



भारत सरकार

वित्त मंत्रालय/ राजस्व विभाग

केंद्रीय अप्रत्यक्ष कर एवं सीमाशुल्क बोर्ड - मुंबई अंचल-1, भारतीय सीमाशुल्क

आयुक्त सीमाशुल्क (आयात-1) का कार्यालय

द्वितीय मंजिल, नवीन सीमाशुल्क भवन, शूरजी वल्लभदास मार्ग, बेलाई एस्टेट,

मुंबई-400001.

दूरध्वनि-22757401

फैक्स-22757402

ई-मेल: adjn-commr-imp1nch@gov.in

इ-फा.सं. GEN/ADJ/COMM/280/2021-ADJN-O/O COMMR-CUS-IMP-I-ZONE-I-MUMBAI

आदेश दिनांक: 25.05.2022

के द्वारा जारी किया गया : मनोज कुमार केडिया

जारी दिनांक: 25.05.2022

आयुक्त सीमाशुल्क (आयात-1)

सी.ए.ओ. क्रमांक : 12/2022-23/CAC/CC(IMPORT-I)/MKK.

DIN No. 20220577000000555B53

मूल आदेश

- 1- यह प्रति उस व्यक्ति के प्रयोग के लिए निः शुल्क है, जिसके लिए यह पारित किया है।
- 2- इस आदेश के विरुद्ध क्षेत्रीय पीठ, सीमाशुल्क, उत्पाद एवं सेवाकर अपीलीय अधिकरण, जय सेन्टर, चौथा एवं पांचवा तल, 34 पी. डी. मेलो रोड, पूना स्ट्रीट, मस्जिद बन्दर (पूर्व) मुंबई 400 009 को अपील की जा सकती है।
- 3- सीमाशुल्क (अपील) नियमों 1982 के नियम 6 के आधार पर अपील फॉर्म सी ए-3 में जैसा कि उक्त नियम में संलग्न है के आधार पर की जानी चाहिए। अपील चार प्रतियों में की जानी चाहिए एवं 90 दिनों के अन्दर दायर की जानी चाहिए एवं उसके साथ उस आदेश की चार प्रतियां संलग्न होनी चाहिए जिसके विरुद्ध अपील की गई हो (इन प्रतियों में कम से कम एक प्रति अभिप्रमाणित प्रति होनी चाहिए)। अपील के साथ सीमाशुल्क अधिनियम 1962 की धारा 129A की उपधारा (6) के अन्तर्गत लागू रु.1,000/-, रु.5,000/- अथवा रु.10,000/- का, क्रास किया हुआ बैंक ड्रॉफ्ट अधिकरण की पीठ के सहायक रजिस्ट्रार के नाम जारी किया होना चाहिए। यह बैंक ड्राफ्ट ऐसे राष्ट्रीय बैंक का होना चाहिए जिसकी शाखा उस जगह स्थित हो जहां अधिकरण पीठ स्थित है।
- 4- अपील अधिकरण पीठ के सहायक रजिस्ट्रार अथवा इस संबंध में उनके द्वारा अधिकृत किसी भी अधिकारी के कार्यालय में प्रस्तुत की जानी चाहिए अथवा सहायक रजिस्ट्रार या ऐसे अधिकारी के नाम पंजीकृत डाक द्वारा भेजी जानी चाहिए।
- 5- जो व्यक्ति इस आदेश के विरुद्ध अपील करना चाहता है वह इस अपील के लंबित रहने तक दंडराशि या अपेक्षित शुल्क की साढ़े सात प्रतिशत धनराशि को जमा करे और ऐसे भुगतान का साक्ष्य प्रस्तुत करे। ऐसा न करने पर यह अपील सीमाशुल्क अधिनियम, 1962 की धारा 129E के प्रावधानों के अनुपालन न करने के आधार पर निरस्त मानी जाएगी।



GOVERNMENT OF INDIA

MINISTRY OF FINANCE/ DEPARTMENT OF REVENUE

CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS, INDIAN CUSTOMS - MUMBAI ZONE - I

OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I)

2nd FLOOR, NEW CUSTOM HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE,

MUMBAI - 400001.

Tel. No. 22757401

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e-mail: adjn-commr-imp1nch@gov.in

e-F.No.GEN/ADJ/COMM/280/2021-O/O COMM-R-CUS-IMP-I-ZONE-I-MUMBAI

Date of Order: 25.05.2022

**Passed by: MANOJ KUMAR KEDIA
COMMISSIONER OF CUSTOMS (IMPORT-I)**

Date of Issue: 25.05.2022

C.A.O. NO.: 12/2022-23/CAC/CC(IMPORT-I)/MKK.

DIN NO. 20220577000000555B53

ORDER-IN-ORIGINAL

1. This copy is granted free of charge for the use of the person to whom it is issued.
2. An appeal against this order lies to the Regional Bench, Customs, Excise and Service Tax Appellate Tribunal, Jai Centre, 4th & 5th Floor, 34 P. D'Mello Road, Poona Street Masjid Bunder (East), Mumbai 400 009.
3. The appeal is required to be filed as provided in Rule 6 of the Customs (Appeals) Rules, 1982 in form C.A.3 appended to said rules. The appeal should be in quadruplicate and needs to be filed within 90 days and shall be accompanied by Four copies of the order appealed against (at least one of which should be certified copy). A crossed bank draft drawn in favour of the Asstt. Registrar of the Bench of the Tribunal on a branch of any nationalized bank located at a place where the bench is situated for Rs.1,000/-, Rs.5,000/- or Rs.10,000/- as applicable under Sub Section (6) of the Section 129A of the Customs Act, 1962.
4. The appeal shall be presented in person to the Asstt. Registrar of the bench or an Officer authorized in this behalf by him or sent by registered post addressed to the Asstt. Registrar or such Officer.
5. Any person desirous of appealing against this decision or order shall pending the appeal deposit seven and a half per cent of the duty demanded or the penalty levied therein and produce proof of such payment along with the appeal failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 129E of the Customs Act, 1962.

Subject: Adjudication of Show Cause notices dated 27.05.2021 and 08.07.2021 issued vide F. No. GEN/INV/MISC/68/2020-SIIB-O/O-COMMR-CUS-IMP-II-ZONE-I-MUM, regarding misuse and wrong availment of benefit vide Sr. no. 524 (1) (a) of exemption Notification no. 50/2017 dated 30.06.2017 (as amended by Notification no. 25/2019 dated 06.07.2019) and non-inclusion of the cost towards erection and commissioning charges in the declared Assessable Value, for the goods imported by M/s Northern Coalfields Limited – reg.,

BRIEF FACTS OF THE CASE

1. Intelligence was received by the officers of Special Investigation and Intelligence Branch (Import) [SIIB(I)], New Custom House (NCH), Mumbai, regarding misuse and wrong availment of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 for the goods imported by M/s Northern Coalfields Limited (M/s NCL or Noticee No.-1) (hereinafter referred as Importer), vide BOE's 9284011, 9284020, 9284056, 9284063, 9284073, 9284075, 9284079 and 9284087, all dated 23.10.2020. Accordingly, SIIB (I), NCH, Mumbai initiated an investigation in the case of the imports made by the importer. The Preliminary enquiries revealed the fact that M/s Coal India Limited (M/s CIL), Kolkata, West Bengal was the parental company for its subsidiary, M/s NCL. The EDI system indicated 08 live B/Es i.e., 9284011, 9284020, 9284056, 9284063, 9284073, 9284075, 9284079 and 9284087, all dated 23.10.2020 filed by M/s Northern Coalfields declaring the goods as ***"CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION"*** under CTI 87041010 claiming Notification 50/2017 S.no. 524(1)(a) @ 15% BCD. The goods were supplied by M/s Caterpillar INC., USA, (herein after referred as Manufacturer) through their authorised Indian Agent, M/s GMMCO LTD. (herein after referred as Supplier or Noticee No. 2) as per their contract.

2. Out of said 08 BOE's, the goods covered under 06 BoE's i.e. 9284011, 9284020, 9284056, 9284063, 9284073 & 9284075 all dated 23.10.2020, had already arrived at Mumbai Port. However, in respect of remaining two Bills of Entry the goods had not arrived at that point of time. The importer filed the Bills of Entry under self-assessment u/s 17(1) of the Customs Act, 1962. The Importer also submitted a "Certificate of Chartered Engineer" dated 02.11.2020 issued by C.E. Sh. M. Vairamohan of M/s Mohan and Techno Associates, certifying that the goods imported under above referred 06 Bills of Entry were *in CKD conditions having engine, gearbox, and transmission mechanism not in pre-assembled condition*.

3. On the basis of the above intelligence, SIIB (I) undertook the examination of the above said consignment covered under 06 Bills of Entry i.e. 9284011, 9284020, 9284056, 9284063, 9284073 and 9284075 all dated 23.10.2020, under Panchnama dated 05.11.2020 in the presence of Shri Sadanand C Kapei, Custom Broker, M/s Seashell Logistics Pvt Ltd. and Shri



M.Vairamohan, Chartered Engineer, M/s Mohan & Techno Associates. The examination of the above said 6 consignments under Panchnama dated 05.11.2020 revealed as under:

- (a) Item named "BANJO" in the packing lists, was a standalone unit and was the transmission mechanism of the rear dumpers. Transmission mechanism "BANJO" was already in assembled form.
- (b) Item mentioned as "Engine in the packing list with net weight of 9897 Kgs, was a stand-alone unit" and was already in assembled form. All the necessary parts of the engine were already assembled in the said item. The engine had been mentioned as a one complete item in packing list of all BOE's and had been allotted an engine number also.
- (c) The engine had already been allotted a specific engine number by the manufacturer. The Manufacturer would assign the number to an equipment once it was a set in completely pre-assembled form. Engines of the said BOE's appeared to be in pre-assembled form.
- (d) Item mentioned as "Engine Parts" in the packing list of said BOE are just mere attachments to the engine and even without these attachments the engine can work.
- (e) Goods covered under examined BOE's were found to be completely identical in all aspects and had absolute similarity in shape, size and form.
- (f) Imported goods appeared to be not as per declaration made by importer and the submissions made in "Certificate of Chartered Engineer" issued by, CE. M. Vairamohan of M/s Mohan and Techno Associates.

4. On the basis of the above findings, the goods were seized under Seizure Memorandum dated 06.11.2020 in terms of Section 110 of the Customs Act, 1962, under the reasonable belief that M/s NCL had mis-declared the description of goods covered under 06 BoE's i.e. 9284011, 9284020, 9284056, 9284063, 9284073 & 9284075 all dated 23.10.2020 in as much as the engine, transmission mechanism and driveshaft were found in pre-assembled form.

5. Further, to ascertain the technical aspects of the goods covered under said 06 BOE's, the Custom's empanelled Chartered Engineer Shri Rajendra S. Tambi, conducted the re-examination of goods. The Chartered Engineer Shri Rajendra S. Tambi, submitted the Chartered Engineer Certificates vide Ref No's: CE1227 and CE1226 both dated 09.11.2020 & CE1306, CE1307, CE1308 and CE1309 all dated 19.11.2020, for the six Bills of Entry as mentioned in para 2 above wherein he made the following submissions in his reports:

- (a) The chassis inspect bearing numbers CAT0789DHSPD00949 and CAT0789DHSPD00951, imported vide BOE's 9284056 and 9284073 respectively, were in pre-assembled condition having all cylinders, valves, hoses, pipes, hydraulic and electrical mechanism assembled together and were basically, sub-assemblies of the dumpers.
- (b) The engines inspected bearing numbers: 7TR03826 and 7TR03831, imported vide BOE's 9284056 and 9284073 respectively, were in pre-assembled condition although not mounted on the chassis.



- (c) Transmission Mechanisms bearing serial numbers: 90001873 and 90001825, imported vide BOE's 9284056 and 9284073 respectively, mentioned in packing list as "BANJO", were also in pre-assembled form although not mounted on the chassis. All the parts and components of the Transmission Mechanism i.e. BANJO had already been pre-assembled in assembly line of manufacturing facility.
 - (d) Drive shaft mentioned in packing List as "DRIVE SHAFT" was basically a sub-assembly for the dumper and was in pre-assembled form.
 - (e) Engine parts mentioned in packing list, viz. pipes, hoses, hardware, seals etc. were basically attachments to the engine which has been imported in pre-assembled form. The pre-assembled engine will start even without these attachments in place.
 - (f) Parts mentioned as "Parts" in the packing list viz. hardware, plates, tubes, flange, clamps, seals etc. were basically attachments of other sub-assemblies, which were in pre-assembled form. Some of these parts like mirror, instruments had no relation whatsoever with the engine/transmission mechanism.
 - (g) The goods imported were not in completely knocked down condition as there were various sub-assemblies viz. Chassis, Engine, Transmission mechanism, Driver Cabin etc. which were combined together to erect a dumper.
 - (h) Conclusion that the Engine, Transmission Mechanism, Driver Cabin, Chassis main body etc., were in pre-assembled form but not mounted on chassis or a body assembly.
6. For the sake of clarity, the scanned copies of chartered engineer's certificate along with the photographs of the engine, gearbox and transmission mechanism are reproduced below:
- i. **Engine:**



ii. Transmission mechanism declared as "BANJO":



iii. Gear Box declared as "Drive Shaft":



iv. Sample copy of Chartered Engineer's Certificate:

Rajendra S. Tambi

- Chartered Engineers & Valuers - Customs Empowered at Mumbai, JNPT & Air Cargo (Mumbai and Delhi)
- ISBI Registered Valuers under the Companies Act
- Insurance Surveyor and Loss Assessor
- 'Competent Person' under the Factories Act.

Off : 403, Nandekar, Near NHT School, Sector 19, AIRPORT, NAVI MUMBAI-400 708. Mob: 9324181461 / 9899961481
E-mail: tambiraj1@gmail.com

Sr No CE1226 DATE 09/11/2020

Chartered Engineer Certificate
To whomsoever It May Concern

- Date of Examination : 07/11/2020
- Bill of Entry no. 9284073
- Date of Bill of Entry: 23/10/2020
- Invoice no. : GMK103553
- Examined the goods in the presence of Shri Vikas Bhardwaj, S/O, Sillb (H), Shri Sadanand, G-card holder of M/s Seashell Logistics Pvt. Ltd. (CIN) on 07/11/2020. The photographs of all goods covered under the said Bill of Entry were also taken which is enclosed to this certificate.

The goods imported consists of different sub-assemblies viz. Engine, Transmission mechanism, Chassis, Drive Shaft, etc.

- 789 D Chassis bearing Serial no. CAT0789DCH5PD00951 mentioned at S. No. 1 of the packing list and photograph of which is enclosed as P-1. The chassis is in pre-assembled condition having all cylinders, valves, hoses, pipes, hydraulic and electrical mechanism assembled together and is basically a sub-assembly of the dumper. Pre-assembled means all the parts and components of the chassis have already been assembled in assembly line of manufacturing facility to manufacture the said chassis.
- Engine bearing Serial no. 7TR02831 mentioned at S. No. 2 of the packing list and photograph of which is enclosed as P-2. The Engine is in pre-assembled condition and is basically a sub-assembly of the dumper. It is in complete pre-assembled form although not mounted on the chassis. Pre-assembled means all the parts and components of the Engine have already been assembled in assembly line of manufacturing facility to manufacture the said Engine.
- Transmission mechanism bearing Serial no. 90001825 mentioned at S. No. 10 of the packing list as 'TRANJO' and photograph of which is enclosed as P-3. The Transmission mechanism is in pre-assembled condition and is basically a sub-assembly of the dumper. It is in pre-assembled form although not mounted on the chassis. Pre-assembled means all the parts and components of the Transmission mechanism have already been assembled in assembly line of manufacturing facility to manufacture the said Transmission mechanism.

Continued—

Offices at : Nripendra Bheva (Township), Air Cargo, Arshiya FTWZ, Gujarat.

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- Drive Shaft mentioned at S. No.15 as 'DRIVE SHAFT' photograph of which is enclosed as P-4. Is basically a sub-assembly of the dumper. They are in pre-assembled form although not mounted on the chassis.
- Engine parts mentioned at S. No. 3 of the packing list and photograph of which is enclosed as P-5. These parts viz. pipes, hoses, hardware, seals etc. are basically attachments to the engine which has been imported in pre-assembled form. These attachments are required to connect the engine to other sub-assemblies / parts of the dumper such as transmission mechanism, etc. The pre-assembled engine will start even without these attachments in place.
- Parts mentioned at S. No. 4 of the packing list and photograph of which is enclosed as P-6. Some of these parts viz. hardware, plates, tubes, flange, clamps, seals etc. are basically attachments of other sub-assemblies which are in pre-assembled form. These attachments are required to connect the engine to other sub-assemblies of the dumper such as transmission mechanism, etc. Some of these parts like mirror, instruments etc. have no relation whatsoever with the engine / transmission mechanism.
- RH Platform, mentioned at serial No 5 of the packing list and photograph of which is enclosed as P-7, is also pre-assembled. It is base or platform placed above wheels on which driver cabin is mounted.
- Fuel Tank, mentioned at serial No 6 of the packing list and photograph of which is enclosed as P-8, is use for storage and supply of the fuel.
- Handrails, mentioned at serial No 7 of the packing list and photograph of which is enclosed as P-9, are basically safety rails on both side of ladders which is used to step up in the cabin from ground.
- F Strut mentioned at Sr no 8 & 9 of packing list, and photograph of which is enclosed as P-12 is basically a constituent of transmission system and is in preassembled form.
- Cab or Driver Cabin, mentioned at Sr no 11 of Packing list and photograph of which is enclosed as P-10, has all the electrical circuitry, instruments panel, steering, seating, canopy etc preassembled.
- Rims- 6 nos - photograph of which is enclosed as P-11, mentioned at Sr no 12,13 and 14 of the packing list, are rims for tyre.

Contd—



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13. It is hereby certified that the goods imported vide above Bill of Entry no. 9284073 dated 23/10/2020 are not in a completely knocked down condition as there are various sub-assemblies viz. Chassis, Engine, Transmission mechanism, Cabin etc. which are combined together to erect a dumper. These sub-assemblies cannot be assembled on site but only on an assembly line in manufacturing facility.


In conclusion: Engine, Transmission Mechanism, Driver Cabin, chassis main body etc are in a preassembled form but not mounted on chassis or a body assembly.

REVISED

- We have carried out thorough visual examination only from outside and after opening the item.No other test was carried out due to limitation of the premises
- This Chartered Engineer's Certificate are issued without prejudice to the best of our knowledge.
- This report is an evidence of our findings at the time and place of inspection our firm does not assume responsibility for physical alterations of the goods inspected which may have occurred after the date / time of inspection.
- Shall this certificate be accepted/rejected by whomsoever it may be concerned with the understanding that the CE jointly or severally are not responsible for any Claims/Damages.
- Since the items are subject to variable opinions and conditions, this report is issued based on the documentary evidences provided and our physical inspection and findings of the items offered for our inspection at the time and place of inspection.

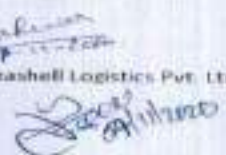
I hereby declare that the particulars and statements made in this certificate are true and correct.

Certified by,


Rajendra Tambi
Chartered Engineer

Examined in our presence:

- Shri Vikas Bhardwaj, SIO (SIIB)
- Shri Sadanand, G-card holder of M/s Seashell Logistics Pvt. Ltd. (CB)



7. The goods covered under remaining 02 Bills of Entry nos. 9284079 and 9284087 both dated 23.11.2020 were examined subsequently vide examination report dated 19.11.2020, on its arrival at a later date. The Goods covered under these 02 BOE's also were found to be completely identical to the goods seized earlier in case of above referred 06 BOE's. The examination proceedings established that imported goods were not in Completely Knock Down form and are contradictory to the declaration of importer. Therefore, the goods covered under this 2 Bills of Entry no. 9284079 & 9284087 dated 23.10.2020, were also seized by SIIB vide Memorandum dated 19.11.2020 under section 110 of the Customs Act, 1962. The goods covered under the referred 02 BOEs were identical to those goods for which CE Certificates were obtained. Infact, the goods covered under the same contract and have been imported in the same state of packing with the identical description. This fact was admitted and confirmed by Shri Ravindra Prasad, GM/Clearing and Forwarding, M/s CIL, Kolkata vide his letter dated 03.03.2021.

8. Importer had claimed the benefit of Serial No: 524 (1)(a) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 claiming BCD at the rate of 15%. The examination findings along with CE reports submitted by Chartered Engineer Shri Rajendra S. Tambi, suggested that the goods shall be covered under Serial No;



524 (1)(b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 and shall attract BCD at the rate of 25%.

9. As there was mis-declaration in respect of description of goods covered under referred the Bills of Entry, the statement of Shri Sadananda C. Kapei, Custom Broker- M/s Seashell Logistics Pvt. Ltd. (11/1566) was recorded u/s 108 of the Customs Act, 1962 on 20.11.2020 wherein he inter alia stated as under:

- i. The importer had cleared 50 BOE's consignments of same description and identical nature in past; that previously cleared goods covered under the previously cleared BOE's were identical in shape, size and forms to the seized goods;
- ii. The importer has claimed the benefit of Serial No: 524 (1) (a) Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 claiming BCD at the rate of 15%;
- iii. The Chief Manager Shri Syamal Samanta, M/s CIL, C&F Division gave the approval for the final Checklist via e-mail communications and the claimed benefit was filed after his due approval only;
- iv. M/s Seashell Logistics Pvt. Ltd. hired the services of Chartered Engineer Shri M. Vairamohan;
- v. He had no documentary evidence to submit in support of claims made by importer for imported goods being in CKD condition with engine, transmission mechanism and gearbox not in pre-assembled condition;
- vi. He was present during the physical examination of previously cleared 50 BoE's and seized 08 BOE's;
- vii. Previously cleared BOE's had same descriptions and were completely identical in all aspects to the seized goods, covered under 08 BOE's, with no change in any manner;
- viii. The goods imported vide previously cleared 50 BOE's and seized 08 BOE's were not in completely knock down condition with Engine, Gearbox and Transmission Mechanism in pre-assembled form;
- ix. The goods imported vide previously cleared 50 BOE's and seized 08 BOE's are to be reclassified in line with Serial No: 524 (1) (b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 attracting 25% BCD and not the availed BCD benefit in line with Serial No: 524 (1) (a) Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019, at the rate of 15%.

10. The Lots wise details of previously cleared 50 BOE' which were taken during the search proceedings conducted at the premises of M/s Seashell Logistics Pvt Ltd (CHA) under panchanama dated 20.11.2020, were as follows: -

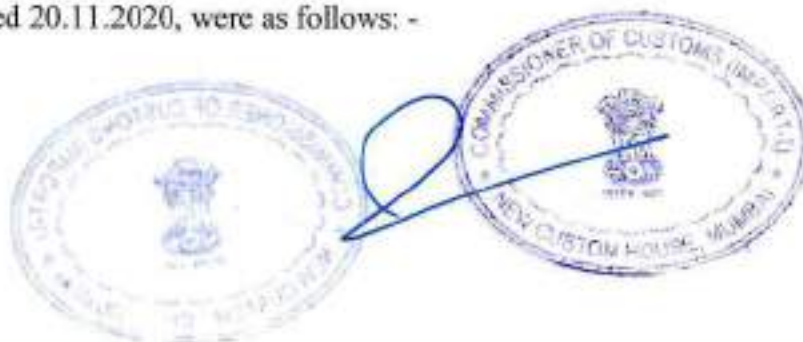


Table - I

Lot Number	Total No of BOE's	BOE's/Date	Status
1	08	7527056 dated 25.04.20; 7559096, 7559587, 7559833, 7559941, 7560376, 7560435, 7560670 all dated 30.04.2020	Goods were already cleared before the SIIB investigation
2	08	7770956, 7770962, 7770975, 7770981, 7770990, 7770999, 7771004, 7771009 all dated 29.05.2020	
3	08	8022753, 8022759, 8022764, 8022767, 8022774, 8022777, 8022779, 8022785 all dated 29.06.2020	
4	10	8417892, 8417915, 8417939, 8417951, 8417963, 8417995, 8418004, 8418008, 8418021, 8418027 all dated 09.08.2020	
5	08	8687732, 8687827, 8687947, 8688075, 8688226, 8688356, 8688471, 8688562 all dated 03.09.2020	
6	08	9096282 dated 07.10.20; 9101824, 9102742, 9103237, 9107488, 9107046, 9105642, 9106188 all dated 08.10.2020	

- (a) The Importer issued authorisation letters to M/s Seashell Logistics Pvt. Ltd. on consignment basis by giving imports documents. The CHA used to file B/Es as per the documents given by importer and after confirmation of the check lists from the importer.
- (b) The Imported equipment would be supplied by M/s Caterpillar Inc., USA, under Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019.

11. Further, the statement of Shri M. Vairamohan, Chartered Engineer, M/s Mohan & Techno Associates (Reg. No: F-018159-1) was recorded on 20.11.2020, under section 108 of Customs Act, 1962, wherein he inter alia stated that his specialisation lies in industrial safety; that he was hired by M/s Seashell Logistics Pvt Ltd., for the inspection of 06 BoE's i.e. 9284011, 9284020, 9284056, 9284063, 9284073 and 9284075 all dated 23.10.2020 and subsequent issuance of Certificate of Chartered Engineer dated 02.11.2020; that he has no documentary evidence for his concluded submission in his report dated 02.11.2020; that his report dated 02.11.2020 was based upon the assumption that engine and engine parts were separate and secondly BANJO i.e. transmission mechanism was not connected to drive shaft; that in light of new facts, he revised his earlier report and submitted that Banjo i.e. transmission mechanism of the rear dumper is already in pre-assembled form; that engine is a standalone unit and is already in the pre-assembled form; that he is in absolute conformity that engine, gearbox and transmission are already assembled and hence in pre-assembled form but not mounted on chassis or body assembly; that going by the description of packing list, invoice, BOE's details and related specifications, goods cleared vide previous 50 BOE's must have been identical to the present goods; that seized goods to be described as engine, gearbox or transmission in pre-assembled form but not mounted on a chassis or a body assembly.

12. Further, a search was conducted at the premises of M/s GMMCO Limited located at 9/1 R.N. Mukherjee Road, Kolkata- 700001 under panchanama dated 23.11.2020. From the scrutiny of the documents recovered during the search proceedings, the following inferences were drawn:

- a) M/s Caterpillar INC., USA authorised their Indian agent, M/s GMMCO Limited to submit the bid and to sign the contract against the tender issued by M/s CIL. Contract



No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 was executed among M/s GMMCO Ltd, M/s Coal India Ltd. (M/s CIL), Kolkata & M/s Caterpillar Inc. USA. This contract was executed in reply to a tender that was awarded to the manufacturer via M/s GMMCO Limited, the supplier, for the supply, installation, commissioning and support of Caterpillar make 102 numbers of 190T Dumper of Model Caterpillar 789D. Out of this, 84 dumpers were to be installed at different sites NCL by M/s GMMCO Limited. Further, 18 Dumpers were to be installed at the project sites of Eastern Coalfields limited (ECL) by another Dealer of M/s Caterpillar INC., USA i.e., M/s Gainwell Commosales Private Limited, which was earlier known as M/s Tractors India Private Limited (TIPL).

- b) Vide its letter dated 11.04.2019 with Ref No: CIL/C2D/190T Dumper/R-66/17-18/43, M/s CIL sought justification for the query that equipment's under contract will be imported in Completely Knocked Down kit under chapter heading 8704.10 to be read with Notification No: 50/2017 dated 30.06.2017. The Importer also asked M/s GMMCO Limited to submit a certificate that in case, at the time of importation or subsequently, the correct rate of BCD happens to be more than 15%, the differential amount along with interest, penalty etc., will be paid by M/s GMMCO Limited.
- c) In reply to the said query, M/s Caterpillar INC., USA issued a letter dated 19.04.2019 with Ref No: CIL/190T/price Justification/18-19 stating that the machines would be shipped in completely disassembled conditions in 20-25 packages confirming that the offered supply will be received in completely knock down condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition.
- d) M/s Caterpillar INC., USA confirmed the dispatching of invoice in line with its justification dated 19.04.2019, however no conclusive documentary evidence has been submitted to justify the description for imported goods, as not in pre-assembled form. M/s Caterpillar INC., USA submission that machines will be shipped in completely disassembled conditions in 20-25 packages, was found to be in contravention with packing list for the respective import's invoices.
- e) Based on the above said letter of M/s Caterpillar Inc., USA, letter dated 19.04.2019, M/s GMMCO Limited vide their letter dated 27.04.2019 has certified that in case, at the time of importation or subsequently, the correct rate of BCD happens to be more than 15%, the differential amount along with interest, penalty etc. will be paid by M/s GMMCO Limited.
- f) Further an amount of Rs.30,00,000/- per unit will be paid by the importer to M/s GMMCO Limited for the purpose of erection and commissioning.

13.1 Further the statement of Shri Syamal Samanta, Chief Manager, M/s Coal India Limited, Clearing and Forwarding Department, was recorded on 01.12.2020 and 03.12.2020 under Section 108 of the Customs Act , wherein he inter alia stated that his job profile included looking after imports against orders placed by M/s CIL as well as subsidiaries of M/s CIL which included arranging logistics support, Custom clearance, and forwarding of the import cargo to



the end consignee, to make the duty payment and to scrutinise the checklist and related aspects; that seized 08 BOE's and previously cleared 50 BOE's were imported by M/s CIL on behalf of Northern Coalfields Ltd and since the contractual requirement was only one model of 789D 190 T rear dumper, it can be concluded that goods imported vide all 58 BOE's were identical in all aspects; based on the M/s Caterpillar INC., USA letter dated 19.04.2019 with Ref No: CIL/190T/price Justification/18-19 stating that the machines will be shipped in completely disassembled conditions, he proposed to avail the benefit in line with Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 Serial No: 51 (1-a) and availed BCD @ 15%; that M/s CIL incorporated the letter by M/s Caterpillar INC., USA letter dated 19.04.2019 with Ref No: CIL/190T/price Justification/18-19 in Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019, executed between M/s GMMCO Ltd, M/s Coal India Ltd. (M/s CIL), Kolkata & M/s Caterpillar Inc, USA; that M/s CIL never conducted the physical examination of any of the cargo bought by previously cleared 50 BOE's and currently held 08 BOE's; that M/s CIL has no documentary evidence to support for their exemption notification except the justification letter dated 19.04.2019 with Ref No: CIL/190T/price Justification/18-19 provided by M/s Caterpillar INC., USA; that the cost towards erection and commissioning charges are not included in declared assessable value being post import expenses; that it was conclusive that engine, gearbox and transmission mechanism are basic units which were imported separately. Engine, gearbox or transmission mechanism all are in pre-assembled form but not mounted on a chassis or a body assembly; that item mentioned as "Engine Parts" in the packing list were pipes and plates only and that these were only mere external attachments to the engine and this engine parts item contained no internal parts of engine; that importer was responsible to ensure that goods being imported are as per declaration specification submitted to Customs, which in this is M/s CIL on behalf of M/s Northern Coalfields Limited; that imported goods would be connected together under the supervision of M/s GMMCO Limited, technical team to form a complete vehicle.

13.2 From the above statement of Shri Syamal Samanta, Chief Manager of M/s Coal India Limited, it was evident that the importer had mis-declared the description of goods before Customs Authorities with sole intention of availing undue benefit of notification. Further, in respect of previously cleared 50 Bills of Entry also, the goods were imported with pre-assembled engine, gear box and transmission mechanism as all the consignments were identical in nature and covered by the same contract. Therefore, the claimed S.no 524(1)(a) under Notification no. 50/2017-Customs dated 30.06.2017 was not applicable for the goods covered under those previously cleared 50 Bills of Entry (as detailed in Table – I above) also.

14. On requests of the importer for the provisional release of the seized goods, competent adjudicating authority granted the permission for provisional release of the seized goods covered under 08 Bills of Entry i.e. 9284011, 9284020, 9284056, 9284063, 9284073, 9284075, 9284079 and 9284087 all dated 23.10.2020, under Section 110A of the Customs Act, 1962, after submission of Bank Guarantee issued by ICICI Bank Limited vide Ref No:



0006NDLG00226021 dated 16.01.2021 for the differential duty amount of Rs 10,58,78,920/-and Indemnity Bond No: L-690558 dated 19.01.2021 equal to the value of the seized goods.

15.1 Further, the statement of Shri Vikash Kumar, AGM, Sales, M/s GMMCO Limited, Kolkata was recorded on 21.01.2021 under Section 108 of the Customs Act, wherein he inter alia stated that M/s CIL being the parental company of NCL and ECL, awarded the contract for the importation of 102 Dumpers, executed between M/s GMMCO Ltd, M/s CIL & M/s Caterpillar Inc. USA; that the claimed benefit of 15% duty in line with Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019, availed by M/s CIL, was completely based on M/s GMMCO Limited recommendation to M/s CIL; that M/s GMMCO Limited letter dated 27.04.2019 answering the M/s CIL query letter dated 11.04.2019, was issued with absolute reliance placed on the justification letter issued by principal manufacturer M/s Caterpillar INC., USA dated 19.04.2019; that he has no documentary evidence to support M/s GMMCO Limited recommendation to M/s CIL about the form of imported goods i.e., CKD in line with claims made by M/s Caterpillar INC., USA, also there was no verification done by M/s GMMCO Limited; that cost towards erection and commissioning of the equipment are not included in declared assessable value, as these activities happen in India after import and are charges to be paid to M/s GMMCO Limited from M/s CIL as Erection and Commissioning charges in India; that M/s GMMCO Limited being the authorised dealer of M/s Caterpillar INC., USA, is responsible for the erection and commissioning of all the equipment supplied by M/s Caterpillar INC., USA through M/s GMMCO Limited; that M/s GMMCO Limited employees are being provided specialised training, technology and material to be utilised for erection and commissioning, by M/s Caterpillar INC., USA; that the cost towards erection and commissioning for Amlohri and Jayant are displayed as zero as a way to absorb the cost by M/s GMMCO Limited; that goods imported vide previous 50 BOE's were identical to the goods seized by Customs and since the contract requirement was for same machine i.e. Model 789D, the goods imported vide all 58 BOE's were identical in nature; that he has nothing to state on the submission made by M/s Seashell Logistics Pvt Ltd. appointed Chartered Engineer, Shri M.Vairamohan, where he submitted that Banjo, the transmission mechanism of the Rear Dumper and gearbox are pre-assembled and the engine was a standalone unit and was already in the pre- assembled form.

15.2 Thus, from the above, it appeared that M/s GMMCO Limited had advised M/s CIL for the benefit in line with Serial No: 524 (1) (a) of Notification No: 50/2017 dated. 30.06.2017 as amended by Notification No: 25/2019 dated. 06.07.2019 and the Erection and Commissioning charges were cited as post-importation charges and hence were not added in declared assessable value. As M/s Caterpillar INC., USA provided specialised training, technology and material to M/s GMMCO Limited for the purpose of erection and commissioning of imported dumper units, hence, the same could not be considered as post importation charges. In-fact such charges were the part of contract and one of the Conditions of Sale of the goods.



16. From the CE Certificates and Statements of Shri Syamal Samanta, Chief Manager, M/s CIL and Shri Vikash Kumar, M/s GMMCO Ltd., it appeared that engine and transmission mechanism are in pre-assembled form and not mounted on a chassis. The said fact was further confirmed by the following:

- i. All the packing lists declared engine as single sub-assembly with specific/unique serial numbers.
- ii. All the packing lists declared BANJO i.e. transmission mechanism as single sub-assembly with specific/unique serial number.
- iii. Both the Chartered Engineers had certified that i.e., engine, gearbox and transmission mechanism were in pre-assembled form. Even the C.E. appointed by the importer himself also re-confirmed that the engine, gear box and transmission mechanism were in pre-assembled form.
- iv. Engine parts mentioned in invoices were only attachments as certified by C.E.
- v. The clause of contract wherein M/s GMMCO undertook to pay the differential duty over and above the 15% BCD and penalty, clearly shows that the importer and supplier had thread bare scrutiny of the conditions of the notification before executing the contract. The language used in contract shows that the supplier was well aware about the facts that the engine, gear box and transmission mechanism were imported in pre-assembled form only.

17. From the perusal of the Notification No: 50/2017 dated, 30.06.2017 amended by Notification No: 25/2019 dated, 06.07.2019, if engine or gearbox or transmission mechanism are in pre-assembled form and not mounted on chassis or body assembly then the same shall be covered under Serial No: 524 (1)(b) of Notification No: 50/2017 dated, 30.06.2017 (Notification No: 25/2019 dated, 06.07.2019).

18.1 As the importer have themselves certified in their packing list that engine and transmission mechanism i.e. Banjo have attained their essential characteristics as both are provided with unique serial numbers. Since essential characteristics have already been attained and declared by importer, it appears that engine and transmission mechanism were in pre-assembled form.

18.2 Further, the manufacturer of goods M/s Caterpillar Inc., USA, in all its invoices had declared that engine, driveshaft and transmission mechanism were not in pre-assembled condition. However, the packing list issued by the supplier clearly identified the Engine, Banjo and gearbox as a pre-assembled unit. Thus, it was evident that manufacturer M/s Caterpillar Inc., had manipulated the invoice with the intention to avoid Custom duty.

18.3 Further, the manufacturer of goods had categorically stated in the Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 that dumpers will be supplied in a completely knock down condition with engine, gearbox and transmission mechanism not in a pre-assembled condition but still instead of complying with agreement the manufacturer have



contravened the conditions of contract and mis-declared the description of goods in their invoices.

19. M/s GMMCO Ltd., was the Indian dealer of goods on behalf of manufacturer. Therefore, M/s GMMCO Ltd. was responsible for providing services on behalf of manufacturer to importer and its subsidiaries. M/s GMMCO Ltd., has not supplied the goods in terms of conditions of their contract which states that goods shall be supplied as "*caterpillar make 190t rear dumpers model 789d in CKD condition, containing all necessary components for assembling a complete vehicle as per contract having engine, gearbox and transmission mechanism not in a pre-assembled condition*". However, they had supplied the goods with engine, gear box and the transmission mechanism in pre-assembled form/condition. Thus, they were helping the importer in preparation of Customs Documents and clearance of goods and were fully aware about the agreement and mis-declaration in the invoices. Thus, they were also responsible for mis-declaring in invoice along with Bills of Entry and claiming wrong exemption notification by resorting to mis-declaration of goods.

20.1 M/s NCL were importing the contracted quantity of 84 nos. of 190 Tonne Rear Dumpers in piecemeal and not at a time. Subsequent to the seizures and provisional release of dumpers imported vide 08 Bills of entry as mentioned in para 1 above, M/s. Northern Coalfields Ltd. imported 18 more rear dumpers vide 18 Bills of entry (as tabulated below) by wrongly availing the benefit of serial no. 524(1)(a) of the Notification no. 50/2017-Customs as amended vide Notification no. 25/2019-Customs.

Table- II

Sr. No.	Bill of Entry no. and date	Sr. No.	Bill of Entry no. and date	Sr. No.	Bill of Entry no. and date
1.	2190772 dated 31.12.2020	7.	2191409 dated 31.12.2020	13.	2641805 dated 05.02.2021
2.	2190860 dated 31.12.2020	8.	2191493 dated 31.12.2020	14.	2642117 dated 05.02.2021
3.	2190888 dated 31.12.2020	9.	2641738 dated 05.02.2021	15.	2967221 dated 01.03.2021
4.	2191115 dated 31.12.2020	10.	2641755 dated 05.02.2021	16.	2967224 dated 01.03.2021
5.	2191250 dated 31.12.2020	11.	2641786 dated 05.02.2021	17.	2967276 dated 01.03.2021
6.	2191355 dated 31.12.2020	12.	2641804 dated 05.02.2021	18.	2967278 dated 01.03.2021

20.2 The importer in respect of the said 18 Bills of Entry also, as tabulated above, mis-declared the goods as to be not in the pre-assembled condition. However, during the examination of the goods under panchanamas dated 17.02.2021 and 16.03.2021, the engine, gear box and transmission mechanism were found to be in pre-assembled form and shall cover under Serial no. 524 (1) (b) of the Notification no. 50/2017-Customs attracting higher rate of BCD (@25% as against the claimed 15%). Thereby, the goods covered in respect of these 18 Bills of Entry, were also seized under Section 110(1) of the Customs Act, 1962 vide seizure memorandums dated 17.02.2021 and 17.03.2021. It is to note that the subject goods covered under the above referred 18 Bills of Entry in Table –II were identical in nature, description and state of packing to the goods for which the Chartered Engineer has given the certification in respect of the goods covered under the BOEs referred in para 1 above, stating that the Engine,



Transmission Mechanism and Driveshaft are in pre-assembled form and that subassemblies if combined together with Engine, Transmission Mechanism and Driveshaft would erect a dumper.

20.3 On the request of the importer, the adjudicating authority allowed for provisional release of the seized goods covered under 18 bills of entry also, on submission of bond equal to the value of the goods and bank guarantee equal to the differential duty. Accordingly, M/s. NCL furnished the Bank Guarantee no. 0229NDLG00007021 dated 02.03.2021 of Rs. 18,47,32,452/- issued by ICICI bank, in respect of Bills of Entry mentioned at Serial no. 1 to 14 of Table – II above and Bank Guarantee no. 0229NDLG00012121 dated 22.03.2021 of Rs. 5,24,30,789/- issued by ICICI Bank, in respect of Bills of entry mentioned at serial no. 15 to 18 of Table- II above, for release of the said goods.

21.1 The Importer M/s NCL vide their letter dated 03.03.2021 certified and communicated to SIIB (I) that all the goods under the referred contract were identical in nature/form in all the aspects. Further, subsequent to the import of 76 dumpers vide 76 Bills filed by M/s NCL **[50 Bills of Entry already cleared, plus 26 Bills of Entry (as detailed in para 1 and Table- II above), seized and subsequently provisionally released]** out of the contracted 84 Rear Dumpers, the importer imported the balance quantity of 08 nos. of identical consignments. The details of said 8 Bills of Entry are as per Table-III below:

Table- III

S. No	Bill of Entry no. and Date	S. No	Bill of Entry no. and Date	S. No	Bill of Entry no. and Date
1	3387131/01.04.2021	4	3387842/01.04.2021	7	4112486/28.05.2021
2	3387385/01.04.2021	5	3907456/11.05.2021	8	4112662/28.05.2021
3	3387841/01.04.2021	6	3908511/11.05.2021		

21.2 The goods covered by the above listed 08 B/Es in Table- III above were examined by SIIB(I) vide Panchnamas dated 09.04.2021, 21.05.2021 and 15.06.2021. In the subject 08 Bills of Entry, the goods had been declared claiming the exemption under Serial No: 524 (1)(a) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 at the rate of 15% BCD by declaring that engine, transmission mechanism, and gearbox are not in pre-assembled form. However, the examination of the said goods also clearly revealed that all the items i.e., engine, transmission mechanism, and gearbox were in pre-assembled form but are not mounted on chassis, and accordingly, were covered under Serial No: 524 (1)(b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 and attract higher rate of BCD @ 25%. Thereby, the goods covered in respect of these 08 Bills of Entry as mentioned in Table-III above, were also seized under Section 110(1) of the Customs Act, 1962 vide seizure memorandums dated 09.04.2021, 21.05.2021 and 15.06.2021, respectively.

21.3 Further, on the request of the importer, the adjudicating authority allowed for provisional release of the seized goods covered under the above said 08 Bills of Entry also, on submission of



bond equal to the value of the goods and bank guarantee equal to the differential duty, as per details mentioned in Table-IV below:

Table-IV

Sr. No	BOEs/Date	Seizure Date	Declared Value of Goods	Total Differential Duty	Bond Submitted	BG Submitted
1	3387131,3387385,3387841 and 3387842, all dated 01.04.2021	09.04.21	37,08,48,760/-	5,22,15,504/-	37,08,48,760/- (L804326)	5,22,15,505/- (ICICI Bank BG ; 0006NDLG00019722 dt 29.04.2021)
2	3907456 and 3908511 both dated 11.05.2021	21.05.21	18,88,48,436/-	2,65,89,859/-	18,88,48,436/- (L804331)	2,65,89,860/- (ICICI Bank BG; 0006NDLG00042822 dt 09.06.2021)
3	4112486 and 4112662 both dated 28.05.2021	15.06.21	18,73,37,382/-	2,63,77,103/-	18,73,37,383/- (L804332)	2,63,77,104/- (ICICI Bank BG; 0006NDLG00054422 dt 28.06.2021)

22. Therefore, from the investigations conducted by SIIB (I), NCH, Mumbai, it appeared that:

i. The goods imported vide total 34 Bills of Entry, seized and subsequently provisionally released, (as detailed in para 1, Table- II and Table-III above), filed by M/s NCL, were not as per their declaration and mis-declared as ***"CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION"***. However, the goods were found to be with pre-assembled engine, gear box and transmission mechanism which were not eligible for the BCD @ 15% claimed by the importer, vide Serial No: 524 (1) (a) of exemption Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated, 06.07.2019. Further, as all the previously cleared and provisionally released consignments were completely identical in nature, the benefit claimed by importer as mentioned above, was not applicable for all previously cleared 50 Bills of Entry also. Therefore, the goods covered vide 84 Bills of Entry mentioned in both subject SCNs dated 27.05.2021 and 08.07.2021, were liable for confiscation under Section 111(m) of Customs Act 1962, and the importer M/s NCL, was liable for penal action under section 114A and 114 AA of the Customs Act, 1962, as they have knowingly and intentionally made use of false and incorrect material in the transaction of the imported goods.

ii. During investigation it came on record that the importer, supplier and manufacturer are in absolute collusion to submit wilful misstatement by suppressing the facts about the form/nature of goods and thereby claimed the undue notification benefit. Therefore, this act of omission and commission on their parts rendered the goods liable for confiscation under section 111(m) of the Customs Act, 1962.



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iii. The supplier M/s GMMCO Ltd., had not supplied the goods in terms of conditions of their contract which states that goods shall be supplied as *"in completely knocked down condition containing the necessary components, parts or sub-assemblies, for assembling a complete unit with engine, final drive and transmission mechanism not in a pre-assembled condition"*. However, they have supplied the goods with engine, gear box and the transmission mechanism in pre-assembled form/condition. Thus, they appeared to have mis-declared the goods for undue duty exemption benefit and abetted in the omission and commission in collusion with the importer rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962. Therefore, M/s GMMCO Ltd. had rendered themselves liable for penal action under Section 112(a) of Customs Act, 1962. Further, it was alleged that M/s GMMCO Ltd. (the Indian authorized dealer/supplier on behalf of the manufacturer M/s Caterpillar Inc., USA), had intentionally made use of false and incorrect documents in collusion with the importer M/s NCL, to avail undue advantage of BCD exemption by resorting to mis-declaration of goods, and hence, M/s GMMCO Ltd. had also rendered themselves liable for penal action under section 114AA of Customs Act, 1962, also.

iv. The Cost of erection and commissioning charges were not included in the declared assessable value as per their contract. Such payments from the purchaser to the supplier are being made in relation to the expertise provided by manufacturer to importer, through their authorised supplier and hence the cost of erection and commissioning deemed to be the CONDITION OF SALE of the imported goods, by the buyer to a third party to satisfy an obligation of the seller. This clearly indicates that the value declared for all the imported consignments were not true transaction value as the cost of erection and commissioning have not been included in declared assessable value. The Rule 10 of CVR 2007 clarifies that – *"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."* Therefore, the declared value of all the imported consignments were liable to be rejected in terms of Section 12 of CVR 2007.

v. The wilful mis-declaration and suppression of facts for claim of undue notification benefit led to evasion of Customs duty to the tune of Rs.128,68,24,528/- as detailed in Annexure-I of both subject SCNs dated 27.05.2021 and 08.07.2021, which was liable to be recovered under Section 28(4) of the Customs Act, 1962, along with the applicable interest under section 28(AA) of Customs Act, 1962.

23. Roles played by involved Entities:

i. It was alleged that the Importer, M/s NCL submitted the incorrect description for the subject B/Es and availed the undue duty exemption. The Importer was not sure about the form/nature of imported goods and the importer kept on supplying the goods to the importer and manufacturer



for the same. Importer also tried to shrug off its responsibility by placing the clauses in said contract that if the payment of liability of increased duty happens to be more than 15%, GMMCO Ltd. have to pay the same. This clause proves, that importer was aware about the conditions of notification well before the goods were imported. The importer was well aware that the payment of cost of Erection and Commissioning charges i.e. Rs.30,00,000/- per equipment was one of the conditions of sale purchase as per their contract and the same was includible in the assessable value under Rule 10 (e) of CVR, 2007. However, they did not include it in the value with sole intention to evade the applicable customs duty.

ii. Further, it was alleged that the supplier, M/s GMMCO acted in connivance with the manufacturer and provided the materials to enable importer to file wrong description of the imported goods. For the purpose of duty evasion, the supplier and manufacture provided wrong information in the import documents mis-declaring the form/nature of imported goods to fit into the claimed notification. Neither the importer M/s NCL nor the supplier M/s GMMCO Ltd. and the manufacturer could provide any document, establishing that the Engine, Transmission Mechanism and Driveshaft are not in pre-assembled form as they have declared. Therefore, the supplier M/s GMMCO Ltd. and the importer M/s NCL, both wilfully suppressed the fact and mis-declared the goods (Engine, Transmission Mechanism and Driveshaft) as imported not in pre-assembled form. The CE reports, visual inspection and the photographs brought out in para 6 above, unassailably establishes that the Engine, Transmission Mechanism and Driveshaft, are in pre-assembled form. Further, as the supplier was well aware about the condition of sale of erection and commissioning charges which would be paid to manufacturer, the same should have been added in the assessable value. The aspect was suppressed by the importer/supplier both. Further M/s GMMCO Ltd. would provide all the technical assistance for assembling and commissioning of the dumpers, on behalf of the manufacturer M/s Caterpillar Inc., USA and for such activities M/s GMMCO Ltd. would charge Rs.30,00,000/- per equipment from the importer. It appears that the manufacturer M/s Caterpillar Inc., USA has supplied the goods on the condition that the technical assistance would be provided by the supplier M/s GMMCO Ltd. against the payment. Therefore, the charges received by the M/s GMMCO Ltd. toward the technical knowhow would fall under the ambit of conditions of sale and is includable in the assessable value. Such charges, is one of the condition of sale of goods to the importer and cannot be claimed as payment towards post importation activities.

24. Accordingly, the following noticees vide Show Cause Notices dated 27.05.2021 and 08.07.2021 read with corrigendum's dated 25.11.2021, all issued vide F. No. GEN/INV/MISC/68/2020-SIIB-O/O-COMMR-CUS-IMP-II-ZONE-1-MUM, were called upon to Show Cause to the Commissioner of Customs (Import-I), New Custom House, Ballard Estate, Mumbai - 400001, as under as to why:

For M/s. NCL (Noticee No. -1):

(i) The benefit claimed @15% BCD under Serial No: 524 (1) of Customs Notice No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 should not be denied for



the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] and higher rate of BCD @ 25% should not be charged under Serial No. 524 (1) (b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019.

(ii) The erections and commissioning charges of Rs.30,00,000/- per unit should not be included in the declared assessable value of all 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] in line with Rule 10 of CVR, 2007;

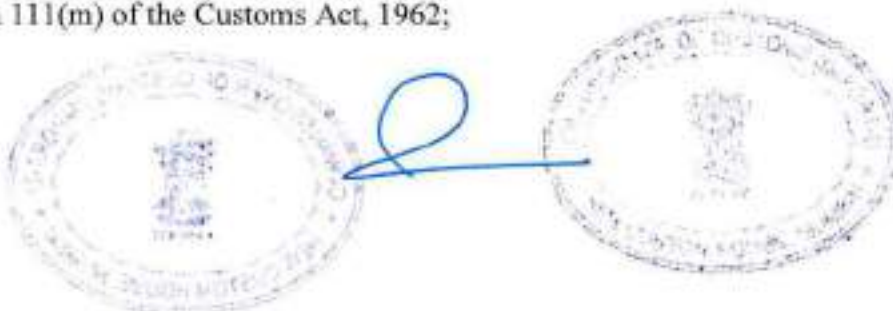
(iii) The declared assessable value in respect of 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] should not be rejected in terms of Rule 12 of CVR, 2007;

(iv) The declared assessable value in respect of 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] should not be re-determined as Rs 8,26,02,42,472.10, under Section 14 of the Customs Act, 1962 read with the Customs Valuation Rule-10 (Determination of value of imported goods) Rules, 2007;

(v) The differential duty of total Rs. 128,68,24,528/-, for the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] should not be demanded and recovered under the provisions of Section 28(4) of the Customs Act ,1962 along with applicable interest under Section 28AA of the said Act;

(vi) The Bank Guarantees deposited for the total amount of Rs.34,30,42,161/- submitted at the time of provisional release of the goods covered under 26 BOE'S (as detailed in para 1 and Table- II above) and Rs.10,51,82,469/- submitted at the time of provisional release of the goods covered under 08 Bills of Entry (as detailed in Table – III above), should not be encashed and the amount if so recovered, should not be appropriated against the duty demand.

(vii) The goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)], having re-determined assessable value of Rs 8,26,02,42,472.10 should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962;



(viii) Penalty should not be imposed on M/s. Northern Coalfields Limited under Section 114A of the Customs Act, 1962 for evasion of duty by wilful mis-statement and suppression of facts and/or under Section 112 (a) of the Customs Act, 1962 for rendering the goods liable for confiscation under Section 111(m) of the Customs Act, 1962.

(xi) Penalty should not be imposed on M/s. Northern Coalfields Limited under Section 114AA of the Customs Act, 1962 for wilfully and intentionally making use of false and incorrect documents by resorting to mis-declaration of the description of the goods.

For M/s. GMMCO (Noticee No. 2):

(xii) Penalty should not be imposed on M/s GMMCO Ltd, Kolkata under Section 112 (a) of the Customs Act, 1962 for their act of omission and commission in mis-declaring the goods, rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962.

(xiii) Penalty should not be imposed on M/s GMMCO Ltd, Kolkata under Section 114AA of the Customs Act, 1962 for intentionally making use of false and incorrect documents by resorting to mis-declaration of goods.

RECORD OF PERSONAL HEARING AND CROSS EXAMINATION

25.1 In view of the above, opportunities for hearing was granted to M/s NCL (Noticee no. 1) and its holding company, M/s CIL, on 13.07.2021 and 18.08.2021. M/s Shetty, Malhotra & Associates, Advocates, the representative of Noticee no. 1, vide their letter dated 29.06.2021 and 16.08.2021 and during the personal hearing dated 18.08.2021, requested for legible and clear copies of all Relied upon documents and allow the inspection of the original copies of all the RUDs as annexed to the SCNs. Accordingly, they completed the inspection on 18.08.2021 and were provided legible copies of the same. M/s NCL/M/s CIL were again granted opportunity for hearing on 20.09.2021. The advocates on behalf of M/s NCL/M/s CIL, vide their letter dated 17.09.2021 requested for cross-examination of Shri M. Vairamohan, C.E., Shri Rajendra S. Tambi, C.E., Shri Sadanand C. Kapei, Customs Broker, Shri Syamal Samanta, M/s CIL, Shri Vikash Kumar, AGM of M/s GMMCO and Shri Vikas Bhardwaj, Senior Intelligence Officer of SIIB (I), NCH, Mumbai.

25.2 In view of the above, opportunities for hearing was granted to M/s GMMCO (Noticee no.2), on 13.07.2021 and 18.08.2021. M/s Khaitan & Co., the representative of Noticee no. 2, vide letter dated 10.08.2021 requested for cross-examination of Shri M. Vairamohan, C.E., Shri Rajendra S. Tambi, C.E., Shri Sadanand C. Kapei, Customs Broker, Shri Syamal Samanta, M/s CIL and Shri Vikash Kumar, AGM of M/s GMMCO.

25.3 Accordingly, cross-examinations of the following persons were allowed and same were conducted by the concerned representatives of the Noticees as mentioned in Table below:



Sr. No.	Name of the person	Date on which cross-examination conducted by M/s NCL/CIL	Date on which cross-examination conducted by M/s GMMCO
1	Shri M. Vairamohan, C. E.	25.11.2021& 09.03.2022	06.09.2021
2	Shri Rajendra S. Tambi, C.E.	25.11.2021& 09.03.2022	06.09.2021
3	Shri Sadanand C. Kapei, Customs Broker, M/s Seashell Logistics Pvt. Ltd.	15.12.2021	20.09.2021
4	Shri Syamal Samanta, Chief Manager (C&F), M/s CIL	24.11.2021& 08.03.2022	20.09.2021
5	Shri Vikash Kumar, AGM of M/s GMMCO	24.11.2021& 09.03.2022	---

Further, the cross examination of Shri Vikas Bhardwaj, Senior Intelligence Officer of SIIB (I) was disallowed by the adjudicating authority as he was investigating authority only for the present SCN and his statement itself was not recorded or relied upon in the SCN.

25.4 After completion of the cross examination of the persons as mentioned above, opportunities for hearing was granted to M/s NCL, on 28.02.2022. M/s Shetty, Malhotra & Associates, the representative of Noticee no. 1, attended the personal hearing on 28.02.2022 and submitted as below:

- They were not involved in collusion and suppression of any facts. Thus, penalty under Section 114A of the Customs Act, 1962 cannot be imposed. Further, any other penalty cannot be invoked.
- Certificate from IIT, Kharagpur was submitted stating that goods were imported in dis-assembled condition.
- Case Laws were submitted to prove that erection and commissioning charges cannot be added in Assessable Value.
- Cross-examination of Shri M. Vairamohan, C.E., Shri Rajendra S. Tambi, C.E., Shri Syamal Samanta, M/s CIL and Shri Vikash Kumar, AGM of M/s GMMCO was again requested to be conducted.
- Written submissions dated 28.02.2022 along with copy of Contract was submitted.

25.5 After completion of the cross examination of the persons as mentioned above by the representatives of M/s GMMCO, Personal hearing opportunity was granted to M/s GMMCO (Noticee no. 2), on 02.03.2022. M/s Khaitan & Co., the representative of M/s GMMCO, attended the personal hearing on 02.03.2022 and submitted as below:

- Transmission mechanism were not imported in pre-assembled condition as established during cross-examination of Chartered Engineer.
- Gear-box were not imported as it was not required.
- Engine was not in fully functional state as different essential parts were not attached.
- Thus, Engines and Transmission Mechanism were not in pre-assembled form.
- They have not imported goods and they were agent of suppliers. Thus, they have not mis-declared any facts. Thus, penalty is not imposable.



vi. Written submissions dated 02.03.2022 along with case laws was submitted.

25.6 As per the request of the Noticee no. 1 during the Personal hearing dated 28.02.2022, cross-examinations of the following persons were conducted by the concerned representatives of the Noticee no. 1, as mentioned in Table below:

Sr. No.	Name of the person	Date on which cross-examination conducted by M/s NCL/CIL
1	Shri M. Vairamohan, C. E.	09.03.2022
2	Shri Rajendra S. Tambi, C.E.	09.03.2022
3	Shri Syamal Samanta, Chief Manager (C&F), M/s CIL	08.03.2022
4	Shri Vikash Kumar, AGM of M/s GMMCO	09.03.2022

25.7 Further, opportunities for hearing was granted to M/s NCL/M/s CIL and M/s GMMCO on 12.04.2022. The representative advocate on behalf of M/s NCL/M/s CIL during the said PH dated 12.04.2022, while submitting their additional reply dated 12.04.2022 also stated that Importation of goods have taken under an agreement/contract. There is no allegation that importation is beyond contract. Thus, collusion, mis-statement or suppression cannot be established against them. Further, the representative advocates on behalf of M/s GMMCO attended the said PH dated 12.04.2022 submitted their final reply dated 12.04.2022 incorporating their final arguments.

WRITTEN SUBMISSIONS OF NOTICEES

26.1 M/s Shetty, Malhotra & Associates, Advocates on behalf of the Noticee no. 1 during the personal hearings dated 28.02.2022 and 12.04.2022, submitted their written reply dated 28.02.2022 and additional reply dated 12.04.2022(as mentioned above), details of the same are as under:

i. The Show Cause Notices in question were issued basically by relying on the alleged confessional statements of the witnesses and by misconstruing Clause 7.5 of the contract. Since the confessional statements made by the witnesses are retracted and in the cross-examinations most of the witnesses have disowned the admissions given by them in their respective statements, therefore, reliance placed on such confessional statements cannot prove the allegations made out in the SCNs.

ii. Cross-examination of all the 5 witnesses whose statements were recorded and relied upon in the Show Cause Notices was allowed, but the cross-examination of one Shri Vikas Bhardwaj SIO of SIIB(I), was rejected. He was the Investigating Officer of this case and the one who recorded all the above said 5 statements using inducement and/or duress or threat on such witnesses. The said denial of Cross- Examination of the very Investigating Officer is clearly in violation of the Principles of Natural Justice and fair play, thus vitiating the entire adjudication proceedings in this case.



iii. M/s CIL (parent company of M/s. NCL) had floated global tender for supply of 102 numbers of 190 T dumpers and the manufacturer (M/s Caterpillar Inc., USA) & the supplier (M/s GMMCO) responded by offering to supply the dumper with Engine, Gearbox and Transmission Mechanism not in pre-assembled condition. Caterpillar Inc., USA. Being the successful bidder, CIL entered into a Tripartite Contract with the manufacturer and the supplier on 2nd December 2019 for the supply of total 102 dumpers, out of which 84 dumpers to M/s NCL (Notice no. 1) and the remaining 18 to Eastern Coal Fields (ECL), another subsidiary of CIL.

iv. Out of the said 84 Rear Dumpers to be supplied to NCL, 50 were already cleared as per the Self Declaration stating that the goods are in CKD condition, while the remaining 34 Dumpers imported subsequently were released provisionally on execution of Bank Guarantees and Bonds. All the 50 Bills of Entry were filed after obtaining report of the Chartered Engineer Mr. M. Vairamohan to the effect that the said three parts of the Dumpers were in CKD condition/not in pre-assembled condition. Merely because the said Chartered Engineer has subsequently given a contrary statement, cannot be a ground to hold that NCL has colluded, suppressed and mis-declared the goods.

v. In the present case, although the goods were cleared under the self-assessment by the importer, the department had assessed the 50 Bills of Entry at various stages and allowed clearances of the 50 Dumpers and no doubt was raised by the assessing officer during clearance. As the proper officer had not re-assessed the goods for levy of customs duty, the allegations regarding collusion, wilful mis-statement and suppression of facts are nothing but a change of opinion on the part of the Department, and hence, both the notices issued invoking action under Section 28 deserve to be recalled.

vi. Although, under the extant provisions of the Customs Act, it is the liability of the Importer to file Bill of Entry by making proper and truthful declarations before the Customs Authorities and to pay the proper amount of duty, etc., in this case, however, NCL acted on the advice of the Bidders who promised under the Contract to deliver the Dumpers at the agreed price, which is exclusive of Customs Duty only at 15% BCD. Thus, the NCL in this case is totally an innocent party, for it has not made any wilful mis-statements or false statements before the Customs Authorities in its Bills of Entry and even not suppressed any fact from the Customs Authorities, while clearing the goods. The second aspect involved herein is, there was no need for the NCL to indulge in any type of acts of misfeasance and malfeasance for gaining by way of clearance of the Dumpers at the Concessional rate of Customs Duty. It is so because the NCL is a Government of India owned Company and all the profits registered by the Company would go to the Government of India itself. However, the Customs officers have completely ignored this aspect while foisting this false case on the NCL in outright illegal manner, without any legally sustainable evidence whatsoever.



vii. Since, under the said Chapter heading 8702 against the Custom Notification dated 25/2019, there are three different rates of BCD based on the condition of shipment and NCL having no control over the form or the condition of shipment that would be undertaken by the aspiring bidder, quote for BCD was also kept open for the Bidder's choice / preference. It is in this context, the CIL had entered into the said CIP Contract, leaving the entire responsibility of supply and erection, including the additional customs duty liability, if any, to the bidders.

viii. CIL at the time of entering in to the contract had made it clear to the Supplier and the Manufacturer that the said three parts of the dumpers ought to be in CKD condition, so that CIL could claim lower rate of duty, as represented by Caterpillar—the successful bidders. After obtaining 2 written Justification Letters from the manufacturer and supplier confirming the supply of the 3 parts in unassembled condition, Clause 7.5 was inserted in the Tripartite Contract, with the Justification Clause to the effect that in case the customs authorities hold that the three parts of the dumpers were not in sub-assembly CKD condition, but in pre-assembled condition, then the entire differential duty amount along with interest and penalty, if any, that may be imposed by the customs authorities will have to be borne by GMMCO, the Supplier. This unequivocally establishes the transparency of the entire transactions entered into by the CIL and its bona fides.

ix. For the mere reason that the aforesaid specific Clause No. 7.5 was contained in the contract dated 02.12.2019, it would be improper to hold that the NCL has connived with the supplier and the manufacturer, especially when ---

- a) CIL being a Government Company, it is legally obliged for it to accept the L-1 bid as to save the Government money and avoid wastage of public money. In this case, Caterpillar being the successful bidders, CIL had no choice, but to accept their bid.
- b) If the representations made by the supplier/manufacturer in their bid are found to be incorrect, then the entire differential duty along with interest and penalty, if any, were to be borne by the Supplier/Caterpillar themselves.
- c) In such a case, where M/s. Caterpillar Inc is the World Renowned Manufacturer of Heavy Duty Dumpers and further that their local agent GMMCO-Supplier is seriously contesting the show cause notices, how anyone can hold that the CIL has connived with the said supplier and manufacturer.
- d) A copy of the contract was made available to the customs authorities during the clearance of goods and investigations stage itself. Hence nothing has been suppressed by the CIL from the customs.

x. The fact that the Supplier, M/s GMMCO stands by its statement that the goods have been supplied not in Pre-assembled condition, clearly shows that the Supplier is willing to prove



before the authorities the fact that the said 3 parts of the dumpers are imported not in pre-assembled condition as claimed in SCN.

xi. The descriptions given in the Bills of Entry that the 3 items were not in Pre-Assembled Condition, was based on the bona fide belief that the documents furnished by manufacturer and the Supplier represented the correct and true state of affairs. It is only if the Custom authorities establish that the documents furnished by the Manufacturer and the Supplier did not represent the true picture, then the Manufacturer and Supplier would be held liable, but not the NCL/CIL, on the mere ground that a Clause has been inserted in the Contract to that affect.

xii. In the instant case of imports there was no question of mechanical gearbox in the 190T Rear Dumpers. The transmission mechanism plays the role of power transmission from engine to wheel through the driveshaft as clarified by M/s GMMCO vide their letter dated 12.11.2020.

xiii. Collusion, or making any wilful mis-statement or suppression of facts, cannot be alleged without there being the *mens-rea* on the part of the importer. In this case, however, absolutely there is no such guilty intention attributable on the part of NCL, as it has never acted with the intention of causing any illegal gain unto itself and illegal loss to the customs. Thus, the element of *mens-rea* is conspicuously missing in this case from such falsely alleged collusion or connivance, etc.

xiv. When the Revenue invokes the extended period of limitation under section 28(4) of the Customs Act, 1962, the burden is invariably cast upon it to prove the acts of collusion, wilful mis-statement and/or suppression of facts. Reliance is placed on the below mentioned judgements of the Hon'ble Supreme Court which is directly applicable to the case of NCL/CIL, who are totally innocent parties:

- *Vinod Solanki vs. Union of India and Anr* (2008) 16 SCC 537
- *Uniworth Textiles Ltd. v CCE, Raipur*, 2013 (288) E.L.T. 161 (S.C.)

xv. Pre Notice-Consultation as provided under the proviso to Section 28(l)(a) of the Customs Act 1962 has been illegally denied to NCL, primarily for the reason that they connived with the supplier and the manufacturer and suppressed material facts by mis-declaring the imported goods as unassembled to evade customs duty. Reliance is placed on judgement of Hon'ble Supreme Court in the case of *Hussein Ghadially alias M.H.G.A. Shaikh and others vs. State of Gujarat* reported at (2014) 8 SCC 425.

xvi. As per statement dated 21.01.2021 of Shri Vikash Kumar, AGM of M/s. GMMCO Ltd., the consignment received at site cannot perform any function. The Engine and Transmission Mechanism undergo assembly process under critical supervision of trained Engineers and technicians to perform intended functions. From his Statement, it is clear that the goods were imported in CKD form, that too the Engine, Gearbox and Transmission Mechanism were



imported under sub-assembled form and definitely not either in Pre-assembled condition, or in semi-assembled condition, as wrongly claimed by the Department.

xvii. As per the "Opinion on CAT 190T Dumper - Import Duty" dated 17.02.2022 given by Prof. A. R. Mohanty of IIT, Kharagpur, the said 3 parts of the Dumpers in question – Engine, Gearbox and Transmission Mechanism are imported in unassembled form and not in Pre-assembled condition, as wrongly and falsely claimed by the Department in the SCNs.

xviii. In view of the Retraction Letters filed by Shri Syamal Samanta, Chief Manager (C&F) of CIL and the CIL itself both dated 14.09.2021, the Department cannot place any reliance thereon, for proving the case against NCL, without corroborating it with independent materials. Reliance is placed on the below mentioned judgements of Apex Court as below:

- *Vinod Solanki vs. Union of India and Anr.* (2008) 16 SCC 537
- *Mohd. Ismail vs. Special Director, ED and Anr.* (2007) 8 SCC 254
- *CCE v. Duncan Agro Industries Ltd.* [(2000) 7 SCC 53]

xix. The entire case of the department has been completely proved wrong and utterly false, consequent to holding of the cross-examinations of the five witnesses allowed. All the said five witnesses, excepting the two Chartered Engineers, have clearly deposed the truth in their respective cross-examinations, confirming that their statements to the effect that the Engine, Gearbox and Transmission Mechanism of the imported dumpers being in pre-assembled condition was not factually correct, as they are not experts of Automobile Engineering. The relevant portions Cross-examination recorded by the advocates of CIL/NCL is reproduced below:

(a) During the Cross-Examination of Shri Syamal Samanta, he interalia stated that no one from CIL had prepared the Bills of Entry. The relevant Contract was on CIP terms i.e. Carriage Insurance Paid, wherein filing Bills of Entry and arranging clearance of the goods from Customs and forwarding the imported consignments to the ultimate consignee, was the responsibility of the Supplier themselves, here M/s. GMMCO Ltd. All the Bills of Entry were prepared by the CHA, viz. M/s. Seashell Logistics Pvt. Ltd. appointed by M/s. GMMCO Ltd. under their supervision. It was the responsibility of M/s. GMMCO for preparing the Bills of Entry and engaging services of CHA of their choice. Only the Checklists were forwarded to CIL for examination and all entries of which were compared by him and his Department for their correctness and accuracy with shipping documents furnished by the Supplier, Caterpillar along with the Condition of Terms of the relevant Tripartite Contract.

(b) During the Cross- Examination of Shri M.Vairamohan, he *inter-alia* stated that he conducted physical examination of the 3 parts of the imported dumpers, viz. the Engine, Gearbox and Transmission Mechanism before issuing first Certificate dated 02.11.2020. He had not inspected dumpers of any capacity while in service with BPCL, but had knowledge and after retirement he inspected dumpers as a safety requirement based on the customer demands.



(c) During the Cross-Examination of Shri Rajendra S. Tambi, he *inter-alia* stated that he had worked with automobile industry—Bajaj Auto Ltd. and also had specialization in Automobile Engineering during his B.E. studies. His experience was in general trucks and not in dumpers manufactured by Caterpillar Inc., USA.

xx. Further, in the Cross examination of Shri Rajendra S. Tambi Chartered Engineer by the Advocates of GMMCO, he admitted to the mistake committed by him while issuing his Certificates to the Customs. The relevant portions of the same is reproduced below:

Q4. Please see picture of drive shaft which has been stated by you to be in pre-assembled condition. What are the components which have been assembled in this drive shaft? Can this be described gear box?

Ans. It has L flange, middle piece, sleeves etc. It does not have any gear. It cannot be described as gear box.

...

Q6. What do you mean by transmission mechanism imported in pre-assembled condition?

Ans. Transmission Mechanism can be said to be in pre-assembled condition if drive shaft and gear box are connected together.

...

Q12. Please confirm as to whether imported goods contain gear box in pre-assembled condition.

Ans. No, I have not mentioned about the gearbox in my report.

...

Q17. I am showing you complete engine part list of the dumper engine, which is required to assemble an engine. Can you confirm that all these parts have been pre-assembled or not in the engine?

Ans. Since I have seen the engine from outside and not opened the engine, I cannot confirm whether all these parts were inside the engine or not.

Q18. The shipper in the invoice has described as "Having engine, Gear Box and Transmission Mechanism not in pre-assembled condition". However, you say you have described engine as in pre-assembled condition based on exporter's declaration. There appears to be contradiction. Please explain.

Ans. I have examined the goods based on packing list and it was clearly mentioned that one package consists of engine. It means exporter has not declared engine 'not in pre-assembled condition'.

xxi. Although, under the extant provisions of the Customs Act, it is the liability of the Importer to file Bill of Entry by making proper and truthful declarations before the Customs Authorities and to pay the proper amount of duty, etc., in this case, however, NCL acted on the advice of the Bidders who promised under the Contract to deliver the Dumpers at the agreed price, which is exclusive of Customs Duty only at 15% BCD. ~~Lower of Customs~~ In this case is totally



an innocent party, for it has not made any wilful mis-statements or false statements before the Customs Authorities in its Bills of Entry and even not suppressed any fact from the Customs Authorities, while clearing the goods. Thus, NCL being not responsible for acts of collusion, etc. cannot be visited with any type of fine, penalties, definitely not the mandatory penalty u/s. 114A ibid. Further, imposition of any fine under Section 111(m) or penalty - under Section 114A, or 112(a), 114AA of the Customs Act, 1962 was not applicable as NCL was a totally innocent party. Reliance is placed on the following Judgments passed by the Hon'ble Supreme Court, High Courts and the CESTAT, clearly holding that every importer who acted bona-fidely and in good faith, rather becoming a scapegoat of the illegalities committed by the third parties, cannot be made liable for the mandatory penalty under Section 114A of the Customs Act, 1962:

- *C.C., ICD, Tughlakabad, New Delhi vs. Orient Ceramics and Industries Ltd.* 2016(344)ELT449(Tri.Del).
- *Sirthai Superware India Ltd vs Cc (Nhava Sheva-III) Mumbai.*
- *Graphite India Ltd. vs. Commissioner of Customs (Port), Kolkata.*
- *Metal Ore vs. Commissioner of Customs (Import), Mumbai.*

xxii. If at all any type of collusion and connivance in this case which resulted in filing the Bills of Entry with the wilful wrong description of goods, the customs ought to have made the said manufacturer, M/s Caterpillar Inc. USA, also a co-noticee in the SCN along with the Supplier, demanding from them the duty sought to be evaded along with the mandatory penalty under section 114A of the Customs Act, since both of them were responsible for furnishing all the information and the duly filled in Bills of Entry to NCL, through the CHA appointed by them, as agreed in the contract.

xxiii. Regarding the valuation of the goods, the same are imported pursuant to a Tripartite Contract dated 02.12.2019 executed by and among M/s. CIL, M/s. Caterpillar Inc., U.S.A and supplier, M/s. GMMCO Ltd. As per the said CIP Contract, the goods were to be shipped by the manufacturer and installed at the site of the importer by the Supplier for which, the supplier would charge a sum of Rs.30 lakhs per Unit of dumper. CVR, 2007 mandates that where the declared value is sought to be rejected by the Department, then the value shall be determined by proceeding sequentially in accordance with Rules 4 to 9 of the Rules. As the Notice, straightaway seeks to add to the declared value the cost of erection and commissioning which is not permissible in law. Further, the SCN does not cite any evidence of contemporaneous import of similar or identical goods at a higher value at about the same time. Therefore, the proposed rejection of the transaction value, as sought to be made out by the Customs is incorrect.

xxiv. As per Section 14 of the Customs Act, 1962 & Rule 10 and Rule 13 of CVR, 2007, charges towards post importation activity such as erection and commissioning of the imported goods is not liable to be included in the valuation of imported goods for computing Customs duty, unless such post-importation activity is a condition of sale of the imported goods.



xxv. The erection and commissioning of the goods in the Dumpers in CKD condition are post importation activities and the charges for such erection and commissioning have been paid to M/s. GMMCO Ltd. in India subsequent to import of the goods. These charges have no bearing on the transaction value of the goods and is genuine. Therefore, the proposed addition of the cost of erection and commissioning to the transaction value of the goods is incorrect and thus deserves to be rejected outright. Reliance is placed on the below mentioned judgements of various forums:

- Decision of Hon'ble Supreme Court in the case of *Tata Iron & Steel Company Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar* - 2000 (116) ELT 422 (SC).
- Decision of Hon'ble Tribunal in the case of *Bharat Aluminium Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam* - 2019 (369) ELT 1064 (Tri).

xxvi. In the cross-examinations held on 09.03.2022 after the receipt of the Expert Opinion dated 17.02.2022 from the IIT-Kharagpur opining that the said 3 parts of the Dumpers imported by the NCL were in un-assembled condition, both the said Chartered Engineers have clearly admitted the fact that they do not have any knowledge about the mechanical functioning of the huge Off-Road Dumpers imported in this case, as they used to deal with only Small or usual On-Road Vehicles, like trucks or small dumpers, etc. Further, Shri Syamal Samanta and Shri Vikash Kumar, the other two witnesses cross-examined after the receipt of the opinion of IIT-Kharagpur, have accepted that they agree with the said opinion of IIT – Kharagpur that the 3 parts of dumpers imported by NCL were in unassembled condition.

xxvii. Further, the present Notice is bad in law for the reason that a demand under Section 28 of the Customs Act, 1962 can only be raised by the same officer who had caused assessment of the Bill of Entry, i.e., in this case, the Assistant/ Deputy Commissioner of Customs, as has been held by the Hon'ble Supreme Court in *Canon India's* case. The reasoning stated above, in respect of the fifty (50) dumpers applies mutatis mutandis to the 34 dumpers also and for this reason alone, no demand of duty or penalties or fines can be fastened on the noticees.

xxviii. It is also undisputed that such assessment either under Sections 17 or 18 of the Customs Act, 1962 are to be exercised by the proper officer, which is as per the mandate of the Notification No. 50/2020-Customs (NT) dated 05 June 2020. The Commissioner of Customs (Import-I), the issuing authority of the present Notice is not the duly notified proper officer under the above said Notification and cannot, therefore, exercise the powers of assessment. In that view of the matter, the Notice is without jurisdiction and for this reason alone, both the SCNs are unsustainable in law.

xxix. Further, it is also clear that for an engine, gearbox or transmission to be treated as not pre-assembled, it is essential that all essential/integral parts which render these items complete in all respects except for any connecting or mounting parts, should be absent. In other words, if the said item is not capable of functioning by itself without any other part, it would not be pre-




assembled. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in *J.B.A. Printing Inks Ltd. vs Collector of Central Excise* [2000 (115) ELT 24(SC)] wherein it was held that an engine is non-functional without a radiator and hence, being apart, is essential to the engine.

xxx. Reliance was also placed on below mentioned judgements to put forth their case in the subject matter:

-Duckbill Drugs Pvt. Ltd vs. Commr. Of Central Excise, Kol. - (2018) SCC On Line CESTAT 4185.

- M/s. Mahadev Logistics vs. Customs and Central Excise Settlement Commission and others.

- Commissioner of Central Excise, Chandigarh vs. Pepsi Foods Limited - (2011) 1 (SC) 601

-Hon'ble Supreme Court in the case of Prabhu Steel Industrie Ltd. vs. CCE 1997 (1) SCC 303.

- Shashikant and Co. vs. Union of India - 1987 (30) ELT 868 Bom

- Commissioner of Customs (EP) vs. P.D. Manjrekar 2009 (244) ELT 51 Bom.

26.2 M/s Khaitan & Co., Advocates on behalf of the Noticee no. 2 during the personal hearings dated 12.04.2022, submitted their final argument vide their written reply dated 12.04.2022 wherein they requested to drop the SCNs in *toto* and inter-alia stated as under:

i. In the regular course of business, CIL floated a tender No. CIL/C2D/190T Dumper/ R-66/17-18/312 dated 26 March 2018 for supply, installation and commissioning of 190T Rear dumpers. M/s GMMCO, being an authorized agent of the foreign manufacturer i.e. Caterpillar, participated in the said tender and the same was awarded and Contract dated 02 December 2019 was entered into between CIL, Caterpillar and the M/s GMMCO.

ii. During the course of finalization, CIL sought certain clarification from GMMCO including a certificate from Caterpillar to the effect that they will be importing the equipment in completely knocked down kit. Accordingly, M/s Caterpillar, vide their dated 19 April 2019 stated and confirmed that the goods will be offered in a completely knocked condition with necessary parts, assemblies, and sub-assemblies, and for ease of transportation these are shipped in completely disassembled conditions in 20-25 packages and as a standard operating procedure these would be assembled at site under the supervision of trained engineers provided by the Noticee. in its capacity as the dealer of Caterpillar. Further, the Noticee vide their letter dated 27 April 2019 *inter alia* reconfirmed that the said goods would be imported in a completely knocked down condition and will be assembled on site with the assistance of trained engineers and personnel.

iii. M/s NCL on import into India claimed the benefit of Sr. No. 524(1)(a) of Notification No. 50/2017-Cus dated 30 June 2017, for the reason that the goods imported were classifiable Heading 87.04 of the Customs Tariff and were imported in the completely knocked-down

condition and that the engine, transmission or gearbox, if any, were not in a pre-assembled condition.

iv. The goods (being the first fifty dumpers) were assessed under section 17 of the Customs Act, 1962 under 'Second Check'. Further, the said goods were examined and physically verified, and after such process, it was concluded by the customs department that that the imported goods were in accordance with the invoice and packing list and eligible to the claimed benefit i.e., completely knocked down condition and engine, gearbox and transmission mechanism were not in a pre-assembled condition.

v. The present Notice impugns (i) the value of the imported goods and (ii) benefit of Sr. No. 524(1)(a) of the Notification No. 50/2017-Cus dated 30 June 2017 and consequently, demands customs duty along applicable interest, penalties and fines under the extant provisions of the Customs Act, 1962. Therefore, the demand of customs duty from the M/s NCL is required to be upheld before any determination on the aspect of penalties on account of mis-declaration can be undertaken. Any penalty proposal cannot be vivisected or segregated from the customs duty proposal and if done, would patently be bad in law. Reliance in this regard is placed on the judgment of the CESTAT in *Bakeman's Home Products Pvt. Ltd. vs Collector of Customs, Bombay* [1997 (95) ELT 278 (Tri.)].

vi. No pre-consultation proceedings have been carried out by the customs department prior to issuance of the Notice as mandated vide Circular No. 1053/02/2017-CX dated 10 March 2017. Proposal for imposition of penalty under Section 114A and/or 112(a) of the Customs Act, 1962 clearly suggests and demonstrates that the proposal for imposition of penalty under Section 114A of the Customs Act, 1962 is merely exploratory and would be decided by the adjudicating authority during adjudication. In the event if penalty under Section 114A is not sustained and penalty under Section 112 of the Customs Act, 1962 is imposed, a demand under Section 28(4) is also unsustainable. Therefore, it is submitted that the department cannot take shelter that no pre-notice consultation is required for notices issued under Section 28(4) of the Customs Act. Reliance is placed on Hon'ble High Court of Delhi judgment in the case of *Amadeus India Private Limited vs Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate* [2019 (25) GSTL 486 (Del.)]. Hence, the Notice is bad in law due to no mandatory pre-consultation and for this reason alone, deserves to be dropped forthwith.

vii. The Notice is sans jurisdiction and deserves to be dropped forthwith. In terms of Hon'ble Supreme Court judgment in *Canon India Private Limited vs Commissioner of Customs* [2021 SCC Online SC 200] it has been held the phrase "the proper officer" occurring in Section 28(4) of the Customs Act, 1962 is akin to a power of re-assessment and hence, only the officer who has the power of assessment or has actually caused assessment is entitled to seek recourse of demand notice under Section 28(4) of the Customs Act, 1962. Similar judgments in similar matter is as below:



- Order dated 31 August 2021 in Commissioner of Customs, Kandla vs M/s. Agarwal Metals & Alloys [Civil Appeal No. 3411 of 2020] of the Hon'ble Supreme Court of India.
- Judgment dated 26 October 2021 in Writ Petition No. 5154 of 2021 (Kitchen Essentials & Ors. vs The Union of India & Ors) of the Hon'ble High Court of Bombay.
- Judgment dated 09 December 2021 in Customs Appeal No. 45 of 2013 (CC Export vs Reliance Industries Limited) of the Hon'ble High Court of Bombay.
- Final Order No. A/87107/2021 dated 09 November 2021 in Appeal No. C/893/2012 (Dhiren Enterprises Limited vs Commissioner of Customs) of the Hon'ble CESTAT.

viii. The C.E. Rajendra Tambi was of the view that the engine and transmission mechanism as imported was in a pre-assembled state but not mounted on the chassis. The reasoning at arriving such conclusion was that all parts and components have already been assembled on the assembly line and leftover parts are in the nature of ancillary equipments only. However, from the cross-examination of Shri Rajendra Tambi, it was clear that BANJO was a sub-assembly of the transmission mechanism and further, a transmission mechanism would be said to be pre-assembled only if driveshaft and gearbox are connected together. This is absolutely contrary to what has been stated in the reports relied upon in the Notice, as it is an undisputed fact that the driveshaft is imported separately and is at no point in time connected in any manner to the other components of the transmission system. Further, he accepted the fact that he presumed that the engine was in a pre-assembled state solely on the basis of the packing list and *sans* any detailed examination. Further, he has only conducted a bare visual examination and not technically inspected neither tested each and every part to come to the conclusion as to whether the engine was actually in a pre-assembled state or not. He also failed to notice *simpliciter* fact that the radiator was not assembled with the engine, but rather, separately imported along with the chassis.

ix. Shri M. Vairamohan, C.E. in the cross-examination, agreed that for a transmission mechanism to be treated as being pre-assembled, what is required are (i) torque converter (ii) driveshaft and (iii) differential. He has also stated therein that all these three components which comprise a transmission mechanism have not been connected in the state of import. Therefore, the manifest conclusion is that while components of the transmission mechanism may be complete, the transmission mechanism *per se* and by itself is not in a pre-assembled state as the same were undisputedly not connected at the time of import and are rather installed on-site of the main noticee. Further, in so far as gear box is concerned, M. Vairamohan has stated that imported dumpers has hydro-mechanical transmission mechanism and in such mechanism, there is no conventional gear box. The torque converter works a gear box.

x. Both Chartered Engineers during cross-examination dated 09 March 2022 conducted by the main Noticee have conceded that sub-systems being (a) air induction system (b) exhaust system (c) cooling system (d) ignition system (e) fuel handling system and (f) lubrication system



are essential to the engine as the same cannot function without them. Therefore, it is an accepted fact that the critical items have not been assembled with the imported goods in question.

xi. No reliance can be placed on the statements of Syamal Samanta, Sadananda C. Kapei and Vikash Kumar to fasten allegation of mis-declaration of the imported goods as either they are not domain expert and have retracted/contradicted their statements during cross-examination.

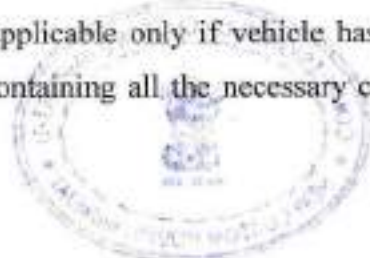
xii. The column (2) of the Sr. No. 524 of the Notification No. 50/2017-Cus dated 30 June 2017 as reproduced *supra*, provides that the goods being imported must be classifiable under Heading 87.02 or Heading 87.04 of the Customs Tariff. Once such *factum* of classification is satisfied, column (3), i.e., description has to be perused. So far as the description is concerned, the same merely states that motor vehicles imported in a completely knocked-down condition are eligible to a concessional rate of customs duty depending on the nature of the state of the engine, gearbox and transmission. If these items are not pre-assembled, the rate of customs duty applicable is 15%; if pre-assembled but not mounted on a chassis, the rate of customs duty applicable is 25% and thereafter, 40%.

xiii. It is undisputed that the description does not qualify the meaning of the words "engine", "gearbox" or "transmission." In this regard, no reference can be drawn to the Customs Tariff which is applicable to classification of these items. In other words, engine and engine parts which are generally covered by Heading 84.07 of Heading 84.09 of the Customs Tariff and gearbox and transmission equipment which is generally covered by Heading 84.83 cannot be read as a limiting scope to interpreting the text of Sr. No. 524 of the Notification No. 50/2017. The above is for the reason that Sr. No. 524 of the Notification No. 50/2017 is an exemption notification and as held by the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai vs Dilip Kumar & Company [2018 (361) ELT 577 (SC)]*, any exemption notification is to be strictly interpreted and there is no place for intendment in the same. Further reliance is placed on the below mentioned judgments in various judicial forums:

- *Jain Engineering Co. vs Collector of Customs [1987 (32) ELT 3 (SC)]*.
- *Collector of Customs, Bangalore vs Maestro Motors Limited [2004 (174) ELT 289 (SC)]*
- *Indian Oil Corporation Limited vs CCE & ST, Vadodara [2015 (329) ELT 334 (Tri-Ahmd)]*

xiv. There cannot be any application for Rule 2(a) of the General Rules for Interpretation of the Customs Tariff ("GRI") for interpretation of the notification and especially to identify as to whether the imported goods are in a pre-assembled state or not. It is submitted that the GRI apply exclusively to interpretation of the entries of the Customs Tariff and not to notification issued under Section 25 of the Customs Act, 1962.

De hors the same, it is further submitted that Sr. No. 524 (1) of the Notification no. 50/2017 is applicable only if vehicle has been imported in as a "Completely Knocked Down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a



complete vehicle. Thus, by virtue of GRI 2(a), such CKD kit would be considered as complete vehicle and if same is considered as complete vehicle for the purpose of the said notification, the difference between entry 524 (1) and 524 (2) of the said Notification would stand obliterated and all such vehicles whether imported in CKD condition or otherwise would be taxable at 40%. Similarly, the distinction between entry no. 524 (1) (a) and 524 (1) (b) of the said Notification would also stand obliterated as application of GRI 2(a) the term "pre-assembled" would mean nothing. This GRI 2(a) has no application, whatsoever, on the interpretation of notification, specifically entry 524 of the Notification No. 50/2017.

xv. Therefore, basis the averments *supra*, it is an inescapable conclusion that the remit of the words "engine", "gearbox" and "transmission" cannot be limited to their customs classification and therefore, are to be understood in their common parlance. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in *United Offset Process Pvt. Ltd. vs Asst. Collector of Customs, Bombay & Ors.* [1989 Supp. (1) SCC 131] wherein it was held as *infra*:

"If there is no meaning attributed to the expressions used in the particular enacted statute then the items in the customs entries should be judged and analysed on the basis of how these expressions are used in the trade or industry or in the market or, in other words, how these are dealt with by the people who deal in them, provided that there is a market for these types of goods. This principle is well known as classification on the basis of trade parlance. This is an accepted form of construction. It is a well-known principle that if the definition of a particular expression is not given, it must be understood in its popular or common sense viz. in the sense how that expression is used every day by those who use or deal with those goods."

xvi. Further to *supra*, it is submitted that Sr. No. 524 of the Notification does not define or provide implicitly any guidance of what constitutes "pre-assembled." In the absence of any such statutory guidance, recourse has to be made to dictionary meanings or judicial precedents.

xvii. In this regard, reference is drawn to the meaning of "pre-assembled" as given in Merriam Webster dictionary which reads as "having been assembled in advance". Therefore, as an example, for an engine to not be in a pre-assembled condition, what is required is that the engine is not assembled in advance. As the meanings suggest, the determining factor must be whether the engine in itself is complete and assembled or not.

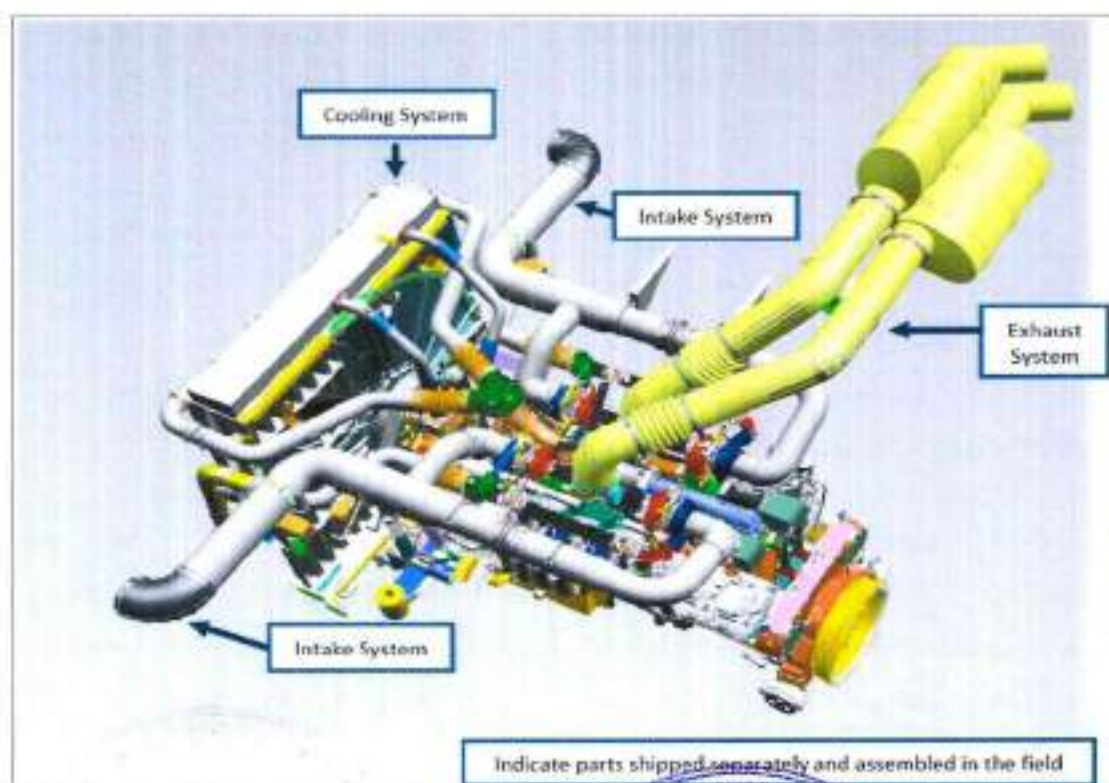
xviii. In this regard, further reference is made to illustrated Oxford Dictionary which defines "engine" as "a mechanical contrivance consisting of various several parts working together, esp. as a source of power". Similarly, the Concise Oxford English Dictionary defines "engine" as "a machine with moving parts that converts power into motion".



xix. Reliance was placed upon *Hon'ble CESTAT, Chennai judgement dated 17.09.2018 in case of BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V as reported in 2019 (366) E.L.T. A28(Tri-Chennai), and inferred that for an engine, gearbox or transmission to be treated as not pre-assembled, it is crucial that all essential/integral parts which render these items complete in all respects save for any connecting or mounting parts, should be absent. In other words, if the said item is not capable of functioning by itself without any other item, it would not be pre-assembled. Therefore, the correct determination of pre-assembled under Sr. No. 524 of Notification No. 50/2017-Cus dated 30 June 2017 is whether an engine, transmission or gearbox can function *sans* introduction of any other part or item or component. As has been exhaustively explained in the averments *supra*, the imported goods are not capable of functioning by themselves and hence, are not functional in nature. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in *J.B.A. Printing Inks Ltd. vs Collector of Central Excise [2000 (115) ELT 24 (SC)]* wherein it was held that an engine is non-functional without a radiator and hence, being a part, is essential to the engine.*

xx. In view of the above legal and factual analysis, it needs to be evaluated as to whether engine is in the pre-assembled condition or not. It is an admitted fact that cooling (radiator), air intake line, exhaust line and engine harness are not pre-assembled to the engine assembly and therefore, the question arises as to whether cooling (radiator), air intake line, exhaust line and engine harness are parts of the engine or not.

xxi. It is an undisputed fact that cooling device i.e. radiator, which is part of technical specification of the engine as per tender as well as contract has been shipped separately and would be assembled at site by the engineers of the Noticee. A pictorial representation of the parts of engine which would be assembled at site is given below:



xxii. In the case of *J.B.A. Printing Inks Ltd. vs Collector of Central Excise [AIR 2000 SC 607]*, a three members bench of the Hon'ble Supreme Court has examined as to whether radiator is part of the engine and held that as internal combustion engine cannot function without a cooling device, and therefore, radiator must be held to constitute a part of such engine. Relevant part of the judgment is extracted below:

"7. Tariff entry 84.09 covers 'parts suitable for use solely or principally with the engines of heading No. 84.07 or heading No. 84.08'. Entry 84.08 covers 'compression-ignition internal combustion piston engines (diesel or semi-diesel engines)'. The argument on behalf of the appellants is that radiator assemblies are not parts of internal combustion engines but accessories thereof and this had been accepted by the respondents earlier. It is difficult to accept this latter argument and the argument that an internal combustion engine can function without a cooling device. It cannot do so. If, then, the cooling device is water based, being the radiator, that cooling device must be held to constitute a part of such engine."

[emphasis supplied]

xxiii. The engine as imported by the main Noticee is not even near complete and requires the addition of various additional items as per the Bill of Material including critical items such as a radiator. The total number of items required for the engine is upwards of 9000. The Noticee further submits that engine number is engraved on the engine block at the time of casting itself. Further, each and every engine shipped by Caterpillar was assembled and tested in the factory and dis-assembled for shipment. Thus, engine block bears a unique engine number which by no stretch of imagination could be construed as engine in pre-assembled condition.

xxiv. Transmission mechanism is a mechanism to transmit power generated by the engine to the wheels in a controlled manner. Such is the definition in the Oxford Dictionary as also Merriam-Webster. "Transmission" as defined in the Dictionary of Automotive Engineering (2nd ed.) by Don Goodsell is as follows:

"transmission (1) Mechanical unit containing a manual or automatic change-speed gear system and associated actuating machinery. (2) Collective term for the components such as clutch, gearbox, driveshaft, whereby power is transmitted from the engine to driven wheels"

The definition extracted above clearly shows that driveshaft is an integral component of a transmission mechanism and is integral to the same.

xxv. Juxtaposing this against the facts, it is an undisputed fact that the drive shaft, which is an essential, integral part of the transmission mechanism failing which the mechanism is inoperable has been imported in a separate box and is not integrated/ connected/ mated to the BANJO, which has been said to be the transmission mechanism in the Notice.



xxvi. The drive shaft does not have any gear and therefore, cannot be considered as gear box unlike the allegation in the notice that drive shaft is a mechanical gear box in pre-assembled condition. A gear box is the part containing gears, i.e., the equipment that changes relation of the engine speed with the speed of the wheels. It is undisputed that the driveshaft does not have any gears and neither does it control any such relationship. Further, it is submitted that imported dumper does not have any gear box. It is fitted with torque converter which works on hydro-mechanical transmission and performs a function similar to that of a gearbox, i.e., to increase the torque while reducing the speed, but it is not a gear box.

xxvii. In view of the above, neither engine nor transmission mechanism is in pre-assembled condition. Thus, it is submitted that the allegation of the engine and transmission mechanism being pre-assembled in the Notice is factually wrong, without the authority of law and *sans* any reasoning, and therefore, the same deserves to be dropped forthwith and without *demur*. It is further submitted that imported dumper don't have any gear box as it works on torque converter. It is submitted that dumpers imported in completely knocked down condition are eligible to benefit of Notification No. 50/2017 under Sr. No. 524(1)(a) as it does not have engine, gear box and transmission mechanism in pre-assembled condition.

xxviii. Professor A. R. Mohanty, Professor of Mechanical Engineering at the Indian Institute of Technology, Kharagpur has in his report dated 17.02.2022 concluded tersely as follows:

"From the above examination of the facts and information provided by CIL, the Indian Institute of Technology Kharagpur is of the opinion the the dumpers alongwith the Engine, Powertrain/gearbox were imported as unassembled CKD kits."

xxix. The goods have been correctly described and therefore, there is no cause for invocation of Section 111(m) of the Customs Act, 1962. A bare perusal of the text of Section 111(m) of the Customs Act, 1962 reveals that the same is attracted in the event if goods do not correspond in value or any entry made under the Customs Act, 1962 only. "Entry" has been defined in Section 2(16) of the Customs Act, 1962 as "'entry' in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84". Therefore, as there was no claim of the goods being pre-assembled or not in the entry made under Section 46 of the Customs Act, 1962 in the Bill of Entry, Section 111(m) of the Customs Act, 1962 is inapplicable in the present case. The packing list and/ or invoice or other import documents such as the Bill of Lading are absolutely irrelevant. Reliance is placed on the below mentioned judgments of various judicial forums:

- *Sandhya Jewellers vs Commissioner of Customs, Ahmedabad* [2013 (293) ELT 412 (Tri.-Ahmd)]
- *Ocean Shipping Services vs Commissioner of Customs, Ahmedabad* [2005 (191) ELT 890 (Tri.-Mum)].



xxx. Mere claiming of an exemption notification or a concession notification does not amount to mis-declaration under Section 111(m) of the Customs Act, 1962 as held in various judgments as below:

- *Northern Plastic Ltd. vs. Collector of Customs & Central Excise* [1998 (101) E.L.T. 549 (S.C.)].
- *Sirthai Superware India Limited vs. Commissioner of Customs, Nhava Sheva* [2020 (371) E.L.T 324 (Tri. - Mumbai)]
- *S. Rajiv & Co. v. Commissioner of Customs (CSI Airport), Mumbai - 2014 (302) E.L.T. 412 (Tri.- Mumbai),*
- *Bussa Overseas & Properties P. Ltd. vs Assit. Commissioner of Customs, Bombay* [2004 (163) ELT 304 (Bom.)] as affirmed by the Hon'ble Supreme Court at (2004) 163) ELT A160 (SC).

xxxi. Proposal of penalty based on misconceived facts, viz., that the Noticee is the supplier of impugned goods is factually incorrect and therefore, unsustainable. Further, as the impugned goods are not liable to confiscation under Section 111(m) of the Customs Act, 1962 and therefore, there arises no occasion for invocation of Section 112(a) of the Customs Act, 1962. In addition to *supra*, invocation of Section 112(a) of the Customs Act, 1962 requires a person to do something or to not do something and such active or passive action or abets such action or omission must be such that it leads to confiscation under Section 111 of the Customs Act, 1962. In the present case, the offence of abetment is being alleged on M/s GMMCO for the reason that merely goods have been claimed to not be in a "pre-assembled" state. On the contrary, for invocation of Section 112(a) of the Customs Act, 1962, it is to be demonstrated with evidence that the very act of claiming the imported goods as being not pre-assembled was a conscious and deliberate. This exercise not having been conducted, there is absolutely no legal basis or justification for imposition of penalty under Section 112(a) of the Customs Act, 1962. Reliance is placed on below mentioned judgments:

- *Shashikant & Co. vs. Union of India* [1987 (30) ELT 868 (Bom.)]
- *Commissioner of Customs (EP) vs. P.D. Manjrekar* [2009 (244) ELT 51 (Bom.)]

xxxii. Further, it is a settled position in law that for imposition of penalty, *mens-rea* is a mandatory requirement as held in the judgment of *CCE vs Pepsi Foods Limited* [2010 (260) ELT 481 (SC)].

xxxiii. The present case is one of pure interpretation and opinions and therefore, no penalty can be imposed on the Noticee. Reliance in this regard is placed on the judgment of *Prabhu Steel Industries Ltd. vs CCE* [1997 (95) ELT 164 (SC)].

xxxiv. No penalty can be imposed for the reason that the impugned goods were requested to be assessed on a first check basis which was rejected by the jurisdictional customs authorities. Once an importer subscribes to a first check, no allegations of contumacious conduct can lie against the Noticee. Reliance in this regard is placed on the judgments of *CC (Imports) vs Amrit Corp.*



Limited [2016 (333) ELT 340 (Tri. -Mumbai)] & Sahil International vs CC [2019 (369) ELT 1397 (Tri. -Mumbai)].

xxxiv. Further, in as much as inclusion of the erection and commissioning charges in the valuation of impugned goods is concerned, there is no allegation that M/s GMMCO has sought payment of these consideration in a clandestine manner. The contract clearly elaborates that the service is to be provided by them and fee to be paid for such service and hence, they are not privy to as to whether such erection and commissioning or so-called technical know-how fee is includible or not as it has neither filed impugned Bills of Entry nor signed any declaration to that effect. The Noticee has no role to this effect and therefore, no liability of penalty can be fastened on the Noticee.

xxxv. Rule 10(1)(c) of CVR mandates addition of any amount payable by the to the assessable value so long as it is related to the imported goods and is a condition of sale of the imported goods. In this regard, it is submitted that the cost of erection and commissioning is in relation to post-import expenses incurred in India and is therefore, not directly connected to the imported goods at all. It is settled law that no additions of post-import expenses can be done to the assessable value. Reliance in this regard is placed on the judgment of the Hon'ble CESTAT in *NCL Industries Limited vs Collector of Customs, Bombay [2005 (189) ELT 193 (Tri.-Mumbai)]* as affirmed by the Hon'ble Supreme Court at *2015 (322) ELT A91 (SC)*. Hence, for the reasons submitted *supra*, the proposal for redetermination of the value is unsustainable in law.

xxxvi. For imposing a penalty under Section 114AA of the Customs Act, 1962, knowledge of any declaration, statement or document that is being made or signed or used must be possessed by the person against whom the said section is being invoked. M/s GMMCO has not made any illegal statement intentionally or provided a false declaration or a statement or a document nor the Notice provide an *iota* of evidence to this effect as how the criterion of Section 114AA of the Customs Act, 1962 are fulfilled in the present case. Mere claiming of an exemption cannot amount to a false declaration inviting the harsh action of penalty on the Noticee no. 3 under Section 114AA of the Customs Act, 1962. Reliance is placed on the below mentioned judgments wherein it has been held that no penalty can be imposed under Section 114AA of the Customs Act, 1962 in the absence of any *malafide* on the part of the assessee:

- *Parag Domestic Appliances vs. Commissioner of Customs, Cochin 2017 (10) TMI 812-CESTAT Bangalore*
- *Premax Logistics vs. Commissioner of Customs, Chennai, 2017 (4) TMI 483-CESTAT Chennai.*

DISCUSSION AND FINDINGS

27. I have gone through both the Show Cause Notices dated 27.05.2021 and 08.07.2021 along with all Relied Upon Documents, replies submitted by the Noticees and heard all the



Noticees during the Personal Hearings. I find that the following issues need to be decided in the present case:

- i. Whether benefit claimed @ 15% BCD under Sr. No. 524 (1) (a) of Notification no. 50/2017-Cus dated 30.06.2017 as amended by Notification no. 25/2019 dated 06.07.2019 shall be applicable for the imported goods?
- ii. Whether higher rate of BCD at the rate 25% covered under Sr. No. 524 (1) (b) of Notification no. 50/2017-Cus dated 30.06.2017 as amended by Notification no. 25/2019 dated 06.07.2019 shall be applicable for the imported goods?
- iii. Whether erection and commissions charges of Rs. 30 Lakhs per unit shall be included in the declared assessable value for calculating the Customs duty?
- iv. whether the imported goods are liable for confiscation under Section 111(m) of the Customs Act, 1962?
- v. Whether the demand under Section 28(4) is sustainable?
- vi. Whether the penalty is imposable under Section 114A/112 (a) and Section 114AA of the Customs Act, 1962 on NCL?
- vii. Whether the penalty is imposable under Section 112(a) and Section 114AA of the Customs Act, 1962 on M/s. GMMCO?

I will be taking up all the issues one by one.

28. I find that the importer i.e. M/s. NCL had filed 84 Bills of Entry declaring their goods as **'CATERPILLAR 190T REAR DUMPER MODEL 789D SR. No..... (CKD) WITH ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE'** enclosing copies of invoice and packing list. They had claimed Sr. no. 524 (1) (a) of Notification no. 50/2017-Cus dated 30.06.2017 as amended by Notification no. 25/2019 dated 06.07.2019 declaring BCD as 15% classifying the product under the CTI 87041010.

29. Sr. no. 524 (1) of Notification no. 50/2017-Cus dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019 is reproduced below for the sake of brevity:

(1)	(2)	(3)	(4)	(5)(6)
"524.	8702 or	Motor vehicles (excluding electrically		
	8704	operated vehicles), if imported, -		
		(1) as a Completely Knocked Down		
		(CKD) kit containing all the necessary		
		components, parts or sub-assemblies, for		
		assembling a complete vehicle, with, -		
		(a) engine, gearbox and transmission	15%	--
		mechanism not in a pre-assembled		
		condition;		



(b) engine or gearbox or transmission mechanism in pre-assembled form but not mounted on a chassis or a body assembly.

25%

--

30. Classification of the product is not in dispute in the present case. However, dispute is between Sr. No. 524(1)(a) and Sr. no. 524(1) (b) of the Notification no. 50/2017-Cus dated 30.06.2017. Sr. no. 524(1) covers a completely knocked down kit containing all necessary components, parts or sub-assemblies for assembling a complete vehicle and 524(2) contain other than completely knocked down kits. Since in both 524(1) (a) and Sr. no. 524(1) (b), the goods are considered to be in Completely Knocked Down kits and therefore, there is no dispute that the goods have arrived in CKD condition. However, in 524(1) (a), engine, gear box and transmission mechanism are not in pre-assembled condition but in 524(1)(b) engine or gear box or transmission mechanism is in a pre-assembled form not mounted on a chassis or a body assembly. The argument of the importer is that the engine, gear box and transmission mechanism is not in a pre-assembled condition while the argument of the department is that the engine and transmission mechanism are in a pre-assembled form. There is no dispute that whatever assemblies have arrived were not mounted on a chassis or a body assembly. Thus, if any of the components i.e. the engine or transmission mechanism is in a pre-assembled form, the argument of the department will sustain.

31. Department has given the following arguments in their support:

- i. All the packing lists have declared engine as single sub-assembly with specific serial numbers.
- ii. All the packing lists have declared BANJO i.e. transmission mechanism as single sub-assembly with specific serial number.
- iii. Both the Chartered Engineers have certified that i.e., engine and transmission mechanism are in pre-assembled form. Even the C.E. appointed by the importer himself also re-confirmed that the engine and transmission mechanism are in pre-assembled form.
- iv. Engine parts mentioned in invoices are only attachments as certified by Chartered Engineer. It has been further argued that importer has further certified in their packing list that engine and transmission mechanism i.e. Banjo have attained their essential characteristic as both are provided with unique serial numbers. Department has further argued that since the essential characteristic has already been attained as declared by importer, thus, engine and transmission mechanism are in pre-assembled form.

32. There is no dispute that the entire importation was done under the contract no. CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 entered among M/s GMMCO Ltd, M/s Coal India Ltd. (M/s CIL), Kolkata & M/s Caterpillar Inc., USA whereby 84 dumpers were to be supplied to importer i.e. NCL by M/s. Caterpillar through their agents in India i.e.



GMMCO. As per the SCN, 50 Bills of Entry were already granted clearance clearing 50 dumpers. However, investigation was initiated thereafter and each dumper was seized under panchanama by issuance of seizure memo, by taking the photographs of actual goods imported. The coloured photograph of the engine is reproduced below:



Similarly, coloured photograph of Banjo is reproduced below:



33. It has been confirmed by the importer that all the consignments imported were in the same condition, therefore, the photographs reproduced above for engine and transmission mechanism i.e. Banjo is applicable to all consignments of the importer.



34. M/s NCL Submissions: The importer in support of their argument regarding claim of Sr. no. 524 (1) (a) of exemption Notification no. 50/2017-Customs dated 30.06.2017 (as amended by Notification no. 25/2019 dated 06.07.2019), stated the following in their written submissions dated 28.02.2022 and 12.04.2022:

i. The supplier representative i.e. M/s GMMCO stand by their argument that goods have been supplied not in pre-assembled condition.

ii. M/s CIL had floated global tender for supply of 102 numbers of 190 T dumpers and the manufacturer (M/s Caterpillar Inc., USA) and the supplier (M/s GMMCO) responded to supply the dumper with Engine, Gearbox and Transmission Mechanism not in pre-assembled condition.

iii. In the instant case of imports there was no question of mechanical gearbox in the 190T Rear Dumpers. The transmission mechanism plays the role of power transmission from engine to wheel through the driveshaft.

iv. M/s GMMCO vide their letter dated 12.11.2020 clarified the following:

"At a high level, the transmission works on the principle of hydraulic shift. The Hydraulic Pump provides power to transmission for its operation. The Banjo is the unit that houses the transmission, differential, final drives and brake groups. The hydraulic tank and pump are shipped separate not connected to Banjo. In order to make the transmission system complete and operational to propel the truck in conjunction with the rest of the drivetrain components, our trained technicians carry out critical assembly, testing, calibration and adjustment activities at the project sites. The engine in its as-shipped configuration cannot perform it's intended design function without critical subsequent assembly using a number of parts and sub-assemblies shipped separately. For example, the Radiator, Air Cleaner & Pre-Cleaner are separately supplied along with over 140 line Items. In order to make an engine fully operational to propel the truck, the complete radiator, air cleaner & pre-cleaner needs to be assembled with about 16 type of tubing supplied as separate parts in Box Named Engine Parts Box. Once fully assembled with the parts and sub-assemblies the engine system is complete ready for erection."

v. The fact that the goods have been imported in CKD condition is supported by certificate dated 02.11.2020 of Chartered Engineer, Shri M.Vairamohan certifying that "the above mentioned equipment with necessary components are in 'Completely Knocked Down' condition having engine, gearbox and transmission mechanism not in pre-assembled condition".

vi. The Engine and Transmission Mechanism undergo assembly process under critical supervision of trained Engineers and technicians to perform intended functions. From the Statement dated 21.01.2021 of Shri Vikash Kumar, Assistant General Manager of M/s GMMCO, it was clear that the goods were imported in CKD form, that too the Engine, Gearbox

and Transmission Mechanism were imported under sub-assembled form and definitely not either in Pre-assembled condition, or in semi-assembled condition, as wrongly claimed by the Department.

vii. Professor A. R. Mohanty, IIT Kharagpur submitted their 'Opinion on CAT 190T Dumper – Import Duty' dated 17.02.2022 and confirmed that dumpers alongwith Engine, Powertrain/gearbox were imported as unassembled CKD units.

viii. It was clear that the Chartered Engineer's first reports obtained by Shri M.Vairamohan is true, for it is factually correct and technically sound, without there being any infirmity whatsoever. The Report dated 17.02.2022 issued by the Apex Technical Body, like IIT, Kharagpur, holds the same view and corroborates the said first report of Shri M.Vairamohan, the same has withstood both the Technical as well as Judicial Scrutiny. Hence, it was clear that the said Original Report dated 02.11.2020 issued by Shri M.Vairamohan, Chartered Engineer depicted the True State of manufacture of the said 3 parts of the Dumpers, i.e. Engine, Gearbox and Transmission Mechanism are not Pre- assembled but only "unassembled" form and thus the said Report is unbiased and without any ambiguity or infirmities whatsoever. It was, therefore, clear that the statement dated 20.11.2020, subsequently given by Vairamohan before the officers of Customs was not true or factually correct. It showed that he being a Customs empanelled Chartered Engineer, had changed and resiled from his original stand, only because of the inducement, pressure or threat exerted on him by the Customs Officers.

ix. The voluntary confessional statement extracted by Customs officer from Shri Syamal Samanta, Chief Manager (C&F) of CIL recorded on 01.12.2020 and 03.12.2020 have been retracted on 16.09.2021.

x. In the cross examination of Shri Rajendra S. Tambi, Chartered Engineer, it was clearly proved that his statement were not voluntary and he was compelled to make the respective statements and/or report favouring the Customs version that the said 3 parts of the dumpers imported in pre-assembled condition.

35. M/s GMMCO submissions: The Noticee No. 2, i.e. M/s GMMCO in support of their arguments submitted the following:

i. The description under Sr. No. 524 merely states that motor vehicles imported in a completely knocked-down condition are eligible to a concessional rate of customs duty depending on the nature of the state of the engine, gearbox and transmission. The description does not qualify the meaning of the words "engine", "gearbox" or "transmission." In this regard, no reference can be drawn to the Customs Tariff which is applicable to classification of these items. In other words, engine and engine parts which are generally covered by Heading 84.07 of Heading 84.09 of the Customs Tariff and gearbox and transmission equipment which is generally covered by Heading 84.83 cannot be read as a limiting



Sr. No. 524 of the Notification No. 50/2017. It is further submitted that there cannot be any application for Rule 2(a) of the General Rules for Interpretation of the Customs Tariff ("GRI") for interpretation of the notification and especially to identify as to whether the imported foods are in a pre-assembled state or not.

ii. Sr. No. 524 of the Notification does not define or provide implicitly any guidance of what constitutes "*pre-assembled*." In the absence of any such statutory guidance, recourse has to be made to dictionary meanings or judicial precedents. As per Merriam Webster dictionary, pre-assembled means "*having been assembled in advance*". As the meanings suggest, the determining factor must be whether the engine in itself is complete and assembled or not.

iii. In this regard, further reference is made to illustrated Oxford Dictionary which defines "*engine*" as "*a mechanical contrivance consisting of various several parts working together, esp. as a source of power*". Similarly, the Concise Oxford English Dictionary defines "*engine*" as "*a machine with moving parts that converts power into motion*".

iv. Reliance was placed upon Hon'ble CESTAT, Chennai judgement dated 17.09.2018 in case of *BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V as reported in 2019 (366) E.L.T. A28(Tri-Chennai)*, and inferred that for an engine, gearbox or transmission to be treated as not pre-assembled, it is crucial that all essential/integral parts which render these items complete in all respects save for any connecting or mounting parts, should be absent. The imported goods are not capable of functioning by themselves and hence, are not functional in nature. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in *J.B.A. Printing Inks Ltd. Vs Collector of Central Excise [2000 (115) ELT 24 (SC)]* wherein it was held that an engine is non-functional without a radiator and hence, being a part, is essential to the engine. Further, cooling (radiator), air intake line, exhaust line and engine harness are not pre-assemble to the engine assembly.

v. Engine number is engraved on the engine block at the time of casting itself. Further, each and every engine shipped by Caterpillar was assembled and tested in the factory and dis-assembled for shipment. Thus, engine block bears a unique engine number which by no stretch of imagination could be construed as engine in pre-assembled condition.

vi. It is submitted that the transmission mechanism is a mechanism to transmit power generated by the engine to the wheels in a controlled manner.


vi. The drive shaft, which is an essential, integral part of the transmission mechanism failing which the mechanism is inoperable has been imported in a separate box and is not integrated/ connected/ mated to the BANJO, which has been said to be the transmission mechanism in the Notice.

vii. Professor A. R. Mohanty, Professor of Mechanical Engineering at the Indian Institute of Technology, Kharagpur has in his report dated 17.02.2022 concluded tersely as follows:



"From the above examination of the facts and information provided by CIL, the Indian Institute of Technology Kharagpur is of the opinion the the dumpers alongwith the Engine, Powertrain/gearbox were imported as unassembled CKD kits."

36.1 I find that the present case was initiated by the department on the basis of Chartered Engineer Certificate dated 09.11.2020 where the said Chartered Engineer (C.E.) i.e. Shri Rajendra S. Tambi certified that Engine is in complete pre-assembled form although not mounted on a Chassis. I have gone through the said C.E. Certificate dated 09.11.2020. In the said C.E. Certificate, details of all goods as described in Packing List has been mentioned. The sample copy of the Packing List is scanned as below:

CATERPILLAR [®]		PACKING LIST				ORIGINAL	
SELLER / EXPORTER		SHIPPING ORDER NO : B5VXJ					
CATERPILLAR INC							
100 NORTHEAST ADAMS ST							
PEORIA, ILLINOIS 61629-3350, USA		L/C NUMBER : 0999819M0000490					
APPLICANT / IMPORTER		L/C ISSUANCE DATE : December 13, 2019					
NORTHERN COALFIELDS LTD.		L/C ISSUING BANK : SBI, KOLKATA					
NCL HQ, PANJREH BHAWAN,		VESSEL NAME : ALLIANCE ST. LOUIS					
PO. SINGRAULI, DIST. SINGRAULI,		VOY: W128					
MADHYA PRADESH, INDIA,		PORT OF LOADING : JACKSONVILLE					
PIN - 486889		PORT OF EXIT : MUMBAI, INDIA					
Pkg Desc	Prod Desc	Gross Wt. (Kg)	Net Wt. (Kg)	High (inch)	Wide (inch)	Long (inch)	CBM
UNIT	789D CHASSIS	28660.00	28660.00	134	150	398	130.84
SKID	ENGINE	10487.00	9897.00	103	90	176	26.60
BOX	ENGINE PARTS	653.00	608.00	37	51	109	3.35
SKID	PARTS	2066.00	1977.00	89	49	90	6.30
SKID	RH PLATFORM	2751.00	2660.00	110	100	169	30.40
SKID	FUEL TANK	1096.00	993.00	86	65	97	8.85
SKID	HANDRAILS	2396.00	2306.00	65	88	157	14.64
SKID	FSTRUT	4953.00	4754.00	56	57	118	6.11
SKID	FSTRUT	4953.00	4754.00	56	57	118	6.11
SKID	BANJO	20194.00	20149.00	51	116	251	24.16
SKID	CAB	2176.00	2086.00	76	89	109	9.32
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BUNDLE	2 RIMS-TOPY	3211.00	3166.00	70	72	72	5.86
BOX	DRIVE SHAFT	181.00	136.00	19	15	66	0.30
SHIPPING MARKS		90203.00	88478.00	284.650			
AS PER BL							
ALL PACKING DETAILS INCLUDING DESPATCH AS REQUESTED IN TERMS OF CONTRACT NO: CIL/C20/190T DUMPER/R-66/17-18/153 Dated 02.12.2019							
ADDITIONAL INFORMATION							
IEC CODE: AABCN4884H							
HS CODE: 87041010							
IMPORT UNDER NON-NEGATIVE LIST OF FOREIGN TRADE POLICY 2015-2020							
CATERPILLAR INC				SIGNATURE : 			
DATE ISSUED : 28-Sep-20							



36.2 The description given as per the C.E. Certificate for goods available as per Packing List is as per Table below:

Sr. No. of Packing List	Description of goods mentioned in Packing List	Description of goods mentioned in C.E. Certificate
1	789 D CHASSIS	Chassis having all cylinders, valves, hoses, pipes, hydraulic and electrical mechanism.
2	ENGINE	Engine.
3	ENGINE PARTS	Pipes, hoses, hardware, seals etc. which are basically attachments to the Engine.
4	Parts	Parts i.e. hardware, plates, tubes, flange, clamps, seals etc. which are basically attachments of other assemblies which are required to connect the engine to other sub-assemblies/parts of dumper such as Transmission Mechanism etc. Some of the parts like Mirror, instruments have no relation whatsoever with the Engine/Transmission Mechanism.
5	RH PLATFORM	Base of Platform placed above wheels on which driver cabin is mounted.
6	FUEL TANK	Fuel Tank used for storage and supply of fuel.
7	HANDRAILS	Handrails which are basically safety rails on both side of ladders which is used to step up in the cabin from the ground.
8	FSTRUT	Fstrut is basically a constituent of Transmission System.
9	FSTRUT	Fstrut is basically a constituent of Transmission System.
10	BANJO	Transmission Mechanism mentioned in Packing List as 'Banjo'
11	CAB	Driver Cabin having all electrical Circuitry, instrument panel, steering, seating, canopy etc.
12	2 RIMS-TOPY	Rims for Tyre.
13	2 RIMS-TOPY	Rims for Tyre.
14	2 RIMS-TOPY	Rims for Tyre.
15	DRIVE SHAFT	Drive Shaft.

36.3 The content of the Packing list as described by the C.E. has not been disputed by any of the noticees or their representatives. It is also to be mentioned here that the Packing List of all the dumpers are also the same and the above facts are also not disputed by the Noticees. 50 dumpers were already cleared prior to investigation and it is also confirmed by the importer that packing list of all the dumpers either seized or cleared are the same in all aspects.

37.1 It is to be noted here that the packing list of each dumper constitute the entire dumper. On careful examination of the packing list, the following facts can be arrived:

- The Sr. no. 1 of the packing list consists of Chassis.
- The item mentioned at Sr. no. 12, 13 and 14 are Rims for tyres.
- The Sr. no. 11 of packing list is Cabin or Driver Cabin.
- The Sr. no. 7 of packing list consists of handrails which are basically safety rails on both sides of ladder.
- The Sr. No. 5 of the packing list is RH Platform which is placed above wheels on which driver cabin is mounted.
- The Sr. No. 6 of the packing list is Fuel Tank.

I find that above parts are not the matter of dispute in the present case.



37.2 I find that the following assembly/sub-assemblies etc. as described in the packing list are matter of dispute in present case:

- i. 'Engine' as declared in Sr. No. 2 of packing list.
- ii. 'Engine Parts' as declared in Sr. No. 3 of packing list.
- iii. 'Parts' as declared in Sr. No. 4 of packing list.
- iv. 'Banjo' as declared in Sr. No. 10 of packing list.
- v. 'F Strut' as declared in Sr. No. 9 and 10 of packing list.
- vi. 'Drive Shaft' as declared in Sr. No. 15 of the packing list.

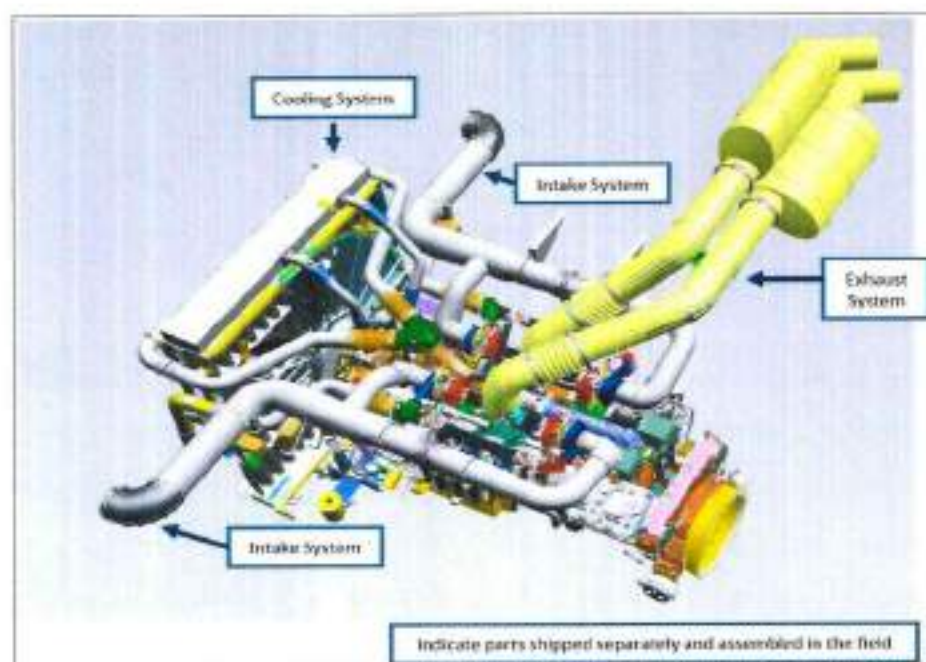
38. On perusal of C.E. Certificate of Shri Rajendra S. Tambi, it can be inferred that Engine, Engine Parts and 'Parts' as declared in Packing List are related to Engines. Further, Banjo, Fstrut and Drive Shaft are related to Transmission Mechanism.

39. I find that in all packing List, Engine has been declared as specific product. There is no dispute that such engine as declared in packing list was never mounted on a chassis. I find that there is a specific engine no. in all cases which has also not been disputed by all the noticees. As per C. E. Certificate, the Engine parts consists of Pipes, hoses, hardware, seals etc. which are basically attachments to the engine to connect the engine to other sub-assemblies/parts of dumpers. Similarly, 'Parts' consists of hardware, plates, tubes, flanges, clamps, seals etc. which are attachments of other assemblies required to connect the engine to other sub-assemblies. Therefore, on perusal of the packing list, it is seen that the parts/engine parts consist of attachments for attaching Engine to other assemblies/sub-assemblies. **When engine has been declared in packing list with exclusive engine number, normally it should be inferred that engine is in pre-assembled condition.** Moreover, the parts which has been declared separately are mere attachments for attaching engines to other sub-assemblies. Wherever dumper is imported in CKD condition, there will be always different parts/sub-assemblies/components to be assembled together and while erecting the dumper these have to be attached through different attachments. Therefore, declaration of engine in packing list with exclusive engine numbers proves that engine has been imported in pre-assembled condition. Further, I find that M/s GMMCO in their submissions dated 12.04.2022 in Paragraph 8.16.14 have submitted that each and every Engine shipped by Caterpillar was assembled and tested in factory and dis-assembled for shipment. It clearly evidences that Engine was already assembled and dis-assembly was only with respect to attachment as evidenced in packing list.

40. I find that Noticee no. 1 has relied upon their supplier letter dated 12.11.2020 which states that Engine in its as-shipped configuration cannot perform its intended function without critical sub-assemblies shipped separately such as Radiator, Air Cleaner & Pre-Cleaner which are separately supplied along with over 140 line items. They have further stated that in order to make an engine fully operational to propel a truck, the Radiator, Air Cleaner & Pre-Cleaner needs to be assembled with about 16 types of tubing supplied as separate parts in Box named Engine parts box. Once fully assembled with the parts and sub-assemblies the engine system is



complete ready for erection. Their supplier M/s GMMCO has argued that cooling (radiator), air intake line, exhaust line and engine harness are not pre-assembled to the engine assembly. They also argued that cooling device i.e. radiator, which is part of technical specification of the engine was shipped separately and assembled at site. In their support they have also given the pictorial representation of the engine system indicating its assembly at site, which has been reproduced below:



They have also argued that engine number is engraved on the engine block at the time of casting itself.

41. I find that as per Sr. No. 524 of exemption Notification no. 50/2017-Customs dated 30.06.2017, Motor vehicles imported as Completely Knocked Down (CKD) kit has been categorised in 2 parts –

- i. Engine, Gear box and Transmission Mechanism not in a pre-assembled condition
- ii. Engine or Gear box or Transmission Mechanism in a pre-assembled condition but not mounted on a Chassis or body assembly.

I find that Noticees have argued that unless above mentioned three units i.e. Engine, Gearbox and Transmission Mechanism become fully functional, they are not in a pre-assembled form. I find that the definition of pre-assembling has not been given in the said Notification. **The Noticee no. 2 i.e. M/s GMMCO in paragraph 8.16.13 of their submissions dated 12.04.2022 has argued that more than 9000 parts are required to assemble the engine.** In this regard, I place the engine which has been imported in pictorial form as placed below:





On perusal of the above picture of engine, it can very well be concluded that the above declared engine consisted of thousands of parts which has taken the shape of engine. Each part of the engine has got a different name and description. When different parts are assembled to achieve a different product, the name of the part loses its significance and the new product gets a new name. In the present case, when thousands of parts are assembled together, a final name was given to the resultant product and that name given by the manufacturer is called 'Engine'. Thus, it has to be inferred that engine is pre-assembled. When engine is not pre-assembled, in such situations, resultant product of assembly of parts cannot be called engine. In the present case, they have not brought various parts of engine to be assembled on assembly line but they have brought thousands of parts assembled together and themselves called it as Engine. In such situation, it has to be inferred that Engine has been 'pre-assembled'.

42. Both the noticees have argued that the engine which has been brought is not in operation phase and certain more parts are needed to be added such as Radiator, Air Cleaner & Pre-Cleaner to make it functional. Moreover, the professor of IIT Kharagpur has given his opinion on the basis of functionality of the engine. I find that as per notification there is no condition that engine has to be in operational phase. Therefore, argument of both the noticees that engine has to be in operational phase, to be considered pre-assembled is not sustainable.

43. I find that clarification of any product is governed by General Rules of Interpretation (GRI) of First Schedule of Customs Tariff Act, 1975. Rule 2(a) of GRI is reproduced below –

"Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has



the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."

Although such explanation has already been given for the purpose of classification, however, it is specific that 'any reference to heading in an article should be taken with reference to an article in an incomplete or unfinished form having essential characteristic of complete or finished article. The above explanatory notes give an indication that if the essential characteristic of an article is achieved, it shall get a name of finished article only. The above principal shall apply in the present case where the essential characteristic of engine is achieved and the supplier themselves have named the article as engine.

44.1 I find that Notice no. 2 i.e. M/s GMMCO in para 8.16.2 of their written reply dated 12.04.2022 has enclosed in Annexure -15 which consists of Shipping Configuration and Engine Installation & Commissioning details for 789D Cat dumpers purchased by M/s NCL. As per the Engine installation & Commissioning, they have declared the parts which need to be connected. Their submission is scanned below:

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Engine Installation & Commissioning: Part details

- Listed 5 packages include parts for Engine Installation & Commissioning

ENGINE SYSTEM	Skid / Box Details	Package Sl No
Radiator	Chassis Unit	1
Engine Assembly	Engine Skid	2
Cooling Line connection – Loose Parts	Engine Part Box	3
Air Intake Line Connection – Loose Parts	Engine Part Box	3
Torque converter Hydraulic Lines & Harness Connection – Loose Parts	Engine Part Box	3
Engine Harness Connection – Loose Parts	Engine Part Box	3
Hardware for connection – Loose Parts	Hardware Box – Part Skid	4
Exhaust Line Connection – Loose Parts	Intake Box – Part Skid	4
Air Filter Assembly	RH Platform Skid	5


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44.2 I find that above documents state as to how the **Engine System** is to be installed and commissioned. Engine system consists of (i) Radiator (ii) Engine Assembly (iii) Cooling line connection (iv) Air Intake line connection (v) Torque converter Hydraulic Lines and Harness connection (vi) Engine Harness Connection (vii) Hardware for connection (viii) Exhaust Line connection (ix) Air Filter Assembly.

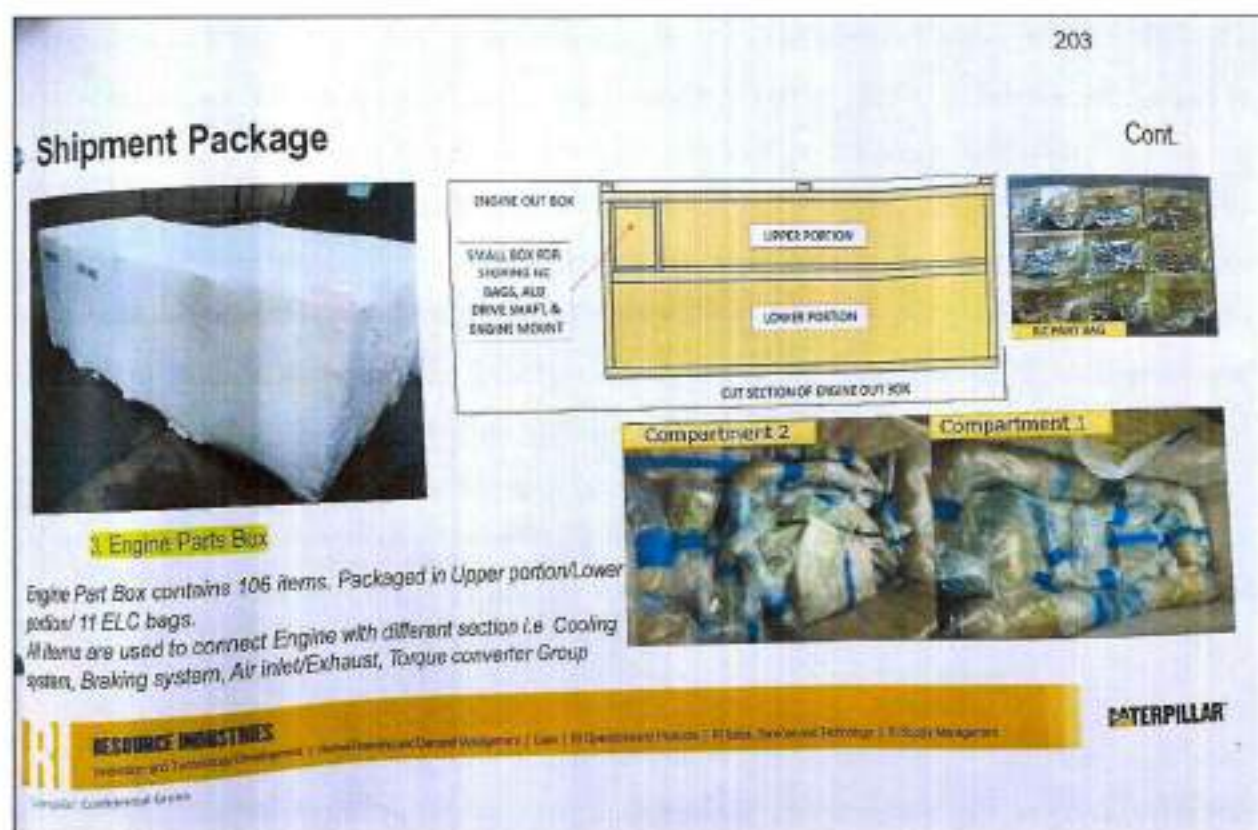


44.3 It is to be noted that the entire 9 assemblies consist of Engine system and engine is one of the assembly. Thus, both the noticees are actually arguing that engine system is not in a pre-assembled condition. But the fact remains that out of the 9 assemblies in an engine system, 'Engine' is itself one of the assembly. The exemption notification talks about the engine and not the engine system. The condition of the Sr. no. 524 (1) (b) of exemption notification no. 50/2017-Customs dated 30.06.2017 is that Engine should be in pre-assembled condition, and does not say that the Engine system should be in pre-assembled condition. Thus, as per Engine installation and commissioning details submitted by the Noticee no. 2, it is clear that Engine was in pre-assembled condition but different other assemblies like radiator, air filter assembly and other assemblies like cooling line, air intake line etc. were needed to be connected to make entire engine system.

44.4 I find that M/s GMMCO in their letter dated 12.11.2020 have also stated that when radiator, air cleaner and pre-cleaner are assembled with other parts, engine system is completely ready for erection. As claimed by the Noticee no. 2, sub-assemblies like radiator, air cleaner and pre-cleaner are parts of the entire Engine System and the engine is one of the sub-assemblies of the Engine System. These sub-assemblies cannot be a part of the engine but part of Engine System. Therefore, argument of Noticee no. 2 that radiator is essential part of engine is not sustainable and hence, case law of *J.B.A. Printing Inks Ltd. vs Collector of Central Excise [2000 (115) ELT 24(SC)]* is not applicable in the present case. In the said case of *J.B.A. Printing Inks Ltd. vs Collector of Central Excise*, issue was of classification of Radiator Assembly wherein it was held that internal combustion engine cannot function without a cooling device i.e. radiator. I find that the issue in the said case was with regard to Internal Combustion Engine. In the present case, the product is a dumper which functions with the help of Engine System; radiator is one of the part of the entire Engine System and Engine being one of the part. I find that nature of two different Engines cannot be compared. Therefore, the said case law of *J.B.A. Printing Inks Ltd. vs Collector of Central Excise* is not applicable in the present case.

44.5 I am reproducing the document submitted by Noticee no. 2 for engine parts box:



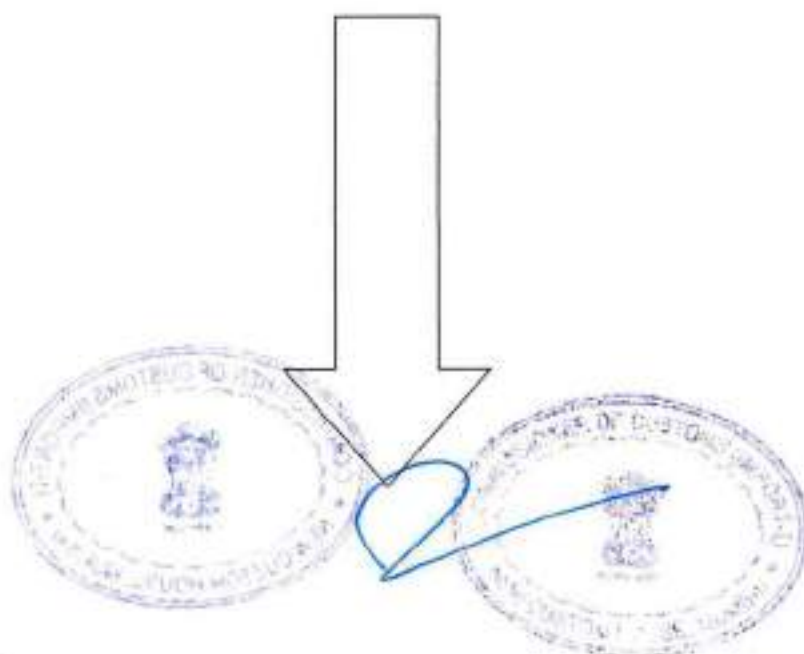


I find that in the above said document, the following is mentioned:

“Engine Part Box contains 106 items. Packaged in Upper Portion/Lower portion/11 ELC bags. All items are used to connect Engine with different Section i.e. Cooling System, Braking Section, Air Inlet/Exhaust, Torque Converter Group”

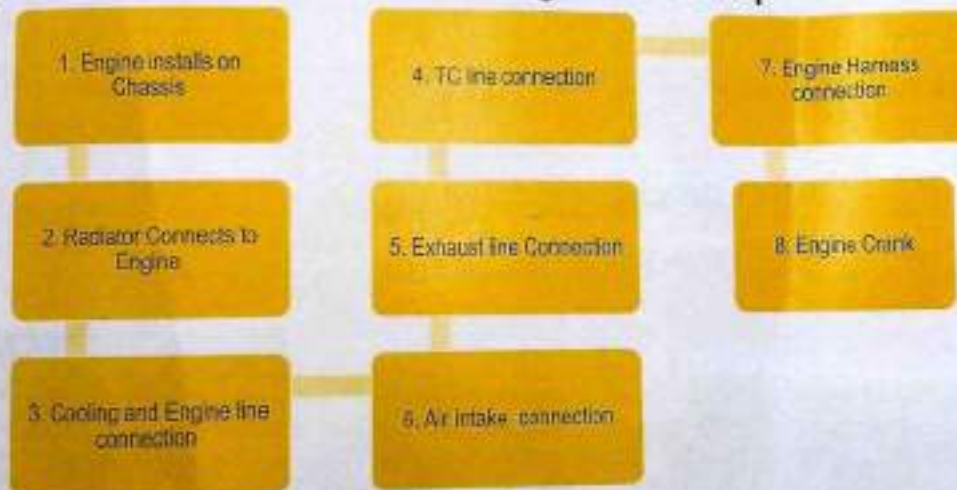
Thus, they themselves have certified in their document that all items are used to connect **ENGINE** with different section i.e. Cooling System, Braking Section, Air Inlet/Exhaust, Torque Converter Group. Thus, it is very clear that engine was having a separate identity and the cooling system, braking system etc. were having different identities and these all were to be connected to the engine. The above said document itself proves that Cooling System, Braking Section, Air Inlet/Exhaust etc. are not parts of the engine but they are connected to the engine to create engine system.

44.6 Now, I am reproducing the engine installation & Commissioning process Map as submitted by Noticee no. 2 as below:



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Engine Installation & Commissioning Process Map



Individual Process details are in next slides

On perusal of the same, it is clear that first engine is to be installed on a Chassis and thereafter radiator is to be connected to engine and other different lines is to be connected to engine as per sequence show above. Further, I am reproducing below the photograph of the Engine installation on Chassis which gives the complete evidence that the product which has been declared as engine has been installed on Chassis –

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1. Engine Installation on Chassis



Chassis Before Engine installation

Chassis after Engine installation

44.7 Although Noticee no. 2 has claimed radiator as a part of Engine, as per the document submitted by them, the radiator is installed on Chassis after engine installation. The scanned copy of the document is reproduced below:



45. On the basis of the evidence submitted by Noticee no. 2, it is clear that engine was imported in pre-assembled form, which is evident by documents submitted by noticee no. 2 as above. The other assemblies which noticee claims to be parts of engine are not parts of engine but other assemblies which are connected to the engines creating the engine system. The condition of the Sr. No. 524 of the exemption notification no. 50/2017-Customs dated 30.06.2017 is that engine should be pre-assembled from and not the engine assembly. Multiple documents submitted by them clearly evidenced that engine was in pre-assembled form.

46. I find that in the case of BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V as reported in 2019 (366) E.L.T.A28(Tri-Chennai), Hon'ble CESTAT held that "*since the imported goods i.e. engine assembly, transmission sub-assembly/gearbox of motor cars have been listed with their corresponding part numbers in the packing list and the manufacturer supplied these goods in the form of single product having Unique Identification Number engraved on it, the same are to be considered in pre-assembled form.*" I find that this judgement is squarely applicable in the present case as Engine and Transmission Mechanism have been imported as a single product with unique identification number engraved on it.

47.1 Noticee no. 1 has stated that Shri Syamal Samanta has retracted his statement and the statements of the Chartered Engineers cannot be relied as they are not automobile engineers. I



find that entire case was built up on the basis of documentary evidence and not only on the basis of statements. The C. E. Rajendra S. Tambi during the examination of the goods has presented the facts of the case and documentary evidences prove that the engine was in pre-assembled form. Noticee no. 2 themselves have given sufficient documents as discussed above to establish that the engine was in pre-assembled form. Shri Syamal Samanta has retracted his statements dated 01.12.2020 and 03.12.2020 recorded under Section 108 of the Customs Act, 1962 on 14.09.2021, after a gap of more than nine months of giving his statement during investigation. It is pertinent to mention that the retraction of the statement was made after more than three months from the conclusion of investigation and subsequent to issuance of second SCN dated 08.07.2021. In this regard, I rely on the below mentioned judgements wherein it is held that retraction of statement recorded under Section 108 of the Customs Act, 1962, after a considerable gap of nine months from deposing before the investigating agency and even after a gap of 3 months from the issuance of SCN, cannot take away the evidentiary value of the said statements.:

- The Hon'ble High Court of Delhi in the matter of H.R. Siddique Vs Director, Enforcement Directorate as reported in 2015 (318) E.L.T. 182 (Del.) has held that *"Retraction of confessional statement containing admission of wrong doings by appellant came after more than ten years at the stage of personal hearing only and not before that - Had the appellant subjected to threat, coercion or pressure, as alleged by him rather belatedly, he would have retracted his confessional statement soon after making the same once the alleged threat, coercion or pressure ceased to influence the action of appellant - Appellant failed to disclose as to how he was pressurized, coerced, or tortured, and by whom, when he made the earlier confessional statement - Statement was also duly corroborated by independent evidence."*
- Hon'ble Tribunal, Mumbai in the matter of P.B. Nair C&F Pvt. Ltd. Vs Commissioner of Customs (General), Mumbai as reported in 2015 (318) E.L.T. 437 (Tri. - Mumbai) has held that *"Proceedings under Section 108 ibid is a judicial proceeding and if any retraction of confession to be made, to be made before same authority who originally recorded the statement - Confessional statements never retracted before the authority before whom the statement was recorded, belated retractions of statements after about one and half years cannot take away the evidentiary value of original statement."*

Further, I find that the Chartered Engineer certificate and the IIT Kharagpur certificate dated 17.02.2022 were more of an opinion and the fact that Engine was pre-assembled is to be established on the basis of technical literature and interpretation of Customs Rules. As discussed above, technical literature and interpretation with regard to Custom laws clearly establishes that the Engine was in pre-assembled condition.

47.2 Noticee no. 1 had sought the cross-examination of the Investigating Officer of the subject case which was disallowed as he was the investigating officer whose statement was



never recorded during case. Noticee no. 1 have further submitted that denial of Cross-Examination of the very Investigating Officer is clearly in violation of the Principles of Natural Justice, thus vitiating the entire adjudication proceedings in this case. In this regard, I rely on the below mentioned judgments which have held that cross-examine of investigating officers was without basis as statements of such officers was never recorded or relied upon:

- Hon'ble CESTAT, Mumbai in the matter of Everest Diamond Tools Versus Commissioner of C. Ex., Visakhapatnam - 2007 (211) E.L.T. 327 (Tri. - Mumbai) has held that *"Appellants contention that they were not allowed to cross-examine investigating officers without basis as statements of such officers never recorded"*. It is to be noted that the said case was further affirmed by the Hon'ble Supreme Court as reported in 2015 (321) E.L.T. A207 (S.C.).
- Hon'ble High Court of Kerala at Ernakulam in the matter of N.S. Mahesh Vs. Commissioner of Customs, Cochin as reported in 2016 (331) E.L.T. 402 (Ker.) has held that *"the investigating unit has developed the case on the basis of documents recovered during investigation and other evidences and not relied on statements of any officers who examined/audited/assessed the consignment. Moreover, said officers have discharged these functions as part of their official duty, based on documents provided by the importer. Further noticee No. 2 has not given any reasons for examining the said officer, nor the evidences sought to be brought out from them. It is also learnt that the dockets of the bills of entry relied upon by investigation have already been supplied along with the show cause notice. However, if required, noticee No. 2 can obtain additional set of copies of documents from SIIB, under prior intimation to undersigned. Accordingly, the request for cross-examining all officers who assessed/audited/examined the impugned consignments cannot be acceded to."*
- In the matter of JSW Steels Ltd. Vs Commissioner of C. Ex., Belgaum as reported in 2010 (254) E.L.T. 318 (Tri. - Bang.), the Hon'ble Tribunal has held that *"the Commissioner adjudicated the classification dispute on the basis of relevant facts ascertained from the assessee. Further, it was held that denial of cross-examination of departmental officer has not violated natural justice as such officers do not contribute to judicial determination of classification Natural justice."*

In addition to the above, denial of request for cross-examination has been held as not violating the principles of natural justice during quasi-judicial proceedings in following case laws:

- In the case of Kanungo & Co. Vs. Collector of Customs, Calcutta & Others [1993(13) E.L.T. 1486 (S.C.)], wherein it was unequivocally held that for proceedings under Customs Act, the right to compliance to the principles of natural justice does not cover the right to cross examination witnesses.
- In the case of Commissioner of Customs, Hyderabad V. Tallaja Impex reported in 2012(279) ELT 433 (Tri.), it was held that *"In a quasi-judicial proceeding, strict rules of*



evidence need not to be followed. Cross examination cannot be claimed as a matter of right."

- In the case of Patel Engg. Ltd. vs UOI reported in 2014 (307) ELT 862 (Bom.) Hon'ble Bombay High Court has held that *"right of cross-examination cannot be asserted in all inquiries and which rule or principle of natural justice must be followed depends upon several factors - Further, even if cross-examination is denied, by such denial alone, it cannot be concluded that principles of natural justice had been violated."*
- Hon'ble Tribunal in its decision in Sridhar Paints v/s Commissioner of Central Excise, Hyderabad reported as 2006(198) ELT 514 (Tri-Bang) has held that *"..... denial of cross-examination of witnesses/officers is not a violation of the principles of natural justice, we find that the Adjudicating Authority has reached his conclusions not only on the basis of the statements of the concerned persons but also the various incriminating records seized. We hold that the statements have been corroborated by the records seized"*

Thus, I find that denial of cross examination of the investigating officer does not lead to violation of principles of natural justice in the present case, as discussed above.

48. Noticee no. 1 has relied upon the opinion dated 17.02.2022 of Shri A. R. Mohanty, Professor of Mechanical Engineering, Indian Institute of Technology, Kharagpur wherein he has concluded that Engine, Powertrain/Gearbox were imported as unassembled CKD units. I find that no reasoning has been provided in his report as to how the engine was in unassembled form. The Engine system as described in para 43 above, has not been taken into account by the said professor of IIT, Kharagpur. The documents supplied by the manufacturer itself states that Engine and Engine assembly are the 2 different products and engine is one of the assemblies of the engine system. The said professor in his observation in Sr. no. 1 has stated that air induction system, exhaust system, cooling system etc. are components/sub-systems which need to be present as a single integral unit to make it functional. There is no dispute that entire Engine System has to be integrated for the working of the system but the fact remains that engine itself is one of the assembly to create an entire Engine System. Thus, inferring that the engine is not pre-assembled is not correct and I find that the certificate submitted by the IIT professor has been prepared without taking into account all the documentary evidences submitted by the Noticee. The document submitted by the supplier itself proves that engine as imported was in a pre-assembled condition.

49.1 I find that the Show Cause Notices have alleged that the Banjo declared in the Packing List is Transmission Mechanism as single sub-assembly with specific serial nos. SCN has also relied upon statement dated 20.11.2020 of CE Shri M. Vairamohan which stated that Transmission Mechanism is in pre-assembled form. As stated earlier Sr. no. 10 of the Packing list has been declared as Banjo. The CE Shri Rajendra S. Tumbi in his CE Report dated 09.11.2020 has also stated that Fstrut at Sr. no. 8 and 9 of Packing List is a constituent of



Transmission mechanism. Noticee no. 1 in their reply has submitted that Transmission Mechanism plays the role for power transmission from engine to wheels through Drive Shaft. They submitted that as per letter dated 12.11.2020 of supplier, their supplier has clarified that 'at a high level the transmission works on the principle of hydraulic shift. The Hydraulic Pump provides power to transmission for its operation. The Banjo is the unit that houses the transmission, differential, final drives and brake groups. The hydraulic tank and pump are shipped separate not connected to Banjo'. In this case, they also relied upon the opinion of IIT, Kharagpur certifying that Transmission mechanism are imported in unassembled form.

49.2 Noticee no. 2 in their written submissions has argued as under:

i. The transmission mechanism is a mechanism to transmit power generated by the engine to the wheels in a controlled manner. Such is the definition in the Oxford Dictionary as also Merriam-Webster. **"transmission"** as defined in the Dictionary of Automotive Engineering (2nd ed.) by Don Goodsell is as follows:

"transmission (1) Mechanical unit containing a manual or automatic change-speed gear system and associated actuating machinery. (2) Collective term for the components such as clutch, gearbox, driveshaft, whereby power is transmitted from the engine to driven wheels"

The definition extracted above clearly shows that driveshaft is an integral component of a transmission mechanism and is integral to the same.

ii. Juxtaposing this against the facts, it is an undisputed fact that the drive shaft, which is an essential, integral part of the transmission mechanism failing which the mechanism is inoperable has been imported in a separate box and is not integrated/ connected/ mated to the BANJO, which has been said to be the transmission mechanism in the Notice.

iii. Shri Rajendra Tambi as well as Shri M. Vairmohan, the Chartered Engineers, during cross-examination admitted that BANJO is not a transmission mechanism and that transmission mechanism is not imported in a pre-assembled condition.

49.3 I find that the said Noticee no. 2 has provided the literature for Powertrain Installation and Commissioning. As per the said document, the parts for powertrain Installation & Commissioning includes as follows:

- i. Banjo Assembly (includes Differential/Transmission/Rear Axle).
- ii. Transmission Hydraulic Line Connection.
- iii. Rear Axle Lubrication Line Connection.
- iv. Transmission Harness Connection.
- v. Brake Oil Cooler Line Gp.



vi. Hardware for Connection - Loose Parts.

Scanned Copy of the same is as below:

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Power train & Commissioning: Part details

- Listed 2 packages include parts for Powertrain Installation & Commissioning

POWER TRAIN SYSTEM	Skid/Box Details	Package
Banjo Assembly (includes Differential/Transmission/Rear axle)	Banjo Skid	10
Transmission Hydraulic Line connection	Banjo Skid	10
Rear Axle Lubrication Line connection	Banjo Skid	10
Transmission Harness Connection	Banjo Skid	10
Brake Oil Cooler Line Gp	Rear Axle box - Part Skid	4
Hardware for connection - Loose Parts	Hardware Box - Part Skid	4


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49.4 On perusal of the same, it is clear that Banjo Assembly includes differential/Transmission/Rear Axle which was packed in one of the package no. 10 called as 'Banjo' in the Packing List of the Bills of Entry. Further, the transmission hydraulic line connection, Rear Axle Lubrication Line Connection, Transmission Harness Connection was also attached to the Transmission Assembly. As per their literature as shipment package, it has been clarified that transmission comes mounted on Banjo Assembly. The scanned copy is as below:

232

Shipment Package

cont...




Transmission Assembly

10. Banjo skid
(Transmission comes mounted on Banjo Assembly)

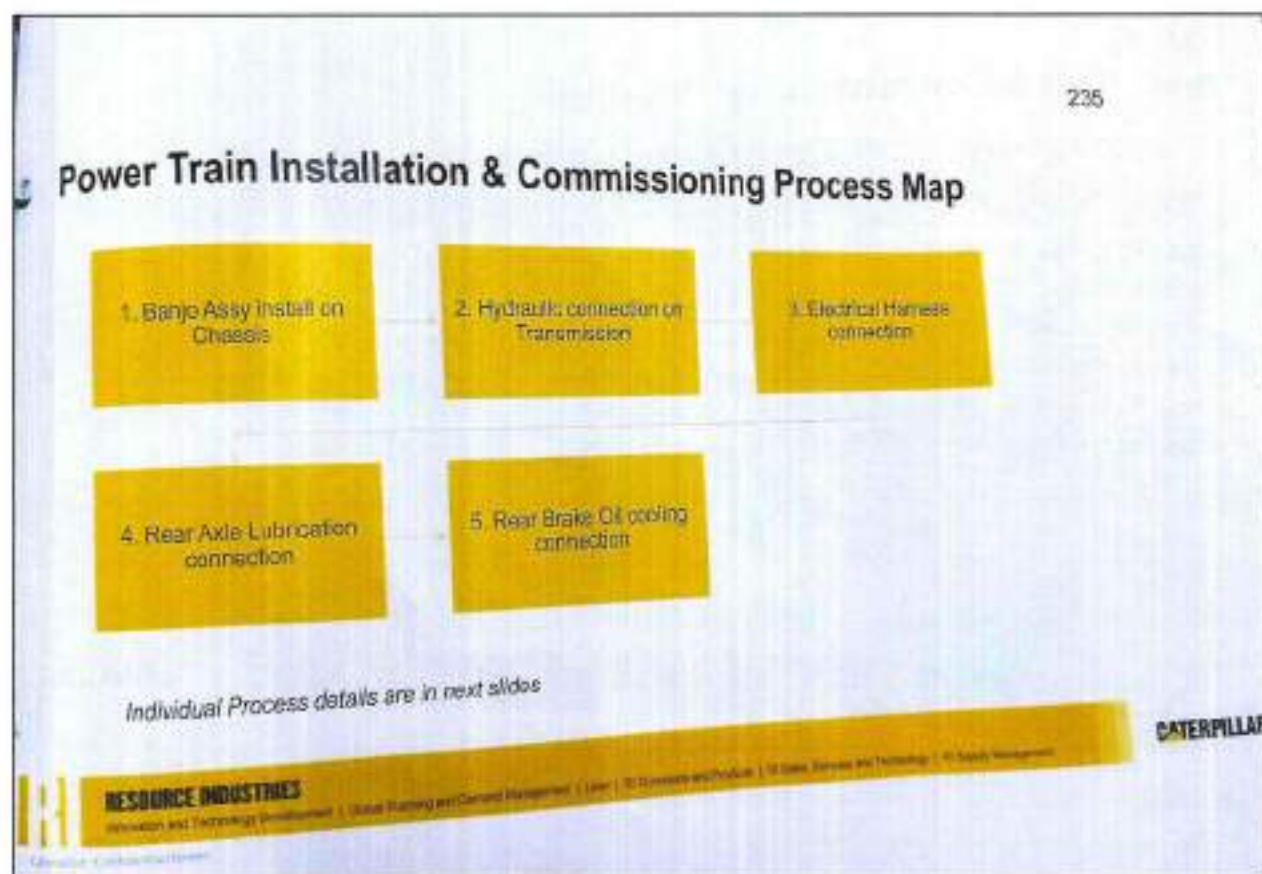

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As per the above photograph, the entire assembled part was known as transmission assembly.

49.5 The flow chart for Power train installation and commissioning as supplied by supplier is as below:



On perusal of the flow chart, it is clear that Banjo Assembly has to be installed on Chassis. They have also certified as per scanned copy of the picture depicted in para 48.4 above, that transmission assembly is nothing but a Banjo Assembly. Therefore, on the basis of document supplied by the supplier, it is clear that Transmission assembly/mechanism were imported in a pre-assembled form. Further, when the Transmission Assembly has attained the essential characteristic of Transmission Mechanism, it has to be inferred that Transmission Mechanism were imported in pre-assembled form. I find that the transmission assembly i.e. Banjo was given specific Sr. No. in the packing list. I again re-iterate the judgment of Hon'ble CESTAT in the case of BMW India Pvt. Ltd. vs Commissioner of Customs, Chennai-V [(366) E.L.T.A28(Tri-Chennai)], wherein it was held that *"since the imported goods i.e. engine assembly, transmission sub-assembly/gearbox of motor cars have been listed with their corresponding part numbers in the packing list and the manufacturer supplied these goods in the form of single product having Unique Identification Number engraved on it, the same are to be considered in pre-assembled form."* Therefore, once essential characteristic of Transmission Mechanism is achieved and ready for attachment through connections, same will be considered as Transmission Mechanism.




49.6 Noticee no. 2 has argued that drive shaft is the part of Transmission Mechanism and it is undisputed that drive shaft has been packed separately. In this regard, the scanned copy of the literature for drive shaft installation as provided by Noticee no. 2 with their written submissions is below:




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Drive shaft Box

- Drive shaft connects Torque converter and Transmission. Drive shaft transmits mechanical power from Engine to Transmission. Required Part comes in Drive Shaft Box






15. Drive shaft Box:
64.5"(L) X 15"(W) X 19"(H)

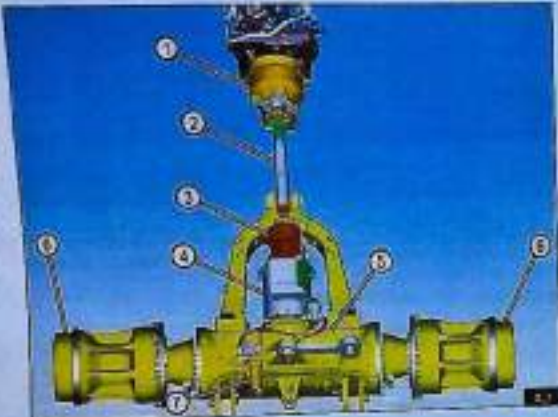


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Drive shaft connect Engine-TC to Transmission




1. Torque converter
2. Drive shaft
3. Transfer Gear
4. Transmission
5. Differential
6. Final Drive



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Thus, it is clear that drive shaft connects torque converter and Transmission. Further, drive shaft transmits mechanical power for Engine to Transmission. As per the above photograph bearing page no. 229, it is clear that transmission is separate from drive shaft. Thus, the argument of notice no. 2 that drive shaft is part of Transmission Mechanism is not sustainable. As discussed above, Transmission Mechanism / Transmission Assembly has been imported as Banjo as discussed above in pre-assembled condition.

50.1 I find that Noticee no. 1 has stated that there was no question of mechanical gearbox in the 190 Tonnes rear dumpers. The transmission mechanism plays the role for power transmission from engine to wheels through driveshaft. Noticee no. 2 has stated as under:

- i. the drive shaft does not have gear and cannot be describes to be a gear box.
- ii. A gear box is the part containing gears, i.e. the equipment that changes relation of the engine speed with the speed of the wheels. It is undisputed that the driveshaft does not have any gears and neither does it control any such relationship. A driveshaft is a *simpliciter* device that transfers the mechanical power of torque and rotation from the engine to the wheels. Hence, by no stretch of imagination can the same be termed as a gear box.
- iii. The imported dumper does not have any gear box. It is fitted with torque converter which works on hydro-mechanical transmission, that performs a function similar to that of a gearbox, i.e., to increase the torque while reducing the speed, but it is not a gear box.

50.2 I find that there is no allegation regarding gearbox in the Show Cause Notice, and it has not been identified as to which item in the Packing list is the gearbox.

51. As discussed above, Engine and Transmission Mechanism are in pre-assembled condition. As per Sr. no. 524 (1) (b) of the exemption notification no. 50/2017-Customs dated 30.06.2017, rate of BCD would be 25%, if either Engine or Gearbox or Transmission Mechanism would be in pre-assembled form but not mounted on a chassis or a body assembly. Thus, the condition is that if any out of the above three is in pre-assembled condition, then they should be eligible for BCD @ 25% as per Sr. no. 524 (1) (b) of Notification no. 50/2017-Customs dated 30.06.2017, and Sr. no. 524 (1) (a) of the said notification shall not be eligible for the importer. It is to be noted that for the benefit of Sr. no. 524 (1) (a) of the said exemption notification, all the 3 i.e. Engine, Transmission Mechanism and Gearbox should be in unassembled condition, which is not the case here. Therefore, it is held that Noticee is not eligible for Sr. no. 524 (1) (a) of the said notification and Notice has rightly charged that the importer shall be eligible for Sr. no. 524 (a) (b) of the said exemption Notification.

52. Whether Erection and Commissioning charges is to be added in assessable value:

52.1 Show Cause Notice has alleged that Rs.30,00,000/- per equipment would be paid by Noticee no. 1 to Noticee no. 2, towards the technical assistance for assembling and commissioning of dumpers on behalf of manufacturer i.e. Caterpillar Inc. USA. It is alleged that m/s Caterpillar Inc. USA has supplied the goods on the condition that technical assistance or technical knowledge for assembling the dumper would be provided by M/s GMMCO (Supply of goods against payment). Such erection and commissioning charges were not included in declared Assessable Value as per contract. It further alleged that the payment of cost of erection and commissioning appears to be the condition of sale of the goods by the buyer to the third party to satisfy an obligation to the seller. The SCN alleged that such payment would fall under



the ambit of condition of sales in terms of Rule 10 (e) of the CVR, 2007 and are liable to be added to the declared value after rejecting the value in terms of Rule 12 of the CVR, 2007.

52.2 Notice no. 1 in their written reply stated as under:

i. The goods have been imported pursuant to a Tripartite Contract dated 02.12.2019 executed by and between M/s. Coal India Ltd., M/s. Caterpillar Inc., U.S.A and its authorized dealer in India, M/s. GMMCO Ltd. As per the said Carriage and Insurance Paid to (CIP) Contract, the goods will be shipped by the manufacturer, M/s. Caterpillar Inc., U.S.A. and the same will be installed at the site of the Importer by the Supplier-M/s. GMMCO Ltd. and for that post-importation service/activity rendered by them M/s. GMMCO Ltd. would charge a sum of Rs.30,00,000/- per unit of dumper.

ii. The Show Cause Notice blissfully ignores the fact that the erection and commissioning of the goods in the Dumpers in CKD condition are post importation activities and the charges for such erection and commissioning have been paid to M/s. GMMCO Ltd. in India subsequent to import of the goods. These charges have no bearing on the transaction value of the goods and which is genuine. Therefore, the proposed addition of the cost of erection and commissioning to the transaction value of the goods is incorrect and thus deserves to be rejected outright. Even the plethora of decided cases by the Hon'ble Supreme Court, High Courts and CESTAT clearly do not support the Department's case herein. Some of the important authorities are referred to and reproduced here below for the kind perusal of the Hon'ble Commissioner.

iii. To put forth their point as above, they relied on the below mentioned judgements:

- *Bharat Aluminum Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri) decided on 23.04.2019.*
- *Tata Iron & Steel Company Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar - 2000 (116) ELT 422 (SC)*

52.3 Further, Notice no. 2 in their written reply dated 12.04.2022 stated as under:

i. The proposal of the Notice to include the cost of Rs.30,00,000/- incurred per dumper to the assessable value of the imported goods under Rule 10 (1) (e) of the CVR, 2007 is *ex-facie* illegal and bad in law. The cost of erection and commissioning is in relation to post-import expenses incurred in India and is therefore, not directly connected to the imported goods at all.

ii. It is settled law that no additions of post-import expenses can be done to the assessable value. Reliance in this regard is placed on the judgment of the Hon'ble CESTAT in *NCL Industries Limited vs Collector of Customs, Bombay [2005 (189) ELT 193 (Tri-Mumbai)]* as affirmed by the Hon'ble Supreme Court at *2015 (322) ELT 491 (SC)*. Hence, the proposal for redetermination of the value is unsustainable in law.



52.4 I find that there is a tripartite agreement among purchase, M/s CIL, manufacturer M/s Caterpillar Inc. USA and M/s GMMCO (authorised Indian Agent of M/s Caterpillar Inc. USA), referred as supplier. The entire agreement was for supply, installation and commissioning of 102 nos. of 190 Tonne Rear Dumpers along with consumables spares and consumables for 12 months of warranty period from the date of commissioning of the equipment and thereafter spares & consumables for a period of 84 months to various projects of NCL. Therefore, it was a turnkey where agreement was for supply of fully commissioned dumpers. Even after commissioning of dumpers, spares and consumables were also to be supplied. The Sr. no. 10 of the said contract is reproduced below:

"The contract is concluded among the Purchaser, the manufacturer and the supplier for supply, installation and commission of 102 nos. of 190 Ton Rear Dumpers along with Consumable Spares and Consumables for 12 months of warranty period from the date of Commissioning of the Equipment and thereafter, spares and consumables for a period of 84 months.

The Equipment shall be supplied by the manufacturer – M/s Caterpillar Inc., 100N E Adams Street, Peoria, Illinois – 61629-3350, USA in USD.

The items sourced in INR required for fitting in the equipment during commissioning of the equipment, consumable spares and consumables for 12 months of warranty period and thereafter spares and consumables for a period of 84 months will be supplied by M/s GMMCO Ltd. in INR.

Separate letter of credit(s) shall be established by NCL and ECL on M/s Caterpillar S. A. R. L., Singapore branch, 7 tractor road, Singapore – 627968 for the set CIF Amount of equipment after deducting Indian Agency commission for equipment in USD for a total value of USD 126,957,480.36 (US Dollars One Hundred Twenty-six million nine hundred fifty seven thousand four hundred eighty and Point thirty six only). Payment for foreign currency, INR, Indian Agency Commission and Customs Duty etc. shall be made as per provisions contained in clause-7, SCC of the Contract."

52.5 Thus, I find that the entire contract price was bifurcated into the following parts:

- i. CIF value of the equipment.
- ii. Erection and commissioning charges per equipment.
- iii. Price of all items sourced in India required for fitting in equipment during commissioning of equipment.
- iv. Price of consumables to be supplied after commissioning.

On perusal of the same it can be inferred that Noticee no. 1 had not ordered for the goods in the condition as imported. They had ordered for supply, installation and commissioning of 102 nos. of 190 Tonnes rear dumpers along with consumables thereafter. Thus, installation and commissioning was integral to the goods imported unless installation and commissioning of goods imported was done, the condition of the contract is not fulfilled.



Erection and commissioning is done for all the goods imported by the Noticee no. 1. Therefore, erection & commissioning is related to imported goods.

52.6 As per the definition given in the contractual agreement, 'Service' is defined in 1 (d) which is reproduced below:

"The "Services" means those services ancillary to the supply of the Goods, such as transportation and insurance, and any other incidental services, such as installation, commissioning, and provisioning of technical assistance, training and other such obligations of the Manufacturer/Supplier covered under the Contract."

It clearly states that Services means those services ancillary to **Supply of Goods** such as installation, commissioning, and provisioning of technical assistance etc. Thus, it is very clear that post importation services like erection and commissioning was a **Condition of Sale** of goods as imported.

52.7 Condition no. 8 of General Conditions of Contract (GCC) is reproduced below:

"8. Inspections and Tests

8.1 The Purchaser or its representative shall have the right to inspect and/or to test the Goods to confirm their conformity to the Contract Specifications at no extra cost to the Purchaser. SCC and the Technical Specifications shall specify what inspections and tests the Purchaser requires and where they are to be conducted. The Purchaser shall notify the Supplier in writing, in a timely manner, of the identity of any representatives retained for these purposes. Sufficient time, at least 30 days in advance should be given for inspection.

8.2 The inspections and tests may be conducted on the premises of the Supplier, at point of delivery and/or at the Goods' final destination. If conducted on the premises of the Supplier, all reasonable facilities and assistance, including access to drawings and production data, shall be furnished to the inspectors at no charge to the Purchaser. However, any drawing and proprietary information provided for this purpose shall remain in control of the supplier.

8.3 Should any inspected or tested Goods fail to conform to the Specifications, the Purchaser may reject the Goods, and the Supplier shall either replace the rejected Goods or make alterations necessary to meet specification requirements free of cost to the Purchaser.

8.4 The Purchaser's right to inspect, test and, where necessary, reject the Goods after the Goods' arrival in the Purchaser's country shall in no way be limited or waived by reason of the Goods having previously been inspected, tested and passed by the Purchaser or its representative prior to the Goods' shipment from the country of origin.

8.5 Nothing in GCC Clause 8 shall in any way relieve the Supplier of any warranty or other obligations under this Contract."



On perusal of the same, it is clear that the inspection and tests was to be conducted on the premises of supplier to the point of delivery and/or at final destination of goods after delivery. The goods which were ordered were for the complete 190 Tonne Rear dumpers in working condition. As per the above condition, it is also stated that if tested goods fail to confirm to the specification, purchaser may reject the goods. Thus, as per the agreement, the goods are actually handed over to the Noticee no. 1 only after the erection and commissioning of the imported goods. If service of erection and commissioning of goods is not provided by the supplier of the goods, the Noticee no. 1 is bound to reject the goods.

52.8 Condition no. 5.1 of the Special conditions of Contract (SCC) is reproduced below:

"5.1 The following Services, pursuant to Clause-13 of the GCC, shall be provided by the Supplier:

(a) Erection, Testing and Commissioning

Erection, testing and commissioning of the Equipment as detailed in the Schedule of Requirements and the Technical Specifications.

The supplier shall be responsible for the erection and commissioning within 30 days from the receipt of equipment at site.

The purchaser will provide necessary cranes, electricity and fuel required for testing only. All other erection tools & tackles including manpower will be arranged by the supplier. Any substantial delay in providing cranes from purchaser side will be recorded jointly for calculation purpose of erection & commissioning time.

If the supplier fails to commission the equipment within the specified period as mentioned above, Liquidated damages will be recovered @ 0.5% of the landed price of the equipment along with accessories per week or part thereof for the delayed period subject to a maximum of 5% of the landed price of equipment along with accessories.

(b) Tools

Furnishing of tools required for assembly and maintenance of the supplied Goods as detailed in the Schedule of Requirements and the Technical Specifications. A complete list as per clause – A.2 of Technical Specifications is enclosed as Annexure –4(f).

(c) Manuals

Furnishing of detailed operating, repair, maintenance and spare parts manuals as detailed in the Technical Specifications.

(d) Training



Training of the Purchaser's personnel as detailed in the Schedule of Requirements and the Technical Specifications. The cost of such Services are included in the Contract Price. The details of training charges are indicated in Price Schedule which shall be used for deduction purposes only, in case of any default in training as per the given schedule.

The Supplier shall be responsible for arranging and the cost of all necessary tickets, visas, permits, foreign exchange and any other matter or facility for visits of the Supplier's personnel for the purposes of Erection, Testing and Commissioning the Equipment and/or Training of the Purchaser's personnel – the Purchaser shall have no responsibility in this regard except in respect of issuance of letters supporting visa applications as may reasonably be requested by the Supplier. The Supplier shall be responsible for paying taxes, if any, including personal income tax and surcharge on income tax, for which it or its personnel may become liable.

For visit of Purchaser's personnel to manufacturer's works/venue of training, the Purchaser shall arrange all necessary tickets, conveyance, lodging and boarding and any other matter or facility for visits of Purchaser's personnel."

It clearly states that if supplier fails to commission the equipment within the specified period, liquidity damage may be recovered. This further proves that erection and commissioning was a Condition of Sale.

52.9 Point no. 7.2 (ii) and 7.2 (iii) for payment of equipment is reproduced below:

"(ii) 80% payment of the net CIF value will be made against submission of shipping documents and copy of Performance Bank Guarantees) and original copies of acceptance of these PBG(s) and receipted challan / consignment note of all the consignments, through unconfirmed, irrevocable letter of credit.

(iii) Balance 20% of the net CIF value will also be paid through the same unconfirmed irrevocable, letter of credit against submission of successful commissioning certificate, signed by the concerned officials of the Project and counter-signed by the Area General Manager and HOD of Excavation Deptt. of the subsidiary company, where the equipment has been deployed and confirmation of receipt of DRR/SRV in respect of spares and consumables. for first 12 months of warranty period from the date of commissioning of the equipment by the paying authority."

From the perusal of the above, it is clear that the payment which is related to the imported goods i.e. net CIF value is not paid on receipt of goods. Only 80 % of payment of net CIF value is made on shipping of document. Rest 20% of net CIF value is being paid upon submission of Erection and Commissioning of the equipment. Thus, even the payment with regard to imported goods is conditioned on the Erection and Commissioning of the imported 190 T rear dumpers.



52.10 I am reproducing certain provision of the scope of supply as specified in Technical specification of Contract:

"A1 Equipment Package:

The supplier is required to provide a complete package of equipment for the supply of 190 T Rear Dumper [Payload – 214 T (195MT)] to opencast (surface) coal mining projects as per the Technical Specifications provided in Part D.

The supplier is required to supply the equipment along with accessories, consumables, training, installation, commissioning and testing at the coal mining project.

A.4 Erection/Assembly, Commissioning and Performance Testing:

The supplier shall provide the Services of Specialist Technicians (refer Part – C.3) and required manpower (skilled/semi-skilled/un-skilled) to undertake the installation/erection/assembly, commissioning and any performance testing of the Equipment and accessories supplied.

The technicians shall remain at site following commissioning until all necessary personnel are fully conversant with the maintenance and operation of the equipment.

On perusal of the above, the entire responsibility of supply of the imported goods was given to the supplier M/s GMMCO on behalf of the manufacturer M/s Caterpillar Inc. USA. Supply was for the 190 Tonnes Rear Dumper and it was the supplier which was supposed to provide specialized Technicians and manpower to undertake the installation/erection/assembly, commissioning and any performance testing of the Equipment and accessories supplied.

52.11.1 I am reproducing Rule 10 of the CVR, 2007 for the sake of brevity:

" 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, -

(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.

...

...

(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."

52.11.2 Rule 10 comes into the picture in determining the transaction value when there shall be a price in addition to the price actually paid or payable for the imported goods. Thus, as per Rule 10 of the CVR, 2007, certain value needs to be added to the price actually paid or payable. In the present case, the price paid for erection and commissioning @ 30 lakhs per equipment is proposed to be added to the price actually paid or payable for the equipment as per Rule 10 (e) of the CVR, 2007. The above conclusion is validated by 1st proviso of Section 14 of the Customs Act, 1962 which states 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.*"

52.11.3 As per Rule 10 (e) of the CVR, 2007, all other payments actually made or to be made as a condition of Sale of 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. Hence, I find that as discussed above, it is well proven that payment of erection and commissioning @ 30 lakhs was a condition of sale of the imported goods made by the buyer to the 3rd party to satisfy the obligation of the seller and such payment was not actually added in the price actually paid/payable. Explanation to Rule 10 clearly states that if other payments are included in terms of Rule 10 (e) of CVR, 2007, same shall be added notwithstanding the fact that such goods may be subjected to the said process after importation of such goods. So even if the services related to the importation of goods was provided after importation of goods, the same should be added as per explanation to Rule 10 (e) of the CVR, 2007. Therefore, the argument of both the noticees that charges of erection and commissioning cannot be added being post importation charges is not sustainable. Thus, I find that erection and commissioning need to be added in terms of Rule 10 (e) of the CVR, 2007 read with Section 14 of the Customs Act, 1962.

52.11.4 I find that Noticee no. 1 has relied upon decision of Hon'ble Tribunal in the case of *Bharat Aluminium Co. Ltd. vs. Commissioner of Customs & Service Tax, Visakhapatnam - 2019 (369) ELT 1064 (Tri)*. I find that the said CESTAT judgment is ~~not~~ ^{relevant} in the present case



as in this case, the FOB value included the supply of equipment including commissioning and mandatory spares on which Customs duty is already paid. Moreover, there was no evidence in this case that extra cost for supervision for erection and commissioning was a condition of sale of the imported goods.

52.11.5 I find that the Noticee no. 1 has also relied upon Hon'ble Supreme Court Judgment in Tata Iron Steel Company Limited Vs Commissioner of Central Excise Cus 2000(116) ELT 422 (SC). The same case is not applicable in the present case as it was held in the said case that no payment was made as a condition of sale of imported goods. Therefore, in both the judgment payment of erection and commissioning was not present as a condition of sale. However, in present case, payment of post importation charges was undisputedly proven as a condition of sale of imported goods. In this regard, I rely upon the judgment of Hon'ble Tribunal, Mumbai, in the case of Mukund limited Vs Commissioner of Customs, ACC as reported in 1999 (112) E.L.T. 479 (Tribunal), wherein it was held that

"Providing of basic design and drawing of the gas cleaning plant and supervision of detail engineering and drawing form an inseparable item as per the contract to be performed by Davy Mckee. The payment of \$ 6,57,900 in the price schedule is towards the supervision during design, erection, commissioning and performance guarantee tests and which is a necessary concomitant to the supply of Design and Engineering drawings for the gas cleaning plant made by Davy Mckee and imported by the appellants. The appellants have been entrusted with the setting up of gas cleaning plant, and this could only be achieved not only by purchasing the basic design and engineering drawings imported from Davy Mckee but also the whole engineering package of supervision of detail drawing, erection, commissioning and performance guarantee tests. The payment made in foreign exchange towards supervision charges during design, erection and commissioning will necessarily have to form part of the assessable value of the imported goods and the value thereof will include not only the price paid for design and engineering but also the supervision charges.

I find that above judgement has been given relying on Hon'ble Supreme Court Judgement in the matter of Collector of Customs (Prev.), Ahmedabad Vs Essar Gujarat Ltd. as reported in 1996 (88) E.L.T. 609 (S.C.) wherein the Hon'ble Apex has held that *"Condition of obtaining a license from Midrex is a pre-condition of sale of the plant; hence Process license fees and cost of technical services for transfer of technology paid to third party includible in the price of the plant since plant cannot be made operational without them.*

Further, in a similar matter of *Otto India Pvt. Ltd.* [2003 (158) E.L.T. A331 (S.C.)], the Hon'ble Apex Court had held that if technical know-how supplied is relatable to the equipment supplied, the consideration paid for the same can be included in the assessable value of the equipment.



Thus, I find that the payment for erection, testing and commissioning charges have to form part of assessable value of imported goods in terms of Rule 10(1)(e) of the CVR, 2007 read with Section 14 of Customs Act, 1962.

52.11.6 I find that various judicial pronouncements as detailed below where it has been held that for adding the post importation services in the value of the imported goods it is necessary that activities of post importation stage should be linked to imported equipment as a condition of sale. As long as there is a condition of sale the post importation of services of goods should be added to Assessable Value of goods. In this regard, I rely upon below mentioned judgments of the Hon'ble Supreme Court:

- 2020 (237) ELT478 (SC)- Commissioner of Customs, Kolkata Vs Steel Authority of India Limited;
- Hon'ble Supreme Court in case 2011 (271) ELT 3 (SC)- Commissioner of Customs, New Delhi Vs Living Media India Limited has held that-

"In all these cases, there is no dispute that the cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement existing in all the matters that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. Counsel appearing for the Respondent relied upon the commentary on the GATT Customs Valuation Code. We failed to see as to how the aforesaid commentary on the GATT Customs Valuation Code could be said to be applicable to the facts of the present case. The specific sections and the rules quoted hereinbefore are themselves very clear and unambiguous. We are required only to give interpretation of the same and apply the same to the facts of the present case."

- Hon'ble Supreme Court in 2008 (224) ELT 23 (SC) – Commissioner of Customs Vs Ferredo India Pvt. Ltd. has held that-
"Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition pre-requisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the wording of the imported goods then such payment was not includible in the price of the imported goods."
- Hon'ble Supreme Court in 2007 (213) ELT 4 (SC)- Commissioner of Customs (Port), Chennai Vs Toyota Kirloskar has held that- *"The transactional value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exists between an amount payable*



as a condition of import and an amount payable in respect of the matters governing the manufacturing activities, which may not have anything to do with the import of the capital goods."

52.11.7 Thus, as long as a post importation charge in terms of Rule 10(1) (c) of CVR, 2007 is a condition of sale of imported goods, same shall be added to Assessable value of the goods. I find that in the case of Jai Balaji Industry Limited Vs Commissioner of Customs & Service tax, Vishakhapatnam as reported in 2015 (319) ELT 149 (Tri-Bang.), it has been held that:

"As regards technical supervision also, the nature of technical supervision has not been given clearly and even otherwise it is part of design and engineering cost and therefore we do not propose that this can be excluded. Further, it has also been noted that, in our opinion, in this case, it can be said that design and engineering charges have to constitute part of the assessable value since it is a condition of sale. There is no indication that appellants had the liberty to get the erection, commissioning and installation done by someone else. This is part of the same contract and there are no separate contracts for these activities. There is also no indication that appellants made enquiries or conducted their own verification to find that the two items of work can be separated. In such a situation, we have to take a view that design and engineering work was a condition of sale. On this ground also, appellants have no case. In view of the above discussions, we find that appellants are liable to pay customs duty on design and engineering and technical supervision charges and therefore demand for customs duty with interest and the amount paid and appropriated are in order and need no interference."

52.11.8 I find that as discussed above, the services of erection and Commissioning was a condition of sale for the imported goods. The contract was for supply of the assembled goods which was transferred to M/s. NCL only after completion of erection, Commissioning and testing process. Since the technology was only with the supplier of goods, no other person was in a position to do erection and commissioning for the said imported goods. All these evidences completely prove that the supply of the said goods after erection and commissioning was a condition of sale of the imported goods. Therefore, the value of the erection and commissioning shall be added to the Assessable value to the imported goods for the purpose of determination Customs duty in terms of Rule 10(1) (c) of the CVR, 2007 read with Section 14 of the Customs Act, 1962.

52.11.9 I find that as per explanation (1) (i) of Rule 12 of the CVR, 2007, it has been stated that where the declared value is rejected, the value shall be determined sequentially in accordance with Rule 1 to 9 of CVR, 2007. In the present case, there is no dispute regarding the declared value. Therefore, there is no need to reject the declared value, and question does not arise in determination of value in terms of Rule 1 to Rule 9 of the CVR, 2007.

53. Confiscation of goods:



53.1 I find that there is proposal for confiscation of the imported goods in the Customs Act, 1962. Section 111(m) of the Customs Act, 1962 is reproduced below:

"Section 111. Confiscation of improperly imported goods, etc. –

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

...

...

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

As per 111(m) of the Customs Act, 1962 any goods which do not correspond in respect of value or in any other particular with the entry made in this Act, they shall be liable for confiscation. I find that erection and commissioning charges was supposed to be added to arrive at the Assessable Value of the goods and the same has not been added in the Bill of Entry, and therefore, there has been a mis-declaration of value of the imported goods.

53.2 I find that Noticee no. 2 has argued that there was no mis-declaration of goods in the Bill of Entry. They have also relied upon the definition of 'entry' as defined in Section 2(16) of the Customs Act, 1962 which states as below:

"'entry' in relation to goods means an entry made in the Bill of Entry, Shipping Bill or Bill of Export and includes the entry made under the Regulations made under Section 84."

53.3 I find that the description of goods as given in the invoice pertaining to a sample Bill of Entry is as described below:

"CATERPILAR MAKE 190T REAR DUMPERS MODEL 789D IN CKD CONDITION, CONTAINING ALL NECESSARY COMPONENTS FOR ASSEMBLING A COMPLETE VEHICLE AS PER CONTRACT.HAVING ENGINE, GEARBOX AND TRANSMISSION MECHANISM NOT IN A PRE-ASSEMBLED CONDITION."

However, the description given in a sample Bill of Entry was as below:

"CATERPILLAR 190T REAR DUMPER MODEL 789D SR.NO.SPD00830(CKD) WITH ALL NECESSCOMPONENTS FOR ASEMBLING A COMPLET VEHICLE"

I find that the entire description of goods was not written in Bill of Entry due to space constraints, as only 120 characters could have been entered in the Bill of Entry (total characters required for the description of the invoice was 234). In such a situation where complete details cannot be entered in a Bill of Entry due to space constraints, then the description given in invoice will be considered as description given in the Bill of Entry. As discussed above, it is already proved that the description in invoice has been wrongly declared as not in pre-assembled condition, as Engine and Transmission Mechanism were in pre-assembled condition. I also find



that in the invoice it has been explicitly declared by the importer/supplier that among other parts/assemblies of dumpers, the Gearbox was not in a pre-assembled condition whereas there is no mention of gearbox in the corresponding packing list or in the contract. Further, both the noticees have clearly mentioned in their submissions that there was no specific gearbox in 190T dumpers imported by them. Yet, the invoice wrongly mentions the "Gearbox not in a pre-assembled condition". This appears to be a deliberate attempt of the supplier/importer with *malafide* intentions to align the description of the imported goods in the invoices with the wordings of the said Notification only to misguide the Customs authorities and wrongly avail the benefits of the Notification, which further unfailingly proves the mis-declaration in description of the goods. In the present case, the wrong exemption has been claimed by mis-declaration of description of goods and therefore, confiscation under Section 111(m) of the Customs Act, 1962 is applicable. There is plethora of judgements in various judicial forums that if there is a mis-declaration of description of goods and value, confiscation of the said goods is applicable in such cases. I rely on a few of the said judgments which are squarely applicable in the present case:

- Parshav Alloys vs Commissioner of Customs(I), Nhava Sheva, Raigad - 2020 (374) ELT 117 (Tri-Mum)
- Om Hemrajani vs Commissioner of Customs, CSIA, Mumbai - 2019 (370) ELT 466 (Tri-Mum)
- R.V. Manoj Kumar vs Commissioner of Cus., C. Ex. & S.T., Cochin - 2019 (369) ELT 1304 (Tri.-Mum)
- Commissioner v. R.R. Enterprises - 2015 (318) ELT A263 (AP)

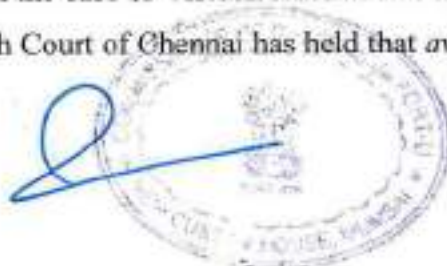
54. I find that noticee no. 1 has imported 84 dumpers, out of which 50 dumpers were already released without seizure, while the remaining 34 dumpers were provisionally released after seizure of the same. I find that in terms of Section 125 of the Customs Act, 1962 there is an option to pay fine in lieu of confiscation. Section 125 is reproduced below for the sake of brevity:

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.]

I also find that as per the judgment in the case of Visteon Automotive Systems India Limited Vs CESTAT, Chennai, the Hon'ble High Court of Chennai has held that availability of goods is not



necessary for imposing redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act.

55.1 I find that the entire demand has been raised invoking Section 28 (4) of the Customs Act, 1962. The Show Cause Notice has alleged that the importer, supplier and manufacturer were in absolute collusion to submit wilful misstatement by suppressing the facts about the form and nature of the goods and thereby claimed undue Notification benefit. It is also alleged that the manufacturer of the goods M/s Caterpillar Inc., USA in all its invoices has declared that Engine, Gearbox and Transmission Mechanism are not in pre-assembled condition. However, the packing list issued by the manufacturer clearly identify the engine and banjo as a pre-assembled unit. Thus, it is alleged that manufacturer has manipulated the invoice with intention to avoid Customs Duty. It is further alleged that the manufacturer of the goods had categorically stated in the Contract No: CIL/C2D/190T Dumper/R-66/17-18/153 dated 02.12.2019 that dumpers would be supplied in a completely knock down condition with engine, gearbox and transmission mechanism not in a pre-assembled condition but still instead of complying with agreement, the manufacturer have contravened the conditions of contract and mis-declared the description of goods in their invoices. It is further alleged that the manufacturer, M/s Caterpillar INC., USA vide their letter No: CIL/190T/price Justification/18-19 dated 19.04.2019, submitted that the machines shall be shipped in completely disassembled condition in 20-25 packages. But such condition was found to be in contravention to respective Packing lists which contained 15 packages only.

55.2 Noticee no. 1 has submitted the following arguments for non-applicability Section 28 (4) the Customs Act, 1962:

- i. Reliance placed by the Customs Department on Clause 7.5 of the Contract is misplaced. In the present case, global tender was invited by CIL for supply of 102 numbers of 190T Rear Dumpers, to which Caterpillar Inc. USA (Manufacturer) responded and became the successful bidder, by offering to supply the same in CKD condition, that too by making the clear cut representation before the CIL that the said three parts thereof – Engine, Gearbox and Transmission Mechanism would be supplied in unassembled condition only and not in pre-assembled condition so as to attract only the lower rate of Customs Duty at 15% BCD as provided in the Exemption Notification. During processing of tender, a representation was received from the L-2 bidder to the effect that such dumpers cannot be imported having 3 parts not in pre-assembled condition. Therefore, the manufacturer and their authorised dealer -



GMMCO Ltd were requested to confirm the condition of shipment of the dumpers in line with relevant Customs Notification qualifying for the lower rate of BCD, i.e. 15%. When the manufacturer and its local representative - GMMCO Ltd. (Supplier) confirmed to CIL that they are in a position inter-alia, definitely to supply the said 3 Parts of the Dumpers in Unassembled CKD condition, it was made known to them that if it is found by the Customs Authorities that the 3 parts of the Dumpers are in Pre-assembled condition attracting higher rate of duty, then apart from paying differential duty of 10% BCD, fine and penalties would also have to be paid/borne by them without any demur. Both the Manufacturer and Supplier were confident that the three parts of the Dumpers to be supplied by them were in unassembled condition and if they fail, then the Supplier who is the representative of the Manufacturer would be liable and make good the differential duty, fine and penalties, etc. Accordingly, after obtaining the 2 written Justification Letters from each of them, as stated herein below, the said Clause 7.5 was inserted in the Tripartite Contract. As per the said clause, the declarations to be made in the Bills of Entry that were to be filed by the CIL, would be based on the declarations made/furnished by the Manufacturer and the Supplier and in case such declarations were found to be incorrect, then the entire differential duty, fine and penalties, etc. imposable by the Customs had to be borne by the Supplier. This fact clearly reflects that if there was any collusion on the part of CIL, then such an express clause would not have been inserted at all in the contract by creating civil as well as criminal liabilities on the part of both the Manufacturer and the Suppliers. In fact, insertion of the said Clause 7.5 in the contract, unequivocally establishes the transparency of the entire transactions entered into by the CIL and its bona fides, which stood the scrutiny of even Independent External Monitors' Certificates/Minutes, as mandated by the Central Vigilance Commission, Government of India.

ii. The Clause 7.5 was inserted in the Contract as a matter of abundant caution, because, the goods were to be supplied subsequent to the contract and if the goods supplied were found to be contrary to the Representations and/or Declarations made by the Manufacturer and the Supplier, then the CIL may face serious difficulty. To obviate such unwarranted and uncalled for liability, if any, the said Clause 7.5 was inserted in the Contract with the avowed object of protecting the CIL's interest. It is because of the complexity of the matter and to safeguard the interest of CIL, in case of failure of the L1/Successful Bidder to comply with the requirement to qualify for BCD @15% during the actual shipments, the said Clause No. 7.5 was incorporated. In such a case, the customs authority is not justified in misreading, misinterpreting and misconstruing the said Clause 7.5 of the Contract and treating or holding that the said clause was inserted in furtherance of the alleged collusion. Further, it is because of the said provision of the Contract, the CIL has proceeded to deposit the entire demand of Customs Duty differential amounting to about Rs.136 crores covered under these 2 and the other one SCN issued to ECL, as stated herein above.

iii. It is relevant to note that all the Bills of Entry were filed after obtaining report of the Chartered Engineer Mr. M. Vairamohan to the effect that the said three parts of the Dumpers were in unassembled condition. Merely because the said Chartered Engineer has subsequently



given a contrary statement, cannot be a ground to hold that CIL has colluded, suppressed and mis-declared the goods. As noted earlier, even the recently obtained report of IIT Kharagpur falsifies the subsequent statement made by the said Chartered Engineer and supports the case of CIL.

iv. The CIL being a Government Company, payment of Customs Duty at the lower rate or at the higher rate would be inconsequential, because in such a case payer and the recipient of the customs duty would only be the Central Government. It is not the case of the Customs Authorities that any of the officers of CIL were to be benefitted either directly or indirectly, by paying lower rate of duty. In such a case, allegation in the Show Cause Notices that CIL has suppressed, mis-declared and colluded with the Manufacturer and the Supplier is completely unwarranted and untenable.

v. 50 bills of Entry at 6 different stages were assessed by the department and no doubt was raised by the assessing officer during clearance. Although, under the extant provisions of the Customs Act, it is the liability of the Importer to file Bill of Entry by making proper and truthful declarations before the Customs Authorities and to pay the proper amount of duty, etc., in this case, however, CIL acted on the advice of the Bidders who promised under the Contract to deliver the Dumpers at the agreed price, which is exclusive of Customs Duty only at 15% BCD. Thus, the CIL in this case is totally an innocent party, for it has not made any willful mis-statements or false statements before the Customs Authorities in its Bs/E and even not suppressed any fact from the Customs Authorities, while clearing the goods. The second aspect involved herein is, there was no need for the CIL to indulge in any type of acts of misfeasance and malfeasance for gaining by way of clearance of the Dumpers at the Concessional rate of Customs Duty. It is so because the CIL is a Government of India owned Company and all the profits registered by the Company would go to the Government of India itself. However, the Customs officers have completely ignored this aspect while foisting this false case on the CIL in outright illegal manner, without any legally sustainable evidence whatsoever.

vi. It is, therefore submitted that for the mere reason that the aforesaid specific Clause No. 7.5 contained in the contract dated 02.12.2019, it would be improper to hold that the CIL has connived with the supplier and the manufacturer, especially when ---

- a) CIL being a Government Company, it is legally obliged for it to accept the L-1 bid as to save the Government money and avoid wastage of public money. In this case, Caterpillar being the successful bidders, CIL had no choice, but to accept their bid.
- b) If the representations made by the supplier/manufacturer in their bid are found to be incorrect, then the entire differential duty along with interest and penalty, if any, were to be borne by the Supplier/Caterpillar themselves.
- c) In such a case, where M/s. Caterpillar Inc is the World Renowned Manufacturer of Heavy Duty Dumpers and further that their local agent GMMCO-Supplier is seriously contesting the show cause notices, how anyone can hold that the CIL has connived with said the supplier and manufacturer.



- d) A copy of the contract was made available to the customs authorities during the clearance of goods and investigations stage itself. Hence nothing has been suppressed by the CIL from the customs.
- vii. While stoutly denying and disputing the allegation of involvement of our clients in the acts of connivance and collusion with Caterpillar Inc., USA, or GMMCO, without prejudice to all other grounds as set out here in this reply, Our Clients respectfully state and submit that if at all any such collusion or connivance existed in this case which has resulted in making any wilful mis-statement while describing the nature of manufacture of the goods, it is only by and between the Manufacturer – Caterpillar Inc., USA and their local agents GMMCO - Supplier, but definitely not the CIL. It is further submitted that the Customs Department, however, has failed to charge the said manufacturer, though they have their local office in India. If at all any type of collusion and connivance in this case which resulted in filing the Bills of Entry with the wilful wrong description of goods, the customs ought to have made the said manufacturer a co-noticee in the SCN along with the Supplier, both of whom were responsible for furnishing to CIL all the information and the duly filled in Bills of Entry by them, as agreed in the contract. Unfortunately, however, Caterpillar has not been made the necessary party in the Show Cause Notices, despite the fact that the entire evidence/records of the case, as built up by the Investigations conducted by the Customs Department, *prima facie*, indicate their (Caterpillar's) complicity in the alleged acts of Collusion and/or Connivance with their own local agents – GMMCO Ltd., but not the CIL, which is an innocent party in this entire deal.
- viii. Without Prejudice to the afore stated grounds it is respectfully submitted that Customs cannot allege collusion, or making any wilful mis-statement or suppression of facts, without there being the *mens-rea* on the part of the importer—CIL/NCL. In this case, however, absolutely there is no such guilty intention attributable on the part of CIL, as it has never acted with the intention of causing any illegal gain unto itself and illegal loss to the customs. Thus, the element of *mens-rea* is conspicuously missing in this case from such falsely alleged collusion or connivance, etc.
- ix. It is submitted that the nomenclatures used in Section 28(1) & (4) of the Customs Act, 1962, namely "Collusion", "Wilful mis-statement" and "Suppression of Facts" are the strong words having serious implications, thereby warranting to be construed strictly in the matter of Interpretation of Penal Statute like the Customs Act. When the Revenue invokes the extended period of limitation under section 28(4) of the Customs Act, 1962, the burden is invariably cast upon it to prove the acts of collusion, wilful mis-statement and/or suppression of facts.

55.3 For deciding whether Section 28 (4) of the Customs Act, 1962 is applicable in the present case or not, I am reproducing Section 28 (4) as below:

"Where any duty has not been levied or not paid or has been short-levied or short-paid 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 not paid 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."

On perusal of the above, it is seen that the demand under Section 28 (4) of the Customs Act, 1962 if there is non- levy of duty, short levy or short payment by reason of collusion or any wilful mis-statement or suppression of facts by the importer or employee of the importer, Section 28 (4) of the Customs Act, 1962 shall be applicable.

55.4 I find that in the present case, the importer, M/s NCL and their several employees were engaged for the purpose of importation of goods. On perusal of the contract, para 7.5 of Special Conditions of Contract (SCC) specifying conditions of payment of Customs Duty is reproduced as below:

"7.5 Payment of Customs Duty

The Purchaser will pay Customs Duties applicable to imported goods. The Purchaser's Port Consignee will undertake the above activity.

Payment in respect of Custom Duties properly levied on the CIF value of the imported goods shall be made in local currency in the following manner:

- a. The supplier shall submit Check List with appropriate Customs Code (H. S. Code) along with a copy each of the supplier's invoice, freight bill and insurance bill well in advance to the C&F Deptt., CIL,*
- b. After examination, the C&F Deptt.,CIL will inform the supplier the correctness of leviable customs duties for preparation of Bill of Entry,*
- c. Thereafter, the supplier will submit the final Bill of Entry to the C&F Deptt., C/L for payment of Customs Duties to Customs Authorities,*
- d. C&F Deptt., CIL will pay Customs Duty directly to Commissioner, Customs by Account Payee Cheque / Electronic Fund Transfer,*
- e. After payment of customs duty by CIL, the supplier will arrange clearance of goods at Port. After final clearance of goods at Port, the Supplier will submit customs cleared duplicate Bill of Entry to C&F Deptt., CIL.*

Special Note: As per the offer of M/s GMMCO Ltd. and subsequent confirmation by M/s Caterpillar Inc. vide letter no. CIL/190T/Price Justification/18-19/ dated 19.04.2019, the import of dumpers



will be "in completely knocked down condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition". As per Notification No. 50/2017-Customs dated 30.06.2017, subsequently amended vide Notification nos. 6/2018-Customs dated 02.02.2018 and 25/2019-Customs dated 06.07.2019 of Customs Authorities, the current rate of Basic Customs Duty (BCD) for the equipment for the above CKD condition of import of dumpers is 15% (fifteen percent). In case, at the time of importation or subsequently, if BCD for equipment is levied at the rate of more than 15% for the above CKD condition of import, the differential amount along with interest, penalty etc. will have to be paid by M/s GMMCO Ltd., failing which the same will be deducted from their pending / future bills in line with the undertaking furnished by M/s GMMCO Ltd. in their letter no. CIL/190T/ Justification/19-20/14 dated 27.04.2019."

55.5 On perusal of the above special note, it has been confirmed by M/s. GMMCO and M/s. Caterpillar INC. USA, before execution of contract that Engine, final drive and transmission mechanism shall not be in pre-assembled condition and rate of duty will be 15%. On perusal of Para 8 of the Main contract regarding statutory duties and taxes and other levies, it has been stated that GST on erection and commissioning charges shall be payable to the supplier. Thus, as per the agreement, a decision was already taken that GST shall be payable on erection and commissioning charges and such charges shall not be included in Assessable value of the machines for the purpose of Customs duties.

55.6 I find that the entire contract is for supply of 190 Ton Rear Dumpers, thus, M/s. NCL wanted to receive the equipment in fully working condition, however, as per bids submitted by M/s. GMMCO, they were not importing the equipment in complete assembled form and they have certified vide their letter dated 27.04.2019 with confirmation from M/s. Caterpillar INC., USA vide Letter no. CIL/190T/Price justification/18-19/ dated 19.04.2019, that the import of dumpers will be in completely knocked down condition containing the necessary components, parts or sub-assemblies for assembling a complete unit with engine, final drive and transmission mechanism not in pre-assembled condition. The above letter of the manufacturer and the supplier was accepted by M/s. CIL on behalf of the importer. It is important to note that although they wanted complete working equipment but importation was taking place in completely CKD condition and on face value they accepted the offer of the supplier and manufacturer. However, M/s. CIL (parent company of the importer) took the responsibility to pay customs duty. Importer took the responsibility to file the Bill of Entry in their name. once the Bill of Entry has been filed by the Noticee No. 1, the responsibility of the correctness of filing Bill of Entry has been taken over by the Noticee No. 1. The para 7.5 of SCC specifies how the responsibility of correctness of filing the Bill of Entry shall be discharged by Noticee No. 1. For the sake of repetition such procedure detailed in Para 7.5 of SCC is reproduced again:

"7.5 Payment of Customs Duty



The Purchaser will pay Customs Duties applicable to imported goods. The Purchaser's Port Consignee will undertake the above activity.

Payment in respect of Custom Duties properly levied on the CIF value of the imported goods shall be made in local currency in the following manner:

- a. The supplier shall submit Check List with appropriate Customs Code (H. S. Code) along with a copy each of the supplier's invoice, freight bill and insurance bill well in advance to the C&F Deptt., CIL,*
- b. After examination, the C&F Deptt., CIL will inform the supplier the correctness of leviable customs duties for preparation of Bill of Entry,*
- c. Thereafter, the supplier will submit the final Bill of Entry to the C&F Deptt., CIL for payment of Customs Duties to Customs Authorities,*
- d. C&F Deptt., CIL will pay Customs Duty directly to Commissioner, Customs by Account Payee Cheque / Electronic Fund Transfer,*
- e. After payment of customs duty by CIL, the supplier will arrange clearance of goods at Port. After final clearance of goods at Port, the Supplier will submit customs cleared duplicate Bill of Entry to C&F Deptt., CIL."*

Thus, it says that the checklist for Bill of Entry shall be submitted initially by supplier along with all documents to C&F department of CIL. The second step is that the entire document and the correctness of the checklist shall be examined by the C&F department of CIL and they will inform the supplier the correctness of leviable Customs duties for preparation of Bill of Entry. Thus, as per the agreement, the entire responsibility for correctness of leviability of Customs duty lies on the C&F department of M/s. CIL. Thus, it has to be inferred that C&F department of CIL was satisfied regarding the correctness of leviability of Customs duty.

55.7 It is to be noted that as per the packing list there was specific mention of Engine in the packing list but still they did not raise the objection to the supplier. As per the agreement, the word BANJO was never used in the said agreement as per specification annexed to the agreement. As per M/s. Caterpillar letter dated 14.12.2020, BANJO is a unit housing the transmissions, differential, final drives. In spite of such name appearing in the packing list, the C&F department of the CIL cleared the checklist of Bill of Entry for filing the same. Further, there was a clarification for M/s. Caterpillar INC., USA vide Letter no. CIL/190T/Price justification/18-19/ dated 19.04.2019, that for the ease of handling the consignment during the transportation, the package would be shipped in 20-25 packages. I find that the packing list consisted of only 15 packages but still no objection was raised by CIL regarding the possibility of sending Engine/Transmission Mechanism in pre-assembled condition by reducing the no. of



packages. Therefore, I find that M/s CIL/NCL had wrongly certified the correctness of the Bill of Entry.

55.8 I find that in the contract there is no mention as to in which form, the goods shall be imported into India. Thus, details of packing list items were not discussed and they have just accepted that Engine, transmission mechanism etc. shall be in pre-assembled condition. Once they have accepted that the same shall be in pre-assembled condition then it is the responsibility of the importer i.e. Noticee No. 1 to verify the correctness of the claim of the supplier. I find that in Para 28 and 29 of the reply dated 28.02.2022 submitted by NCL, they have stated that in response to the said global tender for CIL in procurement of 102 no. of 190T Rear Dumpers L2 bidder had quoted their price considering BCD@25% considering the Engine, gearbox and transmission mechanism in pre-assembled condition but not fitted on body or Chassis. Infact, L2 bidder had complaint to CIL stating that the dumper of such huge capacity cannot be shipped in CKD condition having Engine, Gearbox and Transmission mechanism, not in a pre-assembled condition. Still, when such information was given by L2 bidder, CIL of their own without taking into account in the agreement to prove that these three will be coming not in pre-assembled condition, accepted the offer of the Noticee No. 2 and themselves certified in the Bill of Entry/Packing list as these three items were not in pre-assembled condition.

55.9 I am reproducing the relevant para of Section 46 of the Customs Act, 1962 as mentioned below:

"Section 46. Entry of goods on importation. -

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed.

...

...

(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, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely:

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force."

On perusal of the same, it becomes the responsibility of the importer to ensure the accuracy and completeness of information in the Bill of Entry and truth of content of such Bill



of Entry. I find that in the present case, truth of content of Bill of Entry has been wrongly certified by Noticee No. 1.

55.10 I am reproducing the Section 17(1) of the Customs Act, 1962 as below:

"Section 17. Assessment of duty. -

(1) 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."

On perusal of the same read with Section 46 of the Customs Act, 1962 it is clear that the importer shall self-certify the correctness of the Bill of Entry and should self-assess the Bill of Entry. I find that in the present case, the importer has wrongly certified the Bill of Entry by suppressing the facts that Engine and transmission mechanism was in a pre-assembled condition

55.11.1 I find that for invoking Section 28 (4) of the Customs Act, 1962, one of the 3 ingredients i.e. collusion or wilful mis-statement or suppression of facts is required to be established. I find that it has been already established that entire responsibility of filing the Bill of Entry has been taken over by the importer as per para 7.5 of Special conditions of Contract (SCC) and that responsibility of certifying the correctness of document in the Bill of Entry lies with the importer. **Mis-declaration of description of goods and value has been already proved as discussed above.** The importer has taken the argument that goods have already been examined by the department and therefore, suppression of facts cannot be invoked. I find that there is no evidence that the agreement copy was produced before the department. Moreover, payment of Erection and Commissioning charges as a condition of sale of imported goods was suppressed from the department. Therefore, the suppression of value of Erection and Commissioning charges is sustainable. I find that although goods were examined in front of Chartered Engineer but Banjo being the complete Transmission Mechanism was unearthed only during the investigation. By no stretch of imagination, Banjo being Transmission Mechanism can be detected during the examination. I find that the importer has argued that there cannot be *mens-rea* to evade duty in their case as they are Public Sector Company (PSU) under the Government of India. I find that as a PSU, it was their added responsibility to pay correct Customs duty, but, instead of paying the correct Customs duty, they took the recourse of confirmation from the supplier regarding the applicability of the exemption Notification and the responsibility of certifying the correctness of Customs duty on themselves. These two actions are contradictory in nature. Once they were responsible for certifying the correctness, it was their duty to verify the form of the goods shipped by the supplier and then self-assess the Bill of Entry. **Result of the entire event was to pay lower rate of Customs duty and therefore, the intention to pay lower rate of duty by the importer is established. Infact when the L2 bidder warned them that such goods i.e. engine/transmission mechanism cannot be imported in unassembled form, still they went ahead after clarification from the manufacturer/supplier just to save the Customs duty.** **Therefore, the intention to evade**



Customs duty is sustainable. Hence, there is suppression of facts regarding value and importation of transmission mechanism as Banjo. There was wilful mis-statement regarding description of goods declaring Engine and transmission mechanism not in pre-assembled form. Further there was mis-declaration regarding Gearbox when there was no gearbox in the dumper as claimed by them. Therefore, the plea of the importer that extended period cannot be invoked as goods were examined earlier is not sustainable. The imported goods were in CKD condition with Engine and Transmission Mechanism in pre-assembled condition requiring technical expertise and any wrongful declaration by Chartered Engineer cannot absolve the responsibility of the importer to declare the facts before the department correctly. Therefore, the entire effect of the above said suppression of facts has resulted in the loss of revenue and therefore, demand has been rightly been raised under Section 28(4) of the Customs Act, 1962.

55.11.2 The noticee no. 1 has argued that Pre Consultation Notice has not been given to them as per Section 28 (1) of the Customs Act, 1962. I find that this is a case of Section 28 (4) of the Customs Act, 1962, where Pre Consultation Notice is not required. Provision of Pre Consultation Notice has been provided only in case of Section 28 (1) of the Customs Act, 1962 as provided in proviso to Section 28 (1) (a) of the Customs Act, 1962. Moreover, as per Section 28 (10B) of the Customs Act, 1962, a notice issued under sub-section (4) shall be deemed to have been issued under sub-section (1), if such notice demanding duty is held not sustainable in any proceeding under this Act, including at any stage of appeal, for reason that the charges of collusion or any wilful mis-statement or suppression of facts to evade duty has not been established against any person. Thus, even if charges under Section 28 (4) of the Customs Act, 1962 is not established, demand under Section 28 (1) is sustainable. However, in the present case, for the reasons discussed here-in-above, demand under Section 28 (4) of the Customs Act, 1962 is upheld.

55.12 I find that since the demand under Section 28 (4) of the Customs Act, 1962 is sustainable, penalty under Section 114A of the Customs Act, 1962 is sustainable on the importer, M/s NCL for evading payment of applicable duty by resorting to suppression of facts and wilful mis-statement as discussed in paras supra. In terms of proviso to Section 114A of the Customs Act, 1962, penalty can only be levied either under Section 112 or Section 114A of the Customs Act, 1962. As I have already held that the importer is liable for penal action under Section 114A of the Customs Act, 1962 I refrain from imposing penalty under Section 112 (a) of the Customs Act, 1962.

56.1 I find that there is proposal for imposition of penalty under Section 114 AA of the Customs Act, 1962 against the importer on the grounds that they have knowingly and intentionally made use of false and incorrect documents in the transaction of their business for import of the 190T dumpers. There is also proposal for imposition of penalty on the supplier M/s GMMCO under Section 114AA of the Customs Act, 1962 on the ground that they have



intentionally made use of false and incorrect documents in collusion of importer to avail undue advantage BCD exemption by resorting to mis-declaration of goods.

56.2 M/s NCL in their reply and submission as detailed in para 26.1 (xxi) have stated that they are innocent party and they have not made any wilful mis-statement or false statements before the Customs Authorities in its Bills of Entry and not suppressed any facts from the Customs Authorities, while clearing the goods, and therefore, no pendency under Section 114AA of the Customs Act, 1962 should be imposed on them.

56.3 Noticee no. 2, M/s GMMCO in their reply stated that for imposing a penalty under Section 114AA of the Customs Act, 1962, knowledge of any declaration, statement or document that is being made or signed or used should be possessed by the person against whom the said section is being invoked. They further stated that they have not made any illegal statement intentionally or provided a false declaration or a statement or a document to invoke penalty under Section 114AA of the Customs Act, 1962.

56.4 I find that for imposing penalty under Section 114AA of the Customs Act, 1962, the evidence is required to prove that there was a false/incorrect document which has been used by them knowingly and intentionally to evade payment of appropriate Customs Duty. As discussed above, it has been well established that there was wilful mis-statement and suppression of facts regarding non-declaration of Erection and Commissioning charges, non-declaration of Banjo as Transmission Mechanism and mis-declaration of Engine and Transmission Mechanism as not in pre-assembled condition. For imposing penalty under Section 114AA of the Customs Act, 1962 initially it has to be proved that the importation was done using a false/incorrect document. I find that the declaration in the document i.e. the invoice has been challenged in the present case. I find that mis-declaration of the goods as established above confirms that used document was incorrect document as the same document is used for the clearing of the goods and raising demand in the present case. In this regard, I rely on the judgment of Hon'ble Tribunal in case of Commr. of Cus., New Delhi vs Ashwini Kumar alias Amanullah as reported in 2021 (376) ELT 321 Tri-Delhi, wherein it was held that *if there is a mis-declaration of names of importer or nature of goods, penalty was imposable under Section 114AA of the Customs Act, 1962. It was also held that penalty under Section 114A and 114AA of the Customs Act, 1962 is mutually exclusively*. Further, in para 55.11.1 above the *mens-rea* on the part of the importer is already established. Importer knowingly took the risk of paying lesser rate of duty and in the event of detection by Customs, they took the recourse of payment of such differential duty from the supplier. They were also alerted for the possibility of payment of lesser duty by the L2 bidder, but, they knowingly chose to lower rate of duty by taking the clarification from the manufacturer/supplier who manipulated the documents. Therefore, I find that the penalty under Section 114AA is imposable on the importer. In this regard, I rely upon the judgment of Hon'ble CESTAT, Chennai in the case of Sree Ayyanar Spinning & Weaving Mills Ltd. Vs C.C.,



Tuticorin as reported in 2019 (370) ELT 1681 wherein it was held that *for imposing penalty under Section 114 AA of the Customs Act, 1962, it has to be proved that the person knowingly or intentionally implicated himself in use of false or incorrect document.*

56.5.1 Role of M/s GMMCO: I find that it has been alleged in the Show Cause Notices that supplier M/s GMMCO has not supplied the goods in terms of condition of the contract that Engine and Transmission Mechanism will not be in pre-assembled condition. However, they supplied Engine and Transmission Mechanism in pre-assembled condition. This mis-declaration of the goods led to undue exemption benefit and therefore, they are liable for penal action under Section 112 (a) of the Customs Act, 1962 for abetting in omission and commissioning in collusion with the importer and they have used false and incorrect documents to avail undue advantage of BCD exemption and therefore, they are liable for penal action under Section 114AA of the Customs Act, 1962.

56.5.2 I find that the agreement was executed between manufacturer, M/s Caterpillar Inc. USA, supplier M/s GMMCO and the importer (M/s CIL on behalf of its subsidiary). I find that the supplier was acting on behalf of its manufacturer in India and all services related to the imported goods in India was to be executed by the supplier. I find that in the entire service part of the contract and agency commission, the monetary benefit derived out of the contract has accrued to the supplier. He was getting agency commission for supply of goods and payments for several services to be provided and payment for other components during the warranty period. Therefore, it was in the interest of the supplier to bag the contract. Further, the Tender was quoted by the supplier on behalf of manufacturer. It is pertinent to mention that the risk factor for demand by customs was taken over by supplier only to cover for the differential quotation for bid between L1 and L2 highlighting the different view on the exemption notification, with sole intention to bag the contract. As they were constantly having knowledge of the suppression of facts, they undertook the risk factor for differential duty as possibility of demand was always there but knowing they influenced manufacturer to manipulate invoice.

56.5.3 Further, I find that despite being aware that the gearbox was not there in the dumpers, they went ahead and declared that the gearbox along with Engine and Transmission mechanism was not in pre-assembled condition in invoice, with the sole intention to align the same with the wordings of the exemption notification. Therefore, the entire beneficiary of manipulation of invoice is supplier in getting their tender as lowest. Moreover, importer has also stated that if any manipulation has been done, then it is manufacturer and manufacturer has worked through their agent supplier in India, i.e. M/s GMMCO.

56.5.4 Further, the supplier was entrusted with the delivery of the copy of the invoices, Bill of Lading, packing list, COO, Insurance one week before the arrival of goods and if not, received the supplier would be responsible for the expenses. Thus, it was the supplier who was the person responsible for the goods as being the representative of the manufacturer for all purposes in



India, and it was the supplier who was handling the import documents such as invoice and packing list delivering the same to NCL in India. Thus, I find that they had helped the manufacturer in manipulating the invoice and were fully aware that the description was incorrect in the document. As they were the ones who would finally assemble the goods before delivery to the importer, they were fully aware of the form of the goods, and yet were fully involved in manipulating the description of the invoice. Further, being aware of the form of the goods imported and the manipulation of the invoice, they had prepared check list for the Bill of Entry, which was in turn used for filing Bill of Entry for custom purpose. Therefore, I find that the supplier in agreement with the manufacturer provided wrong information in the import documents mis-declaring the form/nature of imported goods to fit into the claimed notification.

56.5.5 As discussed above, it has been well established that there was a mis-declaration of the nature of the goods in the invoice, and suppression of addition of values of erection and commissioning charges, and therefore, goods are liable for confiscation. The supplier has abetted the clearance of the goods which rendered the goods liable for confiscation under Section 111(m) of the Customs Act, 1962. Therefore, I find that penalty under Section 112 (a) of the Customs Act, 1962 is imposable on the importer.

56.5.6 I find that the incorrect documents were supplied by the supplier to the importer after obtaining the same from the manufacturer as discussed above, with the sole intention to get the goods cleared from Customs by paying lower rate of duty. Therefore, the supplier knowingly used incorrect documents i.e. invoice in preparation of the checklist and forwarding the same to the importer for confirmation. The final beneficiary of the clearance of the goods by payment of lower rate of duty was the supplier only. Therefore, the supplier i.e. Noticee no. 2 knowingly and intentionally used incorrect documents to clear the goods. The supplier manipulated the manufacturer in preparation of the invoice to include even the gearbox in line with the exemption notification which was not even the part of the dumpers. As the direct beneficiary of manipulation of the invoice and clearance of goods was the supplier and therefore, the penalty under Section 114AA is imposable on the supplier.

57. I find that both the noticees have argued that the demand under Section 28 of the Customs Act, 1962 can only be raised by the same officer who had cause assessment of the Bill of Entry i. e. Assistant/Deputy Commissioner of Customs as held by the Hon'ble Supreme Court in Cannon India case. They have further stated that assessments under Section 17 of Section 18 are to be exercised by the proper officer in terms of Notification no. 50/2020-Customs (NT) dated 05.06.2020 and Commissioner of Customs (Import-I) is not the proper officer under the said Notification. I find that as per Section 5(2) of the Customs Act, 1962, an officer of Customs may exercise the power and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him. Accordingly, even if the arguments of the noticees are taken into consideration that the demand was to be raised by the Assistant/Deputy Commissioner of Customs who had assessed the Bills of Entry, I find that the Commissioner of



Customs (Import-I), NCH, Mumbai being the senior officer to the said Assistant/Deputy Commissioner of Customs was the proper officer in this case and the demand would be considered raised properly in terms of Section 5(2) of the Customs Act, 1962. I find that Circular no. 24/2011-Customs dated 31.05.2011 issued by the CBIC talks about the powers of the adjudication of the officers of Customs. In the said circular, it has been explicitly made clear that the cases where the amount of duty involved is above 50 Lakhs in the SCNs issued under Section 28 of the Customs Act, 1962, the proper authority to adjudicate the said cases would be Jurisdictional Commissioner of Customs. Further, subsequent to the order passed by the Hon'ble Supreme Court in case of Cannon India, amendments had been made in the Customs Act, 1962 vide Finance Act, 2022. Pursuance to these amendments in the act, Notification no. 29/2022-Customs dated 31.03.2022 was issued by CBIC with regard to the powers of adjudication. In this notification also, it has been mentioned that for cases where the duty is more than 50 Lakhs, the same may be adjudicated by the Principal Commissioner/Commissioner of Customs to whom the Assistant/Deputy Commissioner of Customs (who has been assigned the functions of assessment of duty) is the subordinate officer, in terms of Section 5(2) of the Customs Act, 1962. Hence, I find that the arguments of the Noticees that the SCN is without jurisdiction and unsustainable in law, does not hold any ground.

58. I find that the importer, M/s NCL vide their letter no. SIIB-NCH-MUM/190t/1206 dated 24.09.2021 has informed the payment of differential duty of Rs. 112,75,60,539/- for 84 nos. of 190 T dumpers in respect of M/s NCL vide Demand Draft nos. 931722 and 931723 both dated 24.09.2021 amounting to Rs. 50,00,00,000/- and Rs. 62,75,60,539/- respectively, which has been deposited in government treasury vide Challan no. 55 dated 27.09.2021. Scanned copies of the Challans are reproduced below:

OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I), SPECIAL INTELLIGENCE & INVESTIGATION BRANCH (IMPORT-I) 10 th FLOOR, NEW CUSTOM HOUSE, BALLARD ESTATE, MUMBAI - 400 001. TEL. NO. 2275 7499.	
ANNEXURE	
CHALLAN FORM FOR MAKING PAYMENT OF DUTY	
NAME & FULL ADDRESS OF THE IMPORTER	M/s. Northern Coalfields Ltd
ISC No.	AABCN4B84H
DE NO. AND DATE	3907456 DATED 11.05.2021 & 3906511 DATED 11.05.2021
DESCRIPTION OF GOODS	Caterpillar Make 190T Rear Dumper Model 789D
AMOUNT RECOVERED	Total Rs. 1,12,75,60,539/- (Rupees One billion twelve crore seventy five lakhs sixty thousand five hundred thirty nine only) Id partial differential duty amount fifty crore vide Demand Draft No. 931722 dated 24.09.2021 & partial duty differential duty amount sixty two crore seventy five lakhs sixty thousand five hundred and thirty nine only vide demand draft no. 931723 dated 24.09.2021 issued by State Bank of India. With no payment towards interest, fine & penalty.
F. NO. : GEN/IMP/Misc/68/2020-SIB-O/O-COMMR-CUS-IMP-I-ZONE-I-MUMBAI Dated : 27.09.2021	
To, The Cashier, Cash Section, NCH, Mumbai - 400001.	
Subject: - Recovery of partial differential duty - reg.	
Please deposit the above mentioned Demand Draft of M/s Northern Coalfields Ltd in the Government Treasury towards the recovery of partial differential duty only of Rs. 1,12,75,60,539/- in respect of Caterpillar make 190T Rear Dumper Model 789D.	
 Somendra Kumar IO/SIB(Import) NCH, Mumbai	

59. I find that the out of the contracted 84 dumpers, 50 190T dumper had already been cleared before the investigation. Further, on the request of the importer competent adjudicating authority granted the permission for provisional release of 34 190T dumpers imported vide 34 Bills of Entry and seized by the investigating agency, after submission of indemnity bond equal to the value of the seized goods and Bank Guarantee amounting to Rs. 44,82,24,630/-. The details of the Bank Guarantees are as tabulated below:

Sr. No.	Bill of Entry no. and date	Bank Guarantee amount (in Rs.)
1.	9284011, 9284020, 9284056, 9284063, 9284073, 9284075, 9284079 and 9284087, all dated 23.10.2020	10,58,78,920/-
2.	2190772, 2190860, 2190888, 2191115, 2191250, 2191355, 2191409, 2191493 all dated 31.12.2020; 2641738, 2641755, 2641786, 2641804, 2641805, 2642117 all dated 05.02.2021; 2967221, 2967224, 2967276, 2967278 all dated 01.03.2021	23,71,63,241/-
3.	3387131, 3387385, 3387841, 3387842 all dated 01.04.2021; 3907456, 3908511 both dated 11.05.2021; 4112486, 4112662 both dated 28.05.2021	10,51,82,469/-

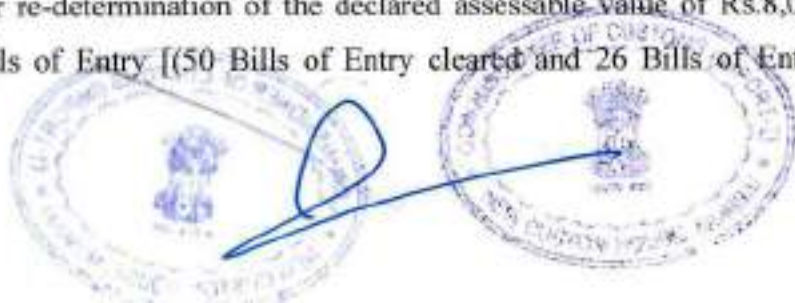
ORDER

60. In view of the above, I pass the following Order:

60.1 I reject the benefit claimed @15% BCD under Serial No: 524 (1) (a) Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019, for the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] and order for assessment of the said 84 Bills of Entry at higher rate of BCD @ 25% under Serial No. 524 (1) (b) of Notification No: 50/2017 dated 30.06.2017 as amended by Notification No: 25/2019 dated 06.07.2019.

60.2 I order that erections and commissioning charges of Rs.30,00,000/- per unit is to be included in the declared assessable value of all 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] in line with Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.

60.3 I order for re-determination of the declared assessable value of Rs.8,00,82,42,472/- in respect of 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally



released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] to Rs.8,26,02,42,472.10, under Rule 10 (1) (e) of CVR, 2007 read with Section 14 of the Customs Act, 1962.

60.4 I confirm the demand and order for recovery of the differential duty of total Rs.128,68,24,528/-, for the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)] under Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the said Act. I appropriate the duty of Rs. 112,75,60,539/- for 84 nos. of 190 T dumpers paid by the importer after the issuance of the Show Cause Notices towards the recovery of the confirmed differential duty as above.

60.5 I order for confiscation of the goods covered under 84 Bills of Entry [(50 Bills of Entry cleared and 26 Bills of Entry provisionally released, as per Annexure-I of SCN dated 27.05.2021) & (8 Bills of Entry provisionally released, as mentioned in Annexure – I of SCN dated 08.07.2021)], having re-determined assessable value of Rs 8,26,02,42,472.10 under Section 111(m) of the Customs Act, 1962. However, I give an option to the importer to redeem the above said goods on payment of Redemption Fine of Rs. 6,00,00,000/- (Rupees Six Crores only) under Section 125 of the Customs Act, 1962.

60.6 I impose a penalty equal to the short paid duty and interest upon the importer, M/s NCL, under Section 114A of the Customs Act, 1962, provided that where such duty and interest, is paid within thirty days from the date of assessment, the amount of penalty liable to be paid under this section shall be twenty-five percent of the duty or interest, as the case may be, so determined. The benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days.

60.7 I impose penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s. Northern Coalfields Limited under Section 114AA of the Customs Act, 1962.

60.8 I order encashment of the Bank Guarantees deposited for the total amount of Rs.34,30,42,161/- submitted at the time of provisional release of the goods covered under 26 BOE'S (as detailed in para 1 and Table- II above) and Rs. 10,51,82,469/- submitted at the time of provisional release of the goods covered under 08 Bills of Entry (as detailed in Table – III above), towards the duty, interest, redemption fine and penalty imposed on the importer, M/s NCL.

60.9 I impose penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s GMMCO Ltd, Kolkata under Section 112 (a) of the Customs Act, 1962 for their act of omission and commission in mis-declaring the goods, rendering the goods liable for confiscation under Section 111 (m) of the Customs Act 1962.



60.10 I impose a penalty of Rs. 6,00,00,000/- (Rupees Six Crores only) on M/s GMMCO Ltd, Kolkata under Section 114AA of the Customs Act, 1962.

61. This order is issued without prejudice to any other action that may be taken against the Noticee or persons or imported goods under the provisions of the Customs Act 1962, or any other law for the time being in force India.



Manoj Kumar Kedia
25/5/2022

(मनोज कुमार केडिया)
(Manoj Kumar Kedia)

आयुक्तसीमाशुल्क(आयात-I),

Commissioner of Customs (Import-I),

नवीनसीमाशुल्कभवन, मुंबई

New Custom House, Mumbai

To,

1. M/s. Northern Coalfields Limited., Morwa, Singrauli, Madhya Pradesh-486889.
2. M/s Coal India Limited, Coal Bhawan, Premise-No:04 MAR, Plot-No-AF-III, ActionArea-1A, Newtown, Rajarhat, Kolkata-700156.
3. M/s. GMMCO Ltd., 11th Floor, 9/1 R. N. Mukherjee Road, Kolkata – 700078.

Copy to:

1. Chief Commissioner of Customs, Mumbai Zone-1, New Customs House, Mumbai.
2. Deputy Commissioner of Customs, SIIB (I), New Custom House, Mumbai.
3. Central Economic Intelligence Bureau, Janpath Bhavan, B-Wing, 6th Floor, New Delhi - 110001.
4. Deputy Commissioner of Customs, Group VB, New Custom House, Mumbai.
5. Office copy.