OFFICE OF THE COMMISSIONER OF CUSTOMS (NS-V)
सीमाशुल्कआयुक्त (एनएस - V) काकार्यालय
JAWAHARLAL NEHRU CUSTOM HOUSE, NHAVA SHEVA,
जवाहरलालनेहरुसीमाशुल्कभवन, न्हावाशेवा,
TALUKA – URAN, DISTRICT - RAIGAD, MAHARASHTRA -400707
तालुका - उरण, जिला - रायगढ़ , महाराष्ट्र 400707

DIN – 20250978NX0000212386 **Date of Order:11.09.2025**

F. No. S/10-113/2024-25/COMMR/NS-VA/CAC/NS-V/JNCH **Date of Issue: 11.09.2025**

SCN No.:1096/2024-25/COMMR/GR.VA/CAC/JNCH

SCN Date: 19.09.2024

Passed by: Sh. Anil Ramteke

Commissioner of Customs, NS-V, JNCH

Order No:191/2025-26/COMMR/NS-V/CAC/JNCH

Name of Noticees: M/s. APPLE INDIA PRIVATE LIMITED(IEC-0796001839)

ORDER-IN-ORIGINAL
मूल - आदेश

1. The copy of this order in original is granted free of charge for the use of the person to whom it is issued.

1. इस आदेश की मूल प्रति की प्रतिलिपि जिस व्यक्ति को जारी की जाती है, उसके उपयोग के लिए नि:शुल्क दी जाती है।

2. Any Person aggrieved by this order can file an Appeal against this order to CESTAT, West Regional Bench, 34, P D'Mello Road, Masjid (East), Mumbai - 400009 addressed to the Assistant Registrar of the said Tribunal under Section 129 A of the Customs Act, 1962.

2. इस आदेश से व्यथित कोई भी व्यक्ति सीमाशुल्क अधिनियम 1962 की धारा 129 (ए) के तहत इस आदेश के विरुद्ध सी.ई.एस.टी.ए.टी., पश्चिमी प्रादेशिक न्यायपीठ (वेस्ट रीज़नल बेंच), 34, पी. डी'मेलो रोड, मस्जिद (पूर्व), मुंबई - 400009 को अपील कर सकता है, जो उक्त अधिकरण के सहायक रजिस्ट्रार को संबोधित होगी।

3. Main points in relation to filing an appeal:-

3. अपील दाखिल करने संबंधी मुख्य मुद्दे:-

Form - Form No. CA3 in quadruplicate and four copies of the order appealed against (at least one of which should be certified copy).

फार्म - सीए3, चार प्रतियों में तथा उस आदेश की चार प्रतियाँ, जिसके खिलाफ अपील की गयी है (इन चार प्रतियों में से कम से कम एक प्रति प्रमाणित होनी चाहिए).

Time Limit - Within 3 months from the date of communication of this order.
समय सीमा - इस आदेश की सूचना की तारीख से 3 महीने के भीतर

Fee -फीस-

(a) Rs. One Thousand - Where amount of duty & interest demanded & penalty imposed is Rs. 5 Lakh or less.

(क) एक हजार रुपय जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्ति की रकम 5 लाख रुपये या उस से कम है।

(b) Rs. Five Thousand - Where amount of duty & interest demanded & penalty imposed is more than Rs. 5 Lakh but not exceeding Rs. 50 Lakh.

(ख) पाँच हजार रुपये – जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्ति की रकम 5 लाख रुपये से अधिक परंतु 50 लाख रुपये से कम है।

(c) Rs. Ten Thousand - Where amount of duty & interest demanded & penalty imposed is more than Rs. 50 Lakh.

(ग) दस हजार रुपये – जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्ति की रकम 50 लाख रुपये से अधिक है।

Mode of Payment - A crossed Bank draft, in favor of the Asstt. Registrar, CESTAT, Mumbai payable at Mumbai from a nationalized Bank.

भुगतान की रीति – क्रॉस बैंक ड्राफ्ट, जो राष्ट्रीय कृत बैंक द्वारा सहायक रजिस्ट्रार, सी.ई.एस.टी.ए.टी., मुंबई के पक्ष में जारी किया गया हो तथा मुंबई में देय हो।

General - For the provision of law & from as referred to above & other related matters, Customs Act, 1962, Customs (Appeal) Rules, 1982, Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 may be referred.

सामान्य - विधि के उपबंधों के लिए तथा ऊपर यथा संदर्भित एवं अन्य संबंधित मामलों के लिए, सीमाशुल्क अधिनियम, 1962, सीमाशुल्क (अपील) नियम, 1982, सीमाशुल्क, उत्पाद शुल्क एवं सेवा कर अपील अधिकरण (प्रक्रिया) नियम, 1982 का संदर्भ लिया जाए।

4. Any person desirous of appealing against this order shall, pending the appeal, deposit 7.5% of duty demanded or 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.

4. इस आदेश के विरुद्ध अपील करने के लिए इच्छुक व्यक्ति अपील अनिर्णीत रहने तक उसमें माँगे गये शुल्क अथवा उद्गृहीत शास्ति का 7.5 % जमा करेगा और ऐसे भुगतान का प्रमाण प्रस्तुत करेगा, ऐसा न किये जाने पर अपील सीमाशुल्क अधिनियम, 1962 की धारा 129 E के उपबंधों की अनुपालना न किये जाने के लिए नामंजूर किये जाने की दायी होगी।

Subject: Adjudication of Show Cause Notice No. 1096/2024-25/COMMR/GR.VA/CAC/JNCH dated 19.09.2024 issued to M/s Apple India Private Limited (IEC-0796001839) – reg.

1. BRIEF FACTS OF THE CASE

1.1 It is stated in the Show Cause Notice (SCN) No. 1096/2024-25/COMMR/GR.VA/CAC/JNCH dated 19.09.2024 that Specific intelligence was developed by DRI, Chennai Zonal Unit (CZU) that certain importers were importing their respective branded "Smart Speakers" which are enabled by MIMO (Multiple Input Multiple Output) technology and claiming benefit under Sl.No.20 of Notification No.57/2017 (Customs) dated 30.06.2017 as amended by Notification No.02/2019 (Customs) dated 29.01.2019 though benefit of the said notification is not applicable for MIMO products.

1.2 Accordingly, DRI, Chennai Zonal Unit (CZU) has initiated investigation against M/s. Apple India Private Limited (hereafter referred to as M/s. AIPL) regarding the mis-classification and also admissibility of the notification benefit on the import of "Smart Speakers" through various ports as below:

	M/s AIPL
Products Imported	HomePod and HomePod Mini
CTH declared	85176290
Period of Import	2019-2021
Current Practice	The product HomePod is discontinued. The product "HomePod Mini" is classified under the tariff item "85176290" and benefit under the notification 57/2017 is being claimed.

1.3 Consequent to the initiation of investigation by DRI, CZU, M/s. AIPL vide letter dated 29.11.2021 had informed that they have adopted the classification of the product "HomePod" and "HomePod Mini" under the ITC (HS) tariff item "85176290" based on the decision of the Customs Authority for Advance Rulings (Mumbai) vide order CAAR/Mum/ARC/14/2021 dated 21.06.2021 for their product "HomePod".

1.4. M/s. AIPL vide their letter dated 20.12.2021 informed that Special Investigation and Intelligence Branch (SIIB), Air Cargo Complex, Mumbai Zone-III had taken up investigation in to their import of "HomePod" by wrongly availing benefit under Sl. No. 20 of the Customs Notification No. 57/2017 (Pertaining to the non-availability of the benefit under the said notification to MIMO products); that they have made a payment of differential duty (under protest) of Rs. 2,01,59,541/- at Mumbai Nhava Seva (INNSA1), of Rs. 2,11,43,371/- at Air Cargo, Bombay (INBOM4) and Rs.3560/-at Hyderabad Air Cargo Complex (INHYDA) on the import of "Homepod" Port for the period 2019-21 for unduly claiming notification benefit under S1.No 20 of Notification 57/2017- dated 30/06/2017. Also, it was informed by M/s. APIL that

the product "Homepod mini" does not support MIMO. M/s APIL while agreeing with DRI, CZU on the issue of notification benefit under Sl. No 20 of Notification 57/2017- dated 30/06/2017 for the product "Homepod", are contesting the classification of the said product under the CTH "85182200" in view of the Advance Ruling which is supporting their declaration under the CTH "85176290".

1.5 Based on the findings of DRI, CZU details of past imports data of "HOMEPOD MINI" and "HOMEPOD" of the importer were thoroughly examined from ICES 1.5 System and it was observed that the importer cleared the Bills of Entries in INSAA1 as detailed in Annexure 1 for the period 01 Jan 2019 to 31st Dec 2021 and in Annexure II from 01 Jan 2022 to 31st Jul 2024 with wrongful availment of lower rate of 10% BCD, Sl. No. 20 of Notification No. 57/2017-Customs dated June 30th , 2017 . The total assessable value and differential duty has been calculated as detailed in Annexure I and II is elaborated below-

Period	Total Assessable Value	Differential Duty
01.01.2019-31.12.2021	**26,98,65,817.86 /-**	**3,50,28,582.93 /-**
01.01.2022-31.07.2024	**13,47,68,717.27 /-**	**1,74,92,979.51 /-**
Total	**40,46,34,535.13 /-**	**5,25,21,562.44 /-**

1.6 The extracts of the following relevant provisions of the Customs Act, 1962; for the time being in force, were mentioned in the subject SCN. The same are not reproduced in this Order-in-Original for the sake of brevity:

- Section 17 - Assessment of duty.
- Section 28(4) - Notice for payment of duties, interest etc.
- Section 46 - Entry of goods on importation.
- Section 111(m) and 111(o)- Confiscation of improperly imported goods, etc.
- Section 112- Penalty for improper importation of goods etc.
- Section 114A - Penalty for short-levy or non-levy of duty in certain cases.
- Section 114AA - Penalty for use of false and incorrect material.

1.7 Further, as per the SCN consequent upon amendment to the Section 17 of the Customs Act, 1962 vide Finance Act, 2011, 'Self-Assessment' has been introduced in Customs. Section 17 of the Customs Act, effective from 08.04.2011, provides for self-assessment of duty on imported goods by the importer himself by filing a Bill of Entry, in the electronic form. Section 46 of the Customs Act, 1962 makes it mandatory for the importer to make entry for the imported goods by presenting a Bill of Entry electronically to the proper officer. As per Regulation 4 of the Bill of Entry (Electronic Declaration) Regulation, 2011 (issued under Section 157 read with Section 46 of the Customs Act, 1962) the Bill of Entry shall be deemed to have been filed and self-assessment of duty completed when, after entry of the electronic declaration (which is defined as particulars relating to the imported goods that are entered in the Indian Customs

Electronic Data Interchange System) in the Indian Customs Electronic Data Interchange System either through ICEGAT or by way of data entry thorough the Service Centre. Thus, under self-assessment, it is the importer who has to ensure that he declares the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry. Self-Assessment can result in assured facilitation for compliant importers. However, delinquent importers would face penal action on account of wrong self-assessment made with intend to evade duty or circumvent compliance of conditions of notification, Foreign Trade Policy or any other provisions under the Customs Act, 1962 or the Allied Acts

1.8. It, therefore, appeared that:

A. M/s. Apple India Private Limited had wrongly availed the concessional rate of BCD of 10% under Sl. No. 20 of Notification No. 57/2017-Customs dated June 30, 2017 (in lieu of 20% BCD) for "HOMEPOD" & "HOMEPOD MINI" imported vide the list of Bills of Entry mentioned in Annexure I and Annexure II. Considering "HOMEPOD" & "HOMEPOD MINI" are MIMO (Multiple Input Multiple output)-enabled devices and the subject notification benefit is not applicable to MIMO (Multiple Input Multiple output)-enabled devices.

B. M/s Apple India Pvt Ltd Imported "HOMEPOD" and "HOMEPOD MINI" vide Bills of Entry mentioned in Annexure I and Annexure II, having assessable value Rs 40,46,34,535.13/-, has wrongly availed the concessional rate of BCD @ 10% under Sl. No. 20 of Notification No. 57/2017- Customs dated June 30, 2017. Therefore, the importer has contravened the provisions of section 17, 46 of the Customs Act, 1962 and Regulation 4 of the Bill of Entry (Electronic Declaration) Regulation, 2011.

C. From the above discussion, it appears that M/s Apple India Pvt Ltd, by acts of omission and commission with an intention to evade payment of appropriate Customs duties, as discussed above, have rendered the impugned goods imported as mentioned in Annexure-I & II to this notice, liable to confiscation under Section 111(m) of the Customs Act, 1962.

D. From the above discussions it appears that in order to evade the legitimate duty of Customs on the imported goods, the importer has deliberately claimed the undue benefit of the Sl. No. 20 of Notification No. 57/2017- Customs dated June 30, 2017 and paid the short-levied Customs Duty. Accordingly, the action of the Importer to avail the undue benefit of said notification (which is not applicable to subject Products) appears to be an act of wilful mis-statement and suppression of facts and the improper action of the importer warrants action for recovery of duty under section 28 (4) of the Customs Act 1962.

E. M/s Apple India Pvt Ltd by wrongly availing the concessional rate of BCD of 10% under Sl. No. 20 of Notification No. 57/2017-Customs dated June 30, 2017 has short paid Customs duty of Rs 5,25,21,562.44/- on the imports of "HOMEPOD" and "HOMEPOD MINI" as mentioned in the Annexure I and Annexure II. Therefore, this differential duty is liable to be recovered from M/s Apple India Pvt Ltd under Section 28(4) of the

Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962.

F. Therefore, M/s Apple India Pvt Ltd appears to have rendered themselves liable for penalty under Section 112 (a) (ii) and/or 114A of the Customs Act, 1962. Further, by the wilful misstated declaration made under Section 46(4) of the Customs Act, 1962, in the bills of entry as detailed in Annexure-I & II to this SCN, M/s Apple India Pvt Ltd have also rendered themselves liable to penalty under section 114AA of the Customs Act 1962.

1.9 In view of the above, vide Show Cause Notice No. 1096/2024-25/COMMR/GR.VA/CAC/ JNCH dated 19.09.2024, M/s. Apple India Private Limited (IEC-0796001839), was called upon to show cause to the Commissioner of Customs (NS-V), Jawaharlal Nehru Custom House, Nhava Sheva (the Adjudicating Authority), as to why:

a) Availment of concessional rate of BCD of 10% by M/s. Apple India Private Limited (IEC No. 0796001839) under Sl. No. 20 of Notification No. 57/2017-Customs dated June 30, 2017 (in lieu of 20% BCD) considering "HOMEPOD" & "HOMEPOD MINI" as MIMO (Multiple Input Multiple output)-enabled device should not be rejected and all Bills of Entry mentioned in Annexure I and Annexure II should not be re-assessed with BCD rate at 20% under Notification No. 03/2021-Cus dated 01.02.2021.

b) The differential duty payment (under protest) amounting to Rs. 2,01,59,541/- made by M/s. Apple India Private Limited (IEC No. 0796001839) should not be appropriated.

c) The goods "HOMEPOD" and "HOMEPOD MINI" imported vide ,Bill of Entries mentioned in Annexure I and Annexure II having total assessable value amounting to Rs.40,46,34,535.13/- (for the period w.e.f. 01.01.2019 to 31.07.2024) should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.

d) Short levy of Customs Duty amounting to Rs. 5,25,21,562.44/- due to wrong availment of benefit of Sl. No. 20 of Notification No. 57/2017-Customs dated June 30th, 2017 for the goods "HOMEPOD" and "HOMEPOD MINI" imported by M/s. Apple India private Limited (IEC No. 0796001839) should not be recovered under Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962 in respect of Bill of Entries mentioned in Annexure I and Annexure II.

e) Penalty should not be imposed on the importer M/s. Apple India private Limited (IEC No. 0796001839) under Section 112(a) &/or 114A of the Customs Act, 1962.

f) Penalty should not be imposed on the importer M/s. Apple India private Limited (IEC No. 0796001839) under Section 114AA of the Customs Act, 1962

2. WRITTEN SUBMISSION OF THE NOTICEES

2.1 The Noticee, vide their letter dated 29.10.2024 gave written reply to the subject SCN. Vide the above reply, they denied all the allegations made in the SCN and made submissions *interalia* as under:

2.1.1. Vagueness of the Show Cause Notice(SCN)

The importer argued that the SCN is vague and lacks specific details and submitted that the allegations focus on ineligibility of concessional duty due to MIMO technology in HomePod/HomePod Mini, but the SCN's discussion is mainly about classification issues, without evidence of the products actually being MIMO-enabled. Importer also Cited some Supreme Court precedents stressing that vague SCN deprives noticee of a proper opportunity to respond and are thus liable to be quashed.

2.1.2 Eligibility for Concessional Duty Pre-Amendment

For imports from January 2019 to January 2021, the importer maintained that concessional BCD under Notification 57/2017-Cus was available, as the pre-amended notification denied benefit only to products with both MIMO and LTE technologies (conjunctive interpretation of "and").

Period	**S.No. 20 of NN 57/2017**	
January 1, 2019 to February 1,2021	CTH 8517 62 90	All goods other than the following goods, namely:- "..... (h) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products"
February 2, 2021 onwards	CTH 8517 62 90	All goods other than the following goods, namely:- "..... (h) Multiple Input/Multiple Output (MIMO): (i) Long Term Evolution (LTE) products"

Supporting case law was presented (Ingram Micro, Redington) establishing that, before the 2021 amendment, only products featuring both MIMO and LTE were excluded, not those with just MIMO or just LTE.

2.1.3. Correct Classification and Binding Advance Ruling (CAAR)

The importer in their submission emphasized that HomePod and HomePod Mini are correctly classified under CTH 8517 62 90, as supported by technical documentation, Harmonized System Notes, and a binding Advance Ruling from the Customs Authority for Advance Rulings (CAAR) Mumbai. The CAAR's ruling was agreed upon by multiple Customs Commissionerates and remains binding on both the applicant and Customs unless appealed, which had not occurred.

2.1.4. Judicial Precedent: Amazon Echo Case

The importer referenced a Delhi High Court judgment confirming that similar products (Amazon Echo, Amazon Echo Dot) are classifiable under 8517 62 90 and eligible for the same concessional rate, reinforcing the importer's stand.

2.1.5. No Suppression of Willful Misstatement

The importer argues that there was full disclosure to customs, random checks were done, and the BOEs in question were already examined and cleared. Deposits of differential duty were made "under protest" in good faith rather than as admission of liability.

It is argued that mistakes in self-assessment or classification are not equivalent to suppression or willful misstatement under Section 28(4), precluding extended limitation.

2.1.6. Invalidity of Supplier's Declared Classification

The importer contended that classification assigned by a supplier (even a related Apple group entity) on its website is not binding for Indian customs purposes.

Indian law assigns the responsibility of classification to the importer, to be assessed on merits, not external identification.

2.1.7. No Double Proceedings or Overlapping Demand

The importer highlighted multiple ongoing or past proceedings (multiple SCNs from different authorities) on overlapping periods/transactions. Citing legal precedents, it is submitted that two SCNs cannot be issued for the same issue and period, making the current SCN unsustainable for duplication.

2.1.8. No Confiscation or Penalty Warranted

Section 111(m) (confiscation) and related penalty provisions (112(a), 114A, 114AA) are not applicable because there was no deliberate misdeclaration or suppression. Claims of incorrect classification do not automatically attract penalty where full documentation and transparency were maintained.

2.1.9. Limitation- Exclusion of Extended Period

As the issue is one of interpretation (supported by advance ruling/judgments), and not wilful suppression, the extended limitation period under Section 28(4) is not invokable. Multiple cited cases reiterate that honest classification disputes or errors do not meet the threshold for extended limitation.

2.1.10. No Interest or Further Demand Justified

Since duty demand is not sustainable, the associated interest under Section 28AA cannot be levied.The importer also seeks refund of duty deposited under protest for periods and items where eligibility for concessional rate is not in dispute.

2.1.11 Reliefs sought by importer

- Quashing of the impugned SCN for vagueness, lack of merit, and duplication;

- Recognition of eligibility for concessional duty on HomePod (pre-amendment) and HomePod Mini (at all times);
- Setting aside demands, penalties, and confiscation proceedings;
- Closure of proceedings and sanction of refund for duty paid under protest.

3. RECORD OF PERSONAL HEARINGS

There is one Noticee in the subject SCN viz. M/s Apple India Pvt. Ltd. In compliance of provisions of Section 28(8) read with Section 122A of the Customs Act, 1962 and in terms of the principle of natural justice, the Noticees were granted opportunity of Personal Hearing (PH). A date-wise record of personal hearings is as under:

3.1 An opportunity for PH was granted to the Noticees on 23.07.2025. However, the Noticees did not attend the PH.

3.2 In view of the above, another opportunity for PH was granted to the Noticees on 12.08.2025. Availing the said opportunity of PH, authorised representative of the Noticees, Mr Gautam Khattar, Mr Arman Khan and MS. Amisha Bhasin, appeared before the Adjudicating Authority on 12.08.2025 on behalf of the Noticee, M/s Apple India Pvt. Ltd. During the PH, they made following submissions:

(i) That they they have rightly classified the goods and rightly claimed the notification benefit. They further added that CAAR, Mumbai has already issued advance ruling for classification of the impugned goods, wherein, it has been held that the Apple HomePods are Classifiable under CTI 85176290. This is also supported by the Delhi High Court decision in Amazon Echo Dot.

(ii) Further, relying on the Delhi High Court decision in Ingram and Redington they stated that the HomePod does not fulfil both the criterion of MIMO 'and' LTE functionality accordingly, they are eligible for the notification benefit.

(iii) That HomePod Mini functions only on SISO technology and hence eligible for claiming benefit under the notification. This fact has been established by the various test reports including IIT Delhi which has been provided on record by the company.

(iv) That section 28(4) cannot be invoked as there is no Collusion, wilful mis-statement or suppression of facts on their part.

4. DISCUSSION AND FINDINGS

4.1 I have carefully gone through the subject Show Cause Notice (SCN) and its enclosures, material on record and facts of the case, as well as oral and written submissions made by the Noticees. Accordingly, I proceed to decide the case on merit.

4.2 In compliance to provisions of Section 28(8) and Section 122A of the Customs Act, 1962 and in terms of the principles of natural justice, opportunity for Personal Hearing (PH) was granted to the Noticee on 23.07.2025 and 12.08.2025. Availing the said opportunity, the authorised representatives of the Noticee attended the PH on 12.08.2025. Having complied with the requirement of the principle of natural justice, I proceed to decide the case on merits, bearing in mind the submission / contention made by the Noticee.

4.3 The fact of the matter is that a Show Cause Notice No. 341/2024-25/Commr/Gr.VA/NS-V/CAC/JNCH dated 19.09.2024 was issued to the Noticee, M/s. Apple India Private Limited (IEC No. 0796001839), regarding wrong availment of exemption of BCD under S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017 as amended on import of goods having description 'HomePod' and 'HomePod Mini'. It is alleged in the SCN that the Noticee had imported 'HomePod' and 'HomePod Mini' and had wrongly availed BCD exemption benefit under S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017 as amended as the said exemption is not available for MIMO devices. Thus, the SCN proposes re-assessment of the Bills of Entry without benefit of exemption Notification No. 57/2017-Cus. dtd. 30.06.2017 as amended; recovery of duty to the tune of Rs. 5,25,21,562.44/- (From hereon rounded off to Rs. 5,25,21,563/-) having total assessable value Rs.40,46,34,535.13/- (From hereon rounded off to Rs. 40,46,34,536/-) as detailed in Annexure- I & II invoking extended period under Section 28(4) of the Customs Act, 1962, along with applicable interest in terms of Section 28AA of the Customs Act, 1962. The Show Cause Notice also proposes confiscation of the offending imported goods under Section 111(m) of the Customs Act, 1962; imposition of penalty under Section 112(a)/114A ibid; appropriation of differential duty paid by the importer.

4.4 On a careful perusal of the Show Cause Notice and case records, I find that following main issues are involved in this case which are required to be decided

I. Whether the impugned goods covered by Bills of Entry as mentioned in Annexure-I & II to the subject SCN, should be re-assessed without benefit of exemption Notification No. 57/2017-Cus. dtd. 30.06.2017 as amended

II. Whether the Differential duty amount of **Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only)** should be demanded under Section 28(4) of the Customs Act, 1962 along with applicable interest as per Section28AA of the Customs Act, 1962

III. Whether the impugned goods covered under Bills of Entry as detailed in Annexure-I & II to the subject SCN, having total declared assessable value of Rs. 40,46,34,536/- (Rupees Forty Crore Forty Six Lakh Thirty Four Thousand Five Hundred and Thirty Six only) should be held liable for confiscation under 111(m) of the Customs Act, 1962.

IV. Whether penalty should be imposed on the importer M/s. Apple India Private Limited (IEC No. 0796001839) under Section 112(a)/114A of the Customs Act, 1962 for the acts of omissions and/or commissions, as stated above.

V. Whether penalty should be imposed on the importer under Section 114AA of the Customs Act, 1962.

4.5 After having identified and framed the main issues to be decided, I now proceed to decide the substantive issues raised in the SCN by examining each of the issues individually for detailed analysis based on the facts and circumstances mentioned in the SCN; provision of the Customs Act, 1962; nuances of various judicial pronouncements, as well as Noticee's oral and written submissions and documents / evidences available on record.

4.6 Whether the impugned goods covered by Bills of Entry as mentioned in Annexure-I & II to the subject SCN, should be re-assessed without benefit of exemption Notification No. 57/2017-Cus. dtd. 30.06.2017 as amended.

4.6.1 I note that the Noticee, M/s. Apple India Private Limited (IEC No. 0796001839) vide the impugned Bills of Entry as detailed in Annexure-I & II to the subject SCN, had imported goods having description 'HomePod' and 'HomePod Mini'. The Noticee had classified the said goods under the CTH 85176290 & paid @10% BCD+ 10% SWS (10% of BCD) + 18% IGST) by availing benefit of S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017. However, as per the SCN, the imported goods are not eligible for the subject notification benefit and hence, attracts duty @ 20% BCD + 10% SWS (10% of BC D) + 18% IGST.

4.6.2 The Customs Tariff Heading 8517 covers the goods of broad description *"TELEPHONE SETS , *SMART PHONES AND OTHER TELEPHONES FOR CELLULAR NETWORKS OR FOR OTHER WIRELESS NETWORKS: OTHER APPARATUS FOR THE TRANSMISSION OR RECEPTION OF VICE, IMAGES OR OTHER DATA , INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR WIDE AREA NETWORK), OTHER THAN TRANSMISSION OR RECEPTION APPARATUS OF HEADING 8443, 8525, 8527 OR 8528 ".* The relevant entries of CTH 8517 are as under:

	-	*Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):*
8517 61 00	--	*Base stations*
8517 62	--	*Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:*

8517 62 90	---	*Other*

I find that the impugned goods have been classified under residual entry '*Other*' available under sub-heading 8517.62. Even the SCN does not contest the classification done by the Noticee. Thus, I find that in the instant case there is no dispute regarding classification of the goods imported by the Noticee under CTI 85176290.

4.6.3 I find that in the present case, the pivotal issue around which the entire case revolves is the eligibility of the impugned imported goods declared as 'HomePod' and 'HomePod Mini' to BCD exemption under S. No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017. As per the SCN, 'HomePod' and 'HomePod Mini' are MIMO enabled devices and hence are excluded from S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017, therefore, the same are not eligible for BCD exemption under aforesaid Notification Sr. No. Relevant portion of the subject notification is reproduced below:

20	8517 62 90 or 8517 69 90	All goods other than the following goods, namely: - (a) Wrist wearable devices [(commonly known as smart watches) and other smart wearable devices including smart rings, shoulder bands, neck bands or ankle bands; (b) Optical transport equipment; (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS); (d) Optical Transport Network (OTN) products; (e) IP Radios; (f) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers; (g) Packet Transport Node (PTN) products, Multiprotocol Label Switching- Transport Profile (MPLS-TP) products; (h) Multiple Input/Multiple Output (MIMO) products; (i) Long Term Evolution (LTE) products]	10%	-]

It is evident from the text of the notification that all the goods falling under HSN 85176290 or 85176990 will attracts BCD@10% except for the goods mentioned from (a) to (g) of the above table.

4.6.4 Further, it is also noticed that nowhere in their submission the noticee has disputed the fact that the device 'HomePod" does not work on MIMO technology. W.r.t. 'HomePod Mini' Noticee have submitted that it works of SISO technology and not on MIMO and thus, the goods are eligible for the said notification benefit. In this regard, the noticee undertook a technical test of its product HomePod Mini and submitted copies of the test reports issued by the following testing agencies-

a. M/s UL India Private Limited, Banglore, India
b. M/s UL VS Ltd., Basingstoke, England
c. Indian Institute of Technology, Delhi

4.6.4.1 Extracts from the technical report of IIT Delhi are reproduced below

- If a device has two or more different technologies (like WiFi, LTE etc.) and each of those communication pipelines have individual single antennas, the devices does not qualify as a MIMO capable device.

- Three antennas are integrated into the device. One shared antenna for WiFi and Bluetooth, one for Thread and one for UWB.

- Technical Opinion of MIMO: By National Test House, Mumbai:

Test Method: Sample was setup and interfaced with local home WiFi and connected with different devices through Bluetooth and WiFi.

Test Result: The sample observed to be connecting with multiple (Apple make like iphone, ipod, imac etc. onlywith Homepod software) devices. From these observations, the sample was considered to be "Multiple Input, Multiple Output enabled" device *.

* *Note: "Multiple Input, Multiple Output" capability is not same as Connection Capability to Multiple Devies. Therefore, above result and conclusion are NOT correct.*

- As per the PCB CAD Diagram and Block Diagram, the device has only one antenna for WiFi and only one corresponding transceiver chain, which is also shared with Bluetooth. The hardware is single antenna only and cannot support MIMO.

- Analysis and evaluation of the product done based on Lab test results and manuals confirm that it is a SISO product. It will not be classified as a MIMO product.

4.6.5 As per the internet, the basic definition of MIMO and SISO technology are reproduced below:

SISO (Single Input Single Output) and MIMO (Multiple Input Multiple Output) represent two fundamental approaches to wireless communication, where SISO uses a single antenna at both transmitter and receiver ends for straightforward one-to-one signal transmission, while MIMO employs multiple antennas on both sides to enable simultaneous transmission of multiple data streams. The key distinction lies in their capability: SISO systems transmit one data stream at a time with limited throughput (typically around 20-32.5 Mbps), making them simpler, less expensive, and suitable for basic applications like radio and GSM. In contrast, MIMO systems can achieve significantly higher data rates (up to double the throughput) by utilizing spatial multiplexing, space-time block coding, and antenna diversity techniques that exploit multipath signals and provide better signal-to-noise ratios. While SISO remains cost-effective and compatible with legacy systems, MIMO has become essential for modern wireless standards like Wi-Fi 802.11n, LTE, and 5G, offering superior spectral efficiency, reliability, and performance at the cost of increased complexity and power consumption.

4.6.6 I find that the product HomePod Mini neither acts as a cellular device not has an inbuilt model. They connect to the Internet through WiFi connection which enables them to send and receive information for performing specific functions. Further, on going through the technical specification of the product 'HomePod Mini' on the website of the noticee viz. **https://www.apple.com/in/homepod-mini/specs/,** it is noticed that the subject product is 802.11n Wi-Fi standard compliant.

IEEE 802.11n is a wireless networking standard that increases wireless local area network (WLAN) speed, improves reliability, and extends the range of wireless transmissions. It is an amendment to IEEE 802.11 and was published in October 2009. This standard introduced the use of **MIMO (multiple-input, multiple-output)** in Wi-Fi to increase the data rate in home and business WLAN networks.

4.6.7 MIMO based WiFi devices use the same traditional network protocols that non-MIMO routers/ access points do. However, MIMO multiplies the capacity of a radio link using multiple transmission and receiving antennas to exploit multipath propagation. These days, MIMO has become an essential element of wireless communication standards including IEEE 802.11n (WiFi 4), IEEE 802.11ac (WiFi 5) etc. MIMO specifically refers to a practical technique for sending and receiving more than one data signal simultaneously over the same radio channel by exploiting multipath propagation.

4.6.8 As per the technical specification of the product 'HomePod Mini', the subject device demonstrates MIMO characteristics through simlataneous operation of :

- WiFi 802.11n(2.4GHz/ 5GHz range)
- Bluetooth 5.0 (2.4GHz range)
- Ultra Wideband (6-8.5GHz range)
- Thread networking(2.4 GHz range)

Such simultaneous multi-protocol operation requires multiple antenna system and MIMO architecture.

4.6.9 Further, as per the study paper issued by Ministry of Telecommunication on Multiple-Input Multiple-Output (MIMO) Technology, MIMO technology is a wireless technology that uses multiple transmitters and receivers to transfer more data at the same time. Also, nowhere it is mentioned that "*If a device has two or more different technologies (like WiFi, LTE etc.) and each of those communication pipelines have individual single antennas, the devices does not qualify as a MIMO capable device*" as concluded in the test report of IIT Delhi. Hence, I conclude that to fall under the definition of MIMO device for the sake of notification No, 57/2017, the subject goods needs to have more than one antenna (i.e. transmitter and receiver). As per the product specification of the goods & the test report of IIT Delhi, the subject goods have more than one antenna. Accordingly, the product i.e. HomePod Mini is a MIMO device.

4.6.10 For the Bills of Entry prior to February 2021, Importer has placed reliance on a recent case of PCC(Import) Vs. Go IP Global Services Pvt. Ltd. wherein the hon'ble tribunal held that the term 'and' used in the exclusion clause has to be read conjunctively and hence, the goods excluded by the exclusion clause are those which have bot MIMO and LTE technology. I find that the department has filed an appeal against the said order. As the said order has not attained finality, hence it cannot be relied upon until both the parties agree and accepts the order.

4.6.11 In view of the above, I am of the opinion that both the devices 'HomePod' and 'HomePod Mini' are MIMO enabled and accordingly, I hold that the subject goods are excluded from benefit of S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017. Accordingly, I hold that the Bills of Entry covered under the subject SCN be re-assessed without benefit of exemption Notification No. 57/2017-Cus. dtd. 30.06.2017.

4.7 Whether the Differential duty amount of Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only) should be demanded under Section 28(4) of the Customs Act, 1962 along with applicable interest as per Section28AA of the Customs Act, 1962

4.7.1 I have already held in the foregoing paras that the S.No. 20 Notification No. 57/2017-Cus. dtd. 30.06.2017 prescribing concessional BCD @ 10% is not applicable to the impugned goods. Thus, after having determined the non-admissibility of the duty exemption notification, it is imperative to determine whether the demand of differential Customs duty as per the provisions of Section 28(4) of the Customs Act, 1962, alongwith applicable interest under Section 28AA ibid, in the subject SCN is sustainable or otherwise. The relevant legal provision is as under:

> ***SECTION 28(4) of the Customs Act, 1962.***
> ***Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded.*** –
> *(4) 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.*

4.7.2 The Noticee has submitted that they had correctly declared the imported goods in the import documents, thus, there was no mis-statement or suppression of facts on their part. The Noticee has further argued that larger period of limitation is not attracted in the case as there is no suppression of facts or wilful mis-statement by them.

4.7.3 I have determined in the preceding paras that the impugned imported goods are not eligible for notification benefit of S.No. 20 of Notification No. 57/2017-Cus. dtd. 30.06.2017 as the subject goods are MIMO enabled. It is seen that the noticee is a reputed Manufacturer/

Exporter/ Seller/ Importer of the impugned goods and other devices. This implies that the Noticee was very well aware of the true nature, structural design and functioning of the impugned goods. However, to claim the notification benefit they declared their product as product based on SISO technology whereas as per their own website the subject goods is 802.11n Wi-Fi standard compliant, which is a MIMO technology. From the above, it is evident that at the time of filing of the Bills of Entry, the Noticee had fraudulently claimed the benefit of exemption Notification with a fraudulent intention to defraud government by paying lesser duty. As the Noticee has paid the duty at a lower rate than what was legitimately payable, the differential duty so not paid is liable to be recovered from them.

4.7.4 In terms of Section 46(4) of the Customs Act, 1962, the importer is required to make a true and correct declaration in the Bills of Entry submitted for assessment of customs duty. In the instant case, I find that the goods cleared vide the Bills of Entry mentioned in Annexure- I & II to SCN were cleared by them by wilfully and deliberately indulging in mis-declaration of goods by self-assessing under CTH 85176290 and paying BCD @10% by claiming the notification benefit of S.No. 20 of Notification No. 57/2017-Cus. dtd. 30.06.2017 only with the intent to evade duty by wrongfully availing the notification benefit claiming incorrect heading instead of correct CTH 39269099 wherein BCD @15% was applicable.As the Noticee has wrongfully availed the notification benefit while filing the Bill of entry for the the impugned goods and evaded the payment of the applicable duty thereon on the date of importation, the Noticee can only come clean of its liability by way of payment of duty not paid.

4.7.5 In view of the above, I find that the Noticee had evaded correct customs duty by wrongfully availing the notification benefit for the imported product at the time of filing of the Bills of Entry. By resorting to this deliberate and wilful mis-classification of the goods, the noticee has not paid the correctly leviable duty on the imported goods resulting in loss to the government exchequer. Thus, this wilful and deliberate act was done with the clear intention to claim ineligible lower rate of duty.

4.7.6 Consequent upon amendment to the Section 17 of the Customs Act, 1962 vide Finance Act, 2011, 'Self-assessment' has been introduced in Customs clearance. Under self-assessment, it is the importer who has to ensure that he declares the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry. Thus, with the introduction of self-assessment by amendments to Section 17, it is the added and enhanced responsibility of the importer, to declare the correct description, value, notification, etc. and to correctly classify, determine and pay the duty applicable in respect of the imported goods. In the instant case, as explained in paras supra, the importer has wilfully and wrongfully availed the notification benefit for the imported product, thereby evading payment of applicable duty resulting in a loss of Government revenue and in turn accruing monetary benefit to the importer. Since Noticee/importer has willfully mis-declared and suppressed the facts with an intention to evade applicable duty, provisions of

Section 28(4) are invokable in this case and the duty, so evaded, is recoverable under Section 28(4) of the Customs Act, 1962.

4.7.7 I find that in the instant case, as elaborated in the foregoing paras, the noticee had wilfully and wrongfully availed the notification benefit for the imported product at the time of filing of the Bills of Entry. The instant case is not a simple case of bonafide wrong declaration of CTI or claiming exemption notification on bonafide belief. Instead, in the instant case, the Noticee deliberately chose to avail the notification benefit which was not available for the said products to claim lower rate of duty, being fully aware of the technical details of the imported goods. This willful and deliberate act clearly brings out their 'mens rea' in this case. Once the 'mens rea' is established on the part of Noticee, the extended period of limitation, automatically get attracted.

4.7.8 The scheme of RMS wherein the importers are given so many facilitations also comes with responsibility of onus for truthful declaration. The Tariff classification and notification benefit claimed of the items, are the first parameter that decides the rate of duty for the goods, which is the basis on which Customs duty is payable by any importer. However, if the importer declared the item description and picks the CTH/notification/description of goods covered in the Bill of entry in a false manner, it definitely amounts to mis-leading the Customs Authorities, with an intent to evade payment of Customs duty leviable, on the said imported goods.

4.7.9 The noticee in its written submission has placed reliance upon various judicial pronouncements of Tribunals, High Courts and Apex Court, however, I find that the Hon'ble Supreme Court of India in case of *Ambica Quarry Works vs. State of Gujarat & Others [1987(l) S.C. C. 213]* observed that "*the ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides and not what logically follows from it.*" Further in the case of *Bhavnagar University vs. Palitana Sugar Mills (P) Ltd. 2003 (2) SCC 111*, the Hon'ble Apex Court observed "*It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.*" In the decision of the Hon'ble Supreme Court in *Ispat Industries vs. Commissioner of Customs, Mumbai [2004 (202) ELT 56C (SC)]*, wherein, the Hon'ble Court has quoted Lord Denning and ordered as under:

> *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become locus classicus:*
>
> "*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*"

Thus, it is a settled position in law that a ratio of a decision would apply only when the facts are identical. In view of the above, the quoted case laws do not support the noticee's stand.

4.7.10 In view of the foregoing, I find that the duty demand against the importer has been correctly proposed under Section 28(4) of the Customs Act, 1962 by invoking the extended period of limitation. In support of my stand of invoking extended period, I rely upon the decision of the Tribunal in *Union Quality Plastic Ltd. Versus Commissioner of C.E. & S.T., Vapi reported in 2013(294) E.L.T.222(Tri.-LB)* [Misc. Order Nos.M/12671-12676/2013-WZB/AHD, dated 18.06.2013 in Appeal Nos. E/1762-1765/2004 and E/635- 636/2008]:

> *"In case of non-levy or short-levy of duty with intention to evade payment of duty, or any of circumstances enumerated in proviso ibid, where suppression or wilful omission was either admitted or demonstrated, invocation of extended period of limitation was justified."*

4.7.11 Accordingly, the differential duty amounting to Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only), resulting from re-assessment of Bills of Entry covered in Annexure- I & II of the SCN, is recoverable from M/s. Apple India Private Limited (IEC No. 0796001839) under extended period in terms of the provisions of Section 28(4) of the Customs Act, 1962.

4.7.12 With regard the interest liability of the importer under Section 28AA of the Customs Act, 1962, I find it apt to mention the scheme of assessment and collection of duty under the Customs Act, 1962. It is settled law that duty is payable only at the point when the goods leave the Customs barrier. On importation, the importer is required to file a bill of entry for home consumption under section 46(1) of the Act. The proper officer of customs then under Section 17 inspects and examines the goods and thereafter assess them. The importer then pays the assessed duty. The proper officer then passes an order for permitting clearance for home consumption in terms of Section 47(1) of the Customs Act. Further, Section 28 is a specific provision which confers power on the proper officer of customs to levy duty by issuance of show cause notice in those cases where duty has not been levied or has been short levied or erroneously refunded or when any interest payable has not been paid, part paid or erroneously refunded. Under section 28AA which was inserted by Finance Act, 2011, speaks of interest on delayed payment of duty in all cases covered by Section 28 in addition to duty, interest is liable to repaid as set out under the section for the time being, in terms of the Notification affixed by the Central Government.

4.7.12 Under Section 28AA of the Customs Act, the person who is liable to pay duty in accordance with the provisions of the Section 28, shall in addition to such duty, be liable to pay interest. In case *M/s Kamat Printers Pvt. Ltd.* the Court observed that once duty is ascertained then by operation of law, such person in addition shall be liable to pay interest at such rate as fixed by the Board. The proper officer, therefore, in ordinary course would be bound once the duty is held to be liable to call on the party to pay interest as fixed by the Board.

4.7.13 I find that the Courts in various judgments pronounced that interest payable is compensatory for failure to pay the duty. It is not penal in character in that context. The Supreme Court under the provisions of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 in Collector of C. Ex., *Ahmedabad vs. Orient Fabrics Pvt. Ltd 2003 (158) E.L.T. 545 (S.C.)* was pleased to observe that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. The Court observed that, the law on the issue of charge of interest, stands concluded and is no longer res integra. We may only gainfully refer to the judgment in *India Carbon Ltd. Vs State of Assam, (1997) 6 S.C.C. 497.* The Court there observed as under:-

> *"This proposition may be derived from the above: interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf". Therefore, once it is held that duty is due, interest on the unpaid amount of duty becomes payable by operation of law under section 28AA.*

4.7.14 In case of *Directorate of Revenue Intelligence, Mumbai vs Valecha Engineering Limited*, Hon'ble Bombay High Court observed that, in view of Section 28AA, interest is automatically payable on failure by the assessee to pay duty as assessed within the time as set out therein.

4.7.15 In view of the above, I am of the considered opinion that imposition of interest on the duty not paid, short paid is the natural consequence of the law and the importers are liable to pay the duty in respect of the said imported goods along with applicable interest.

4.7.16 In view of the above, I hold that the total differential duty amounting to Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only), as detailed in the Annexure-I & II to the subject SCN along with applicable interest thereon in terms of provisions of Section 28AA of the Customs Act, 1962, should be demanded & recovered from the Noticee under Section 28(4) of the Customs Act, 1962.

4.8 Whether the impugned goods covered under Bills of Entry as detailed in Annexure-I & II to the subject SCN, having total declared assessable value of Rs. 40,46,34,536/- (Rupees Forty Crore Forty Six Lakh Thirty Four Thousand Five Hundred and Thirty Six only) should be held liable for confiscation under 111(m) of the Customs Act, 1962.

4.8.1 The SCN proposes confiscation of goods imported vide Bills of Entry as detailed in Annexure- I & II to the SCN, having assessable value of Rs. 40,46,34,536/- (Rupees Forty Crore Forty Six Lakh Thirty Four Thousand Five Hundred and Thirty Six only) under the provisions of Section 111(m) of the Customs Act, 1962.

4.8.2 Section 111(m) of the Customs Act, 1962 states that 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;

4.8.3 Section 111(m) deals with any and all types of mis-declaration regarding any particular of Bill of Entry. Therefore, the declaration of the importer herein by wilfully and wrongfully availed the notification benefit for the impugned goods, amounts to mis-declaration and shall make the goods liable to confiscation.

4.8.4 I have already held in foregoing paras that the goods imported by the Noticee were not eligible for S.No. 20 of Notification No. 57/2017-Cus. dtd. 30.06.2017. The Noticee was very well aware of the actual nature of the imported goods and the eligibility of notification benefit . However, they wilfully and wrongfully availed the notification benefit of S.No. 20 of Notification No. 57/2017-Cus. dtd. 30.06.2017 for the imported product in the Bills of Entry mentioned in Annexure-I & II of the SCN to claim lower rate of duty. This deliberate suppression of facts and willful mis-classification resorted by the Noticee, therefore, renders the impugned goods liable for confiscation under Section 111(m) of the Customs Act, 1962. Accordingly, I find that acts of omission and commission on part of the Noticee have rendered the goods liable for confiscation under Section 111(m) of the Customs Act, 1962.

4.8.5 I find that Section 111(m) provides for confiscation even in cases where goods do not correspond in respect of any other particulars in respect of which the entry is made under the Customs Act, 1962. I have to restrict myself only to examine the words "*in respect of any other particular with the entry made under this act*" would also cover case of claiming ineligible notification benefit. As this act of the importer has resulted in short levy and short payment of duty, I find that the confiscation of the imported goods invoking Section 111(m) is justified and sustainable.

4.8.6 As per Section 46 of the Customs Act, 1962, the importer of any goods, while making entry on the Customs automated system to the Proper Officer, 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. He shall ensure the accuracy and completeness of the information given therein and the authenticity and validity of any document supporting it.

4.8.7 I find that the importer while filing the Bill of Entry for the clearance of the subject goods had subscribed to a declaration as to the truthfulness of the contents of the Bill of Entry in terms of Section 46(4) of the Customs Act, 1962 and Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2011 in all their import declarations. Section 17 of the Act,

w.e.f. 08.04.2011, provides for self-assessment of duty on imported goods by the importer themselves by filing a Bill of Entry, in the electronic form. Section 46 of the Act makes it mandatory for the importer to make an entry for the imported goods by presenting a Bill of Entry electronically to the proper officer. As per Regulation 4 of the Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulation, 2011 (issued under Section 157 read with Section 46 of the Act), the Bill of Entry shall be deemed to have been filed and self-assessment of duty completed when, after entry of the electronic integrated declaration (which is defined as particulars relating to the imported goods that are entered in the Indian Customs Electronic Data Interchange System) in the Indian Customs Electronic Data Interchange System either through ICEGATE or by way of data entry through the Service Centre, a Bill of Entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration. Thus, under the scheme of self-assessment, it is the importer who has to diligently ensure that he declares all the particulars of the imported goods correctly e.g., the correct description of the imported goods, its correct classification, the applicable rate of duty, value, benefit of exemption notification claimed, if any, in respect of the imported goods when presenting the Bill of Entry. Thus, with the introduction of self-assessment by amendment to Section 17, w.e.f. 8th April, 2011, the complete onus and responsibility is on the importer to declare the correct description, value, notification, etc. and to correctly classify, determine and claim correct exemption notification and pay the applicable duty in respect of the imported goods.

4.8.8 Prior to 08.04.2011, sub-section (2) of Section 2 of the Customs Act, 1962 read as under:

(2) "assessment" includes provisional assessment, reassessment and any order of assessment in which the duty assessed is nil;

Finance Act, 2011 introduced provision for self-assessment by the importer. Subsequent to substitution by the Finance Act, 2011 (Act 8 of 2011), (w.e.f. 08.04.2011) sub-section (2) of Section 2 ibid read as under:

Section 2 - Definitions, Sub-section (2) – assessment:

(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;

With effect from 29.03.2018, the term 'assessment' in sub-section (2) of Section 2 ibid means as follows:

(2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;

b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods,

f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,

and includes provisional assessment self-assessment, re-assessment and any assessment in which the duty assessed is nil;

4.8.9 From a plain reading of the above provisions related to assessment, it is very clear that w.e.f. 08.04.2011, the importer must self-assess the duty under Section 17 read with Section 2(2) of the Customs Act, and since 2018 the scope of assessment was widened. Under the self-assessment regime, it was statutorily incumbent upon the importer to correctly self-assess the goods in respect of classification, valuation, claimed exemption notification and other particulars. With effect from 29.03.2018, the term 'assessment', which includes provisional assessment also, the importer is obligated to not only establish the correct classification but also to ascertain the eligibility of the imported goods for any duty exemptions. From the facts of the case as detailed above, it is evident that M/s. Apple India Private Limited (IEC No. 0796001839) has deliberately failed to discharge this statutory responsibility cast upon them.

4.8.10 Besides, as indicated above, in terms of the provisions of Section 46(4) of the Customs Act, 1962 and Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2018, the importer while presenting a Bill of Entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such Bill of Entry. In terms of the provisions of Section 47 of the Customs Act, 1962, the importer shall pay the appropriate duty payable on imported goods and then clear the same for home consumption. However, in the subject case, the importer while filing the Bill of Entry has resorted to deliberate suppression of facts and willful mis-classification to claim lower rate of duty. Thus, the Noticee has failed to correctly assess and pay the appropriate duty payable on the imported goods before clearing the same for home consumption. Therefore, I find that by not self-assessing the true and correct rate of Customs duty applicable on the subject goods, the importer willfully did not pay the applicable duty on the impugned goods.

4.8.11 In view of the foregoing discussion, I hold that the impugned imported goods declared in the Bills of Entry filed by M/s. Apple India Private Limited (IEC No. 0796001839) having total assessable value of Rs. 40,46,34,536/- (Rupees Forty Crore Forty Six Lakh Thirty Four Thousand Five Hundred and Thirty Six only) should be held liable for confiscation under Section

111(m) of the Customs Act, 1962, on the grounds of suppression and mis-classification of the imported goods.

4.8.12 As the importer, through wilful mis-statement and suppression of facts, had mis-classified the goods while filing the Bills of Entry with intent to evade the applicable Customs duty, resulting in short levy and short payment of duty, I find that the confiscation of the imported goods under Section 111(m) is justified & sustainable in law. However, I find that the goods imported are not available for confiscation. But I rely upon the order of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited [reported in 2018 (9) G.S.T.L. 142 (Mad.)] wherein the Hon'ble Madras High Court held in para 23 of the judgment as below:

> *"23. The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the 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. We accordingly answer question No. (iii)."*

4.8.12.1 I further find that the above view of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.), has been cited by Hon'ble Gujarat High Court in case of M/s Synergy Fertichem Pvt. Ltd. reported in 2020 (33) G.S.T.L. 513 (Guj.).

4.8.12.2 I also find that the decision of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.) and the decision of Hon'ble Gujarat High Court in case of M/s Synergy Fertichem Pvt. Ltd. reported in 2020 (33) G.S.T.L. 513 (Guj.) have not been challenged by any of the parties and are in operation.

4.8.12.3 I find that the declaration under Section 46(4) of the Customs Act, 1962 made by the importer at the time of filing Bill of Entry is to be considered as an undertaking which appears as

good as conditional release. I further find that there are various orders passed by the Hon'ble CESTAT, High Court and Supreme Court, wherein it is held that the goods cleared on execution of Undertaking/ Bond are liable for confiscation under Section 111 of the Customs Act, 1962 and Redemption Fine is imposable on them under provisions of Section 125 of the Customs Act, 1962.

4.8.12.4 In view of above, I find that any goods improperly imported as provided in any sub-section of the Section 111 of the Customs Act, 1962, the impugned goods become liable for confiscation. Hon'ble Bombay High Court in case of M/s Unimark reported in 2017(335) ELT (193) (Bom) held Redemption Fine (RF) imposable in case of liability of confiscation of goods under provisions of Section 111(o). Thus, I also find that the goods are liable for confiscation under other sub-sections of Section 111 too, as the goods committing equal offense are to be treated equally. I opine that merely because the importer was not caught at the time of clearance of the imported goods, can't be given different treatment.

4.8.12.5 In view of the above, I find that the decision of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.), which has been passed after observing decision of Hon'ble Bombay High Court in case of M/s Finesse Creations Inc. reported vide 2009 (248) ELT 122 (Bom)- upheld by Hon'ble Supreme Court in 2010(255) ELT A. 120 (SC), is squarely applicable in the present case. I observe that the present case also merits imposition of Redemption Fine having held that the impugned goods are liable for confiscation under Section 111(m) of the Customs Act, 1962. Accordingly, since the impugned goods are not prohibited goods, the said goods are required to be allowed for redemption by the owner on payment of fine in lieu of confiscation under Section 125(1) of the Customs Act, 1962.

4.9 Whether penalty should be imposed on the importer M/s. Apple India Private Limited (IEC No. 0796001839) under Section 112(a)/114A of the Customs Act, 1962 for the acts of omissions and/or commissions, as stated above.

4.9.1 I find that in the era of self-assessment, the importer had self-assessed the Bills of Entry and mis-declared the subject goods and wrongfully availed the notification benefit for the imported product. As the importer got monetary benefit due to their wilful misdeclaration and evasion of applicable customs duty on the subject goods, I find that duty was correctly demanded under Section 28(4) of the Act by invoking extended period.

4.9.2 Regarding the issue of imposition of penalty, it is appropriate to reproduce the provisions of Section 112 and 114A as under:

Section 112 *(Penalty for improper importation of goods etc.) reads as:*

"Any person,-

(a) who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of Section 114A, to a penalty not exceeding ten percent of the duty sought to be evaded or five thousand rupees, whichever is higher……."

Section 114A. *Penalty for short-levy or non-levy of duty in certain cases.*

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under (sub-section (8) of section 28] shall also be liable to pay a penalty equal to the duty or interest so determined:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

4.9.3 As discussed above, I find that the subject Bills of Entry were self-assessed by the noticee. They were aware of the true nature and characteristics of the imported goods and accordingly, were knowing about their correct classification, eligibility of notification benefit and correctly leviable duty thereon. However, still they wilfully suppressed this fact and evaded payment of legitimately payable duty in the Bills of Entry filed before the Customs authorities. By resorting to the aforesaid suppression and mis-declaration, they evaded legitimately payable duty.

4.9.4 I find that in the self-assessment regime, the importer is bound to correctly assess the duty on the imported goods. In the instant case, the importer has claimed ineligible notification benefit. Consequently, the importer has paid less duty by non-payment of applicable BCD on the subject goods, which tantamount to suppression of material facts and wilful mis-statement. The *'mens rea'* can be deciphered clearly from *'actus Reus'* and in the instant case, I find that the importer is an entity of repute and thus providing wrong information/declaration in the various documents filed with the Customs and thereby, claiming undue benefit by not paying the applicable BCD thereon, amply points towards their '*mens rea*' to evade the payment of duty. Thus, I find that the demand of differential duty is rightly invoked in the present case by invoking Section 28(4) of the Customs Act, 1962. Taking all the issues relating to the subject imports into account and in view of my findings that goods were mis-declared in the fashion

discussed above, I find that the importer by their various acts of omission and commission discussed above, have rendered the impugned goods liable for confiscation under Section 111(m) of the Customs Act, 1962, thereby making themselves liable for penalty under Section 112 ibid.

4.9.5 Accordingly, I agree with the proposal made in the subject SCN and hold that penalty should be imposed on the Noticee, M/s. Apple India Private Limited (IEC No. 0796001839) under Section 112 of the Customs Act, 1962.

4.9.6 Further, I find that as per Section 114A, imposition of penalty is mandatory once the elements for invocation of extended period is established. Hon'ble Supreme Court in *Grasim Industries Ltd. V. Collector of Customs, Bombay [(2002) 4 SCC 297=2002 (141) E.L.T.593 (S.C.)]* has followed the same principle and observed:

> "*Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions.*" (para 10).

Hon'ble Supreme Court has again in *Union of India Vs. Ind-Swift Laboratories* has held: "*A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency....*" [2011 (265) ELT 3 (SC)].

Thus, in view of the mandatory nature of penalty under Section 114A no other conclusion can be drawn in this regard. I also rely upon case reported in 2015 (328) E.L.T. 238 (Tri. - Mumbai) in the case of *SAMAY ELECTRONICS (P) LTD. Versus C.C. (IMPORT) (GENERAL), Mumbai*, in which it has been held:

> *Penalty - Imposition of - Once demand confirmed under Section 28 of Customs Act, 1962 read with Section 9A of Customs Tariff Act, 1975 on account of fraud, penalty under Section 114A ibid mandatory and cannot be waived - Therefore imposition of penalty cannot be faulted - Section 114A ibid.*

4.9.7 As I have held above, that the extended period of limitation under Section 28(4) of the Customs Act, 1962 for the demand of duty is rightly invoked in the present case. Therefore, penalty under Section 114A is rightly proposed on the Noticee, M/s. Apple India Private Limited (IEC No. 0796001839), in the impugned SCN. Accordingly, the Noticee is liable for a penalty under Section 114A of the Customs Act, 1962 for wilful mis-declaration and suppression of facts, with an intent to evade duty.

4.9.8 Further, I have already held above that by their acts of omission and commission, the importer has rendered the goods liable for confiscation under Section 111(m) of the Customs Act, 1962, making them liable for a penalty under Section 112 ibid. However, I find that the

penalty under Section 114A and Section 112 of the Customs Act, 1962 are mutually exclusive and both cannot be imposed simultaneously. Therefore, in view of fifth proviso to Section 114A, no penalty is imposed on the Noticee under Section 112 ibid.

4.10 Whether penalty should be imposed on the importer under Section 114AA of the Customs Act, 1962

4.10.1 I find that Section 114AA proposes "Penalty for use of false and incorrect material". In this case, I do not find any substances in the SCN which make any person liable for penalty for use of false or incorrect material under Section 114AA of the Customs Act, 1962. Accordingly, I hold that the Noticee is not liable for a penalty under Section 114A of the Customs Act, 1962.

5. In view of the facts of the case, the documentary evidences on record and findings as detailed above, I pass the following order:

ORDER

a) I order that the Notification benefits availed vide Sr. No. 449A of Customs Notification No. 50/2017 dated 31.06.2017 should be denied and the Bills of Entry mentioned in Annexure I and Annexure II be re-assessed without notification benefit.

b) I order that the differential/short paid duty amounting to **Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only)** for the subject goods imported vide Bills of Entry as detailed in Annexure-'A' to the subject SCN should be demanded under Section 28(4) of the Custom Act, 1962 along with applicable interest under Section 28AA of the Custom Act, 1962.

c) I order that the differential duty amounting to Rs. 2,01,59,541/- paid by the M/s Apple India Private Limited (IEC No. 0796001839) be appropriated and adjusted against the above mentioned differential duty and interest.

d) I order that the subject goods imported vide Bills of Entry as detailed in Annexure-'A' to the subject SCN having assessable value of **Rs. 40,46,34,536/- (Rupees Forty Crore Forty Six Lakh Thirty Four Thousand Five Hundred and Thirty Six only)** should be held liable to confiscation under Section 111(m) and/or 111(o) of the Custom Act, 1962.However, since the goods are not available, I impose a redemption fine of **Rs. 2,10,00,000/- (Rupees Two Crore Ten Lakhs Only)** on M/s. Apple India Private Limited (IEC No. 0796001839) in lieu of confiscation under Section 125(1) of the Customs Act, 1962.

e) I impose a penalty equivalent to differential duty of **Rs. 5,25,21,563/- (Rupees Five Crore Twenty Five Lakh Twenty One Thousand Five Hundred and Sixty Three only) and applicable interest** under Section 28AA of the Customs Act, 1962, M/s.

Apple India Private Limited (IEC No. 0796001839)under Section 114A of the Customs Act, 1962. In terms of the first and second proviso to Section 114A ibid, if duty and interest is paid within thirty days from the date of the communication of this order, the amount of penalty liable to be paid shall be **twenty-five per cent of the duty and interest**, subject to the condition that the amount of penalty is also paid **within the period of thirty days** of communication of this order.

e) As penalty is imposed under Section 114A of the Customs Act, 1962, no penalty is imposed under Section 112 in terms of the fifth proviso to Section 114A ibid.

f) I do not imposed any penalty under section 114AA of Customs Act,1962 for above mentioned reasons.

6. This order is issued without prejudice to any other action that may be taken in respect of the goods in question and/or the persons/firms concerned, covered or not covered by this show cause notice, under the provisions of Customs Act, 1962, and/or any other law for the time being in force in the Republic of India.

(अनिल रामटेके / **ANIL RAMTEKE**)
सीमा शुल्क आयुक्त / Commissioner of Customs
एनएस-V, जेएनसीएच / NS-V, JNCH

To,

1. M/s. Apple India Pvt. Ltd. (IEC No. 0796001839)
19th Floor, Concorde Tower C, UB City No. 24,
Vittal Mallya Road, Bangalore- 560001

Copy to:

1. The Pr. Additional Director General, DRI,
   Chennai Zonal Unit, 27, G.N. (Chetty) Road,
   T. Nagar, Chennai – 600017
2. The Additional Commissioner of Customs, Group VA, JNCH
3. AC/DC, Chief Commissioner's Office, JNCH
4. AC/DC, Centralized Revenue Recovery Cell, JNCH
5. Superintendent (P), CHS Section, JNCH – For display on JNCH Notice Board.
6. EDI Section.
7. Office copy.