigation should be appropriated towards the liability of differential duty, interest and fine and/or penalties, if any levied in these proceedings. The detail of demand of duty and interest amount deposited against duty, interest and penalty is as under:-

Table-A

Break-up of total payment deposited by M/s NFCL:

Total amount paid M/s NFCL	Amount paid for last five years (Rs.)	Amount paid for the period beyond five years (Rs.)
2,07,83,410	51,70,734	1,56,12,676

Table-B

Break-up of Rs.51,70,734/- deposited by M/s NFCL for last five years:

Name of Custom House	Amt. duty (Rs.)	Amt. of interest (Rs.)	Amt. of penalty i.e. 15% of duty amount (Rs.)	Total Amount (Rs.)
Kandla	30,10,922	12,50,921	4,51,638	47,13,481
Vizag	3,06,251	1,05,064	45,938	4,57,253
Total	33,17,173	13,55,985	4,97,576	51,70,734

24. I find that the importer M/s. NFCL accepting and admitting their omission, have deposited the aforesaid amount 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 amount paid by the importer M/s. NFCL as detailed in above Table-A are liable for appropriation and adjustment towards payment of such customs duty, interest and penalty.

25. 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 has also been proposed. Whereas, NFCL had admitted their mistake and voluntarily worked out and paid the duty payable by them and informed the department vide their letters dated 10.08.2018 and 23.09.2019, as provided under Section 28(5) of Customs Act, 1962. Further, vide their

letter dated 03.10.2019 ,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 of the Customs Act, 1962 is imposable.

26. Before reaching at the final conclusion, I would like to deal with the issue of deemed conclusion as sought by NFCL(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.

27. 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, NFCL 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.)

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

**ORDER**

M/s NFCL 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 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. 51,70,734/- paid by M/s NFCL against duty of Rs. 33,17,173/-, interest of Rs. 13,55,985/- and penalty of Rs. 4,97,576/-. Hence, the proceedings in respect of the Show Cause Notice F. No. DRI/MZU/D/INT-35/2017(NFCL) dated 27.09.2019 is hereby treated as concluded in terms of the provisions of Section 28(6) of the Customs Act, 1962 without prejudice to the provisions of Section 135, 135A and 140 of the Customs Act, 1962.

29. 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  
13.02.2020

F.No S/10-48/Adj/ADC/NFCL/2019-20

To,  
M/s. Nagarjuna Fertilizers & Chemicals Ltd.,  
Door No.8-2-248, Nagarjuna Hills,  
Punjagutta, Hyderabad,  
Telangana-500082

By RPAD/Speed Post:

- 1) The Chief Commissioner(in-situ) of Customs, Kandla.
- 2) The Additional / Joint Commissioner of Customs, Vizag Custom House, Port Area, Vishakapatnam, Andhra Pradesh- 530035
- 3) The Additional Director, DRI, Mumbai Zonal Unit, 13, Sir Vithaldas Thackersey Marg, New Marine Lines, Mumbai – 400 020.
- 4) The Deputy Commissioner (RRA) Customs Kandla.
- 5) The Assistant Commissioner (TRC), CH, Kandla.
- 6) The Superintendent (EDI), Customs, Kandla with a request to upload the said order on the official website of this Commissionerate.
- 7) Guard File