	<b>OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT &amp; SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62</b>
A. File No.	: F. No. VIII/48-53/Adj./ADC/MCH/2019-20
B. Order-in- Original No.	: MCH/ADC/AK/93/2019-20
C. Passed by	: Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	: 10.01.2020/ 10.01.2020
E. Show Cause Notice No. & Date	: VIII/48-227/Audit/CRA//Gr-II/MCH/2018 Dated 04.09.2019
F. Noticee(s)/Party/ Importer	: M/s Gujarat State Fertilizers and Chemical Limited, P.O. Fertilizer Nagar, Baroda Gujarat-360311

1. यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।

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

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

**“ सीमा शुल्क आयुक्त (अपील), कांडला  
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”  
“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA  
Having his office at 7<sup>th</sup> Floor, Mridul Tower, Behind Times of India,  
Ashram Road, Ahmedabad-380 009.”**

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-

Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और

A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।

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

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

**Sub.- Show Cause Notice F. No: VIII/48-227/Audit/CRA/Gr-II/MCH/2018 dated 04.09.2019 issued to M/s Gujarat State Fertilizers and Chemical Limited, P.O. Fertilizer Nagar, Baroda, Gujarat-360311.**

## BRIEF FACTS OF THE CASE

M/s. Gujarat State Fertilizers and Chemical Limited, P.O.- Fertilizer Nagar, Baroda, Gujarat- 360311 (holder of IEC No. 0888007574) (hereinafter also referred to as "the importer") presented Bill of Entry No. 4424540 dated 15.12.2017, through their appointed Customs Broker M/s Arihant Shipping Agencies, at Custom House, Mundra, for clearance of imported goods declared as "Muriate of Potash (MOP) (for use as a Manure in production for complex fertilizer)" and classifying the same under Tariff Item 28417090 of first schedule of the Custom Tariff Act, 1975.

1.2 The subject goods were cleared by availing exemption of Basic Customs duty (at NIL rate) under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011, as the goods were imported from Vietnam – a country notified in the said notification.

1.3 Under the impugned Bill of Entry, the importer imported Muriate of Potash (MOP) and availed benefit of concessional rate of duty under the above notification. The exemption under serial No. 230(I) of the said notification was available to goods classifiable under Custom Tariff sub-heading 282490 to 285390. The said entry at serial number 230(I) read:

Sr. No.	Chapter Heading	Description of goods
230	282490 to 285300	all goods

1.4 It appeared from declared description viz. Muriate of Potash are appropriately classifiable under Customs Tariff Item 31042000 as fertilizer and not chemical under 28417090. At the relevant time, the said notification did not grant exemption to Muriate of Potash classifiable under tariff item 31042000. Thus, it appeared that in the subject Bill of Entry, the importer has on purpose to mis-classify the goods and ostensibly to wrongly avail the exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011. Therefore, it appeared that the impugned Bill of Entry is liable to be re-assessed by classifying impugned goods under tariff item 31042000 and denying the claimed and availed exemption under Notification No. 46/2011-Cus dated 01.06.2011 and accordingly, Basic Customs duty at the prevailing tariff rate i.e. 5% is liable to be charged.

1.5 Further, it appeared that though the importer was aware that the exemption under serial No. 230(I) of Notification No. 46/2011-Cus dated 01.06.2011, was not available to the impugned goods but they deliberately assessed the Bill of Entry No. 4424540 dated 15.12.2017 under Section 17(1) of the Customs Act, 1962 by wrongly availing the said exemption. Thus, it appeared that the subject Bill of Entry is liable to be reassessed under tariff item 31042000 by denying the claimed exemption and the differential Customs duty totally amounting to Rs. 9,36,443/- is liable to be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA of the Customs Act, 1962. Further, it appeared that the importer has contravened the

provisions of Section 17(i) of the Customs Act, 1962 and have rendered themselves liable to penalty under Section 117 of the Customs Act, 1962.

2. In view of the above, a Show Cause Notice F.No.VIII/48-227/Audit/CRA/Gr-II/MCH/2018 dated 04.09.2019 was issued whereby the importer M/s. Gujarat State Fertilizers and Chemical Limited, P.O.- Fertilizer Nagar, Baroda, Gujarat- 360311 was called upon to show cause to the Additional Commissioner of Customs (Import), Custom House, Mundra having his office at PUB Building 5B, Adani Port, Mundra, as to why:

- (i) the declared classification under Custom Tariff Item 28417090 in Bill of Entry No.4424540 dated 15.12.2017 should not be rejected and said goods covered should not be classified under Custom tariff item 31042000;
- (ii) the exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011, claimed and availed by them in the Bill of Entry No.4424540 dated 15.12.2017 should not be denied and the said Bill of Entry should not be reassessed under Custom Tariff Item 31042000.
- (iii) the differential Customs duty amounting to Rs. 9,36,443/-, not paid by the importer in respect of the Bill of Entry No. 4424540 dated 15.12.2017 by wrongly availing exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011 should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA *ibid.*
- (iv) penalty should not be imposed on them under section 117 of the Customs Act, 1962.

#### **PERSONAL HEARING**

2. The personal hearing was granted, in the case matter, on dated 19.12.2019, however, Shri K.V. Subrahmanyam, authorised representative, visited this office personally on 18.12.2019 and requested to conduct the hearing on 18.12.2019 itself. Considering his request, the personal hearing was conducted on 18.12.2019 wherein Shri K.V. Subrahmanyam submitted a written defence reply dated 12.12.2019 and reiterated his submission made therein. He further stated that he has nothing more to add.

#### **DEFENCE SUBMISSION**

3. The written submissions made by the authorized representative of the Noticee vide their letter dated 12.12.2019, at the time of personal hearing on 18.12.2019, is interalia as under-

3.1 Imported Muriate of Potash is chemically known as Mono Potassium Phosphate.

3.2 Potassium Phosphate is specifically classified under CTH 28352400 and hence it covers all types of Phosphate, e.g. Mono, Di or Tri. Explanatory Notes to CTH 3105 excluded Mono Potassium Phosphate from being classified under CTH 3105 even if it could be used as fertilizer.

For ready reference, CTH 28352400 description is reproduced hereinbelow :-

2835	Phosphinates (hypophosphites), phosphonates (phosphites) and phosphates; polyphosphates, whether or not chemically defined.
2835 10	- Phosphinates (hypophosphites) and phosphonates (phosphites)
2835 10 10	---Calcium hypophosphite
2835 10 20	---Magnesium hypophosphite
2835 10 90	---Other
	Phosphates:
2835 22 00	--Of mono-or disodium
<b>2835 24 00</b>	<b>-- Of potassium</b>

They also reproduce herein below the Explanatory Notes to CTH 3105 (ibid) :

"It should be noted that the heading does not include other chemically defined compounds not specified in Heading 31.02 to 31.04 even if they could be used as fertilizers (e.g. potassium nitrate (heading 28.34), potassium phosphate (heading 28.35)).

3.3 Secondly, as per Rule 3 of the General Rules for the Interpretation of Import Tariff, the heading which provide the most specific description shall be preferred to heading providing more general description. Hence, the imported goods being Mono Potassium Phosphate merits classification under CTH 28352400. For ready reference Rule 3 of the General Rules is reproduced herein below :-

*"3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:*

a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific In relation to those goods, even if one of them gives a more complete or precise description of the goods.

b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

3.4 Thirdly, as per Chapter Note 1 (b) to Chapter 31, separate chemically defined compound (other than.....) are not covered under CTH 31. As Mono Potassium Phosphate does not figure in the excluded Chapter Notes, it has to be excluded from Chapter 31 and is to be classified under Chapter 28 as a separate chemically defined compound.

3.5 Fourthly, as per Board's Circular No.44/2001, Mono Potassium Phosphate will merit classification under Chapter 28 and not under Chapter 31 as fertilizer. For ready reference the Board's Circular No.44/2001 is reproduced herein below :-

*"Inorganic chemicals such as, monopotassium phosphate, calcium nitrate, potassium magnesium phosphate as 'fertiliser' ----- Classification of*

Circular No. 44/2001-Cus., dated 6-8-2001

F. No. 528/16/2000-CUS. (TU)

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Classification of certain inorganic chemicals such as, monopotassium phosphate, calcium phosphate nitrate, potassium magnesium as fertiliser' : Reg.

I am directed to invite your attention to the subject mentioned above. It has been brought to the notice of the Board that chemical compounds like mono potassium phosphate, calcium nitrate and potassium magnesium phosphate are being classified as fertilisers under Chapter 31 of the Customs Tariff, and levied to duty at a concessional rate as applicable to a fertilisers.

The matter has been examined. Chapter 31 of the Customs Tariff covers fertilisers. Note 1(b) of Chapter 31 states that this Chapter does not cover separate chemically defined compounds other than those answering to the descriptions in Note 2(A), 3(A), 4(A) and 5 of the said Chapter. As mono potassium phosphate, calcium nitrate and potassium magnesium phosphate do not figure in the above Chapter notes, they have to be excluded from Chapter 31 and are to be classified as a separate chemically defined compounds. Further, Chapter Note 5 to Chapter 31 states that for the purposes of Heading 31.05, the term 'other fertilisers' applies only to products of a kind used as fertilisers and containing, as an essential constituent, at least one of the fertilising elements, namely, nitrogen, phosphorus or potassium.

Keeping in view the provisions explained above and the HS Explanatory Notes to concerned headings, the chemical compounds, viz., calcium nitrate, mono potassium phosphate and potassium magnesium phosphate will merit classification under Chapter 28 of the Customs Tariff, and not under Chapter 31 as fertilisers. Such compounds will, therefore, not be eligible for benefit of concessional duty prescribed for fertilisers under the relevant exemption notification. It may be noted that calcium nitrate specifically figures in the Explanatory Notes to Heading 28.34 and potassium phosphate finds a mention in Heading 28.35 itself.

The Custom Houses may kindly take note of the above clarification while classifying the aforementioned chemical compounds. If such goods have been assessed as fertiliser in the past, appropriate demands will have to be issued immediately and differential duty realised. Difficulties, if any faced, in the implementation of above clarification may be brought to the notice of the Board.

Please acknowledge receipt of this circular."

- 3.6 Without prejudice to the above, they further submit that the aforesaid Bill of Entry dated 15.12.2017 is by itself an assessment order. Therefore, by issuance of the impugned Show Cause Notice, the Department cannot review the said assessment order without first challenging the said assessment order by way of an Appeal to the appropriate authority in accordance with the law. Consequently, the impugned Show Cause Notice is without jurisdiction and authority. In this context, reliance is placed on the judgement of the Larger Bench of the Hon'ble Supreme Court in case of ITC Limited Vs. CCE reported in 2019 (9) TMI 802 – Supreme Court.

" Note 3. Subject to the provisions of Note 1 to Section VI, **this Chapter does not cover:**

- (a) Sodium chloride or magnesium oxide, whether or not pure, or other products of Section V;
- (b) Organo-inorganic compounds other than mentioned in Note 2 above;
- (c) Products mentioned in Note 2,3, 4 or 5 to Chapter 31;**
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) .....

The explanatory notes to the subject heading codes for tariff item 3104 under Chapter 31 of Customs Tariff Act, 1975 [Fertilisers] reads as under-

<b>3104</b>	<b>MINERAL OR CHEMICAL FERTILISERS, POTASSIC</b>
<b>31042000</b>	<b>- Potassium chloride</b>
31043000	-Potassium sulphate
31049000	-Other

**Note 4. Heading 3104 applies only to the following goods, provided they are not put up in the forms or packages described in heading 3105:**

- (a) goods which answer to one or other of the descriptions given below:
  - (i) crude natural potassium salts (for example, carnallite, kainite and sylvite);
  - (ii) potassium chloride, whether or not pure, except as provided in Note 1 (C) above**
  - (iii) potassium sulphate, whether or not pure;
  - (iv) magnesium potassium sulphate, whether or not pure;
- (b) **fertilisers** consisting of any of the goods described in (a) above mixed together

From the above, it is quite evident that the heading 31042000 covers Potassium Chloride (Muriate of potash) and accordingly classification of the subject goods obviously would be under Custom tariff item 31042000. Therefore, I find that the importer has wrongly classified the goods under Custom tariff item 28417090.

4.4 I also find further on verification of Notification No. 46/2011-Cus dated 01.06.2011 and description of the goods that the serial number 230 (I) of the said Notification is applicable to Customs tariff items falling under 282490 to 285390, whereas the imported goods is declared as "*Muriate of Potash (MOP) (for use as a Manure in production for complex fertilizer)*". Therefore, the declared description viz. "*Muriate of Potash (MOP) (for use as a Manure in production for complex fertilizer)*" are appropriately classifiable under Customs Tariff Item 31042000 as fertilizer and not chemical under 28417090. At the relevant time, the said notification did not grant exemption to Muriate of Potash classifiable under tariff item 31042000, thus in the subject Bill of Entry, the importer has purposefully mis-

classified the goods to wrongly avail the exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011.

4.5 In view of the above, I hold that the impugned goods "*Muriate of Potash (MOP) (for use as a Manure in production for complex fertilizer)*" are appropriately classifiable under Customs Tariff Item 31042000 as fertilizer. Since exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011 is not available to the goods covered under tariff item 31042000, I hold that the said exemption is liable to be denied and the impugned Bill of Entry is liable to be re-assessed by classifying impugned goods under tariff item 31042000 and accordingly, Basic Customs duty at the prevailing tariff rate i.e. 5% is liable to be levied. Accordingly, I hold that the importer M/s Gujarat State Fertilizers and Chemical Limited is required to pay the differential Customs duty of Rs. 9,36,443/- as demanded in the Show Cause Notice under Section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA of the Customs Act, 1962

4.6 As regard proposal in the Show Cause Notice for imposition of penalty on the importer under Section 117 of the Customs Act, 1962, I find that Section 117 of the Customs Act, 1962 stipulates that any person who contravenes any provisions of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty. I further find that Section 17(1) of the Customs Act, 1962 authorizes any Importer or exporter of the goods to self assess the duty leviable on the Import or export of goods. In the instant case, I find that the importer was aware that the exemption under serial No. 230(I) of Notification No. 46/2011-Cus dated 01.06.2011, was not available to the impugned goods but they deliberately assessed the Bill of Entry No. 4424540 dated 15.12.2017 under Section 17(1) of the Customs Act, 1962 by wrongly availing the said exemption. Thus, I find that the importer has contravened the provisions of Section 17(1) of the Customs Act, 1962 and accordingly I hold that the penalty under Section 117 of the Customs Act, 1962 are attracted on the importer M/s Gujarat State Fertilizers and Chemical Limited, P.O.-fertilizer Nagar, Baroda, Gujarat-360311.

5. In view of the forgoing discussions and findings, I pass the following order:-


#### ORDER

(i) I reject the declared classification of imported goods viz. "*Muriate of Potash (MOP) (for use as a Manure in production for complex fertilizer)*" under Custom Tariff item 28417090 and order the same to be re-classified under Custom tariff item 31042000. in Bill of Entry No.4424540 dated 15.12.2017

(ii) I reject the importers claim of exemption under serial No. 230 (I) of Notification No. 46/2011-Cus dated 01.06.2011 in Bill of Entry No.4424540 dated 15.12.2017 and order to re-assess the said Bill of Entry under Custom Tariff Item 31042000.

- (iii) I confirm and order to recover the differential Customs duty amounting to Rs. 9,36,443/- from the importer M/s Gujarat State Fertilizers and Chemical Limited, P.O.-fertilizer Nagar, Baroda, Gujarat-360311 in respect of the Bill of Entry No. 4424540 dated 15.12.2017 for wrongly availing exemption under serial No. 230 (i) of Notification No. 46/2011-Cus dated 01.06.2011, under Section 28(1) of the Customs Act, 1962.
- (iv) I order to charge and recover interest from the importer M/s Gujarat State Fertilizers and Chemical Limited, P.O.-fertilizer Nagar, Baroda, Gujarat-360311, on the confirmed duty at Sr. No. (iii) above under Section 28AA of the Customs Act, 1962.
- (v) I also impose a penalty of Rs. 1,00,000/- (Rupees One Lakh only) on the importer M/s Gujarat State Fertilizers and Chemical Limited, P.O.-fertilizer Nagar, Baroda, Gujarat-360311, under Section 117 of the Customs Act, 1962.

6. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

  
(Ajay Kumar)  
Additional Commissioner  
Custom House, Mundra

F. No. VIII/48-53/Adj./ADC/MCH/2019-20

Date: 10.01.2020

To

M/s. Gujarat State Fertilizers and Chemical Limited,  
P.O.- Fertilizer Nagar, Baroda,  
Gujarat- 360311



Copy to:

1. The Principal Commissioner of Customs, Custom House, Mundra.
2. The Deputy/Assistant Commissioner (RRA), Custom House, Mundra.
3. The Deputy/Assistant Commissioner (TRC), Custom House, Mundra.
4. The Deputy/Assistant Commissioner (EDI), Custom House, Mundra.
5. The Deputy/Assistant Commissioner (GR-II), Custom House, Mundra.
6. The Deputy/Assistant Commissioner (Audit), Custom House, Mundra.
7. Guard File

P.O. (EDI)