

	OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62	
	OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS CUSTOM HOUSE, MUNDRA	
A. File No.	:	F.No. VIII/48-33/Adj./Pr.Commr./MCH/2016-17
B. Order-in- Original No.	:	MUN-CUSTM-000-COM-06-18-19
C. Passed by	:	Shri Sanjay Kumar Agarwal Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order / Date of issue	:	20.04.2018/ 20.04.2018
E. SCN No. & Date	:	VIII/48-33/Adj./Pr.Commr./MCH/2016-17 dated 23.12.16
F. Noticee(s)/Party/ Importer	:	M/s. Mayur Uniquoters Ltd. Village Jaitapur, Jaipur Sikar Road, Jaipur -303704

- यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
- यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है- Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

“केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवा कर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर, बहुमाली भवन, मंजुश्रीमिल कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद 380 004”
“Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004.”

- उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within three months from the date of communication of this order.
- उक्त अपील के साथ 1000/-रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो, 5000/- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो, 10,000/- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्डपीठ बैंक आहरित ट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा। Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
- उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची-1, न्यायालय शुल्क अधिनियम, 1870 के मद सं-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए। The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
- अपील ज्ञापन के साथ ड्यूटी/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए। While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.
- इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा। An appeal against this order shall lie before the Tribunal 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: SCN F. No: VIII/48-33/Adj./Pr.Commr./MCH/2016-17 dated 23.12.2016 issued to M/s. Mayur Uniquoters Ltd. Village Jaitapur, Jaipur Sikar Road, Jaipur -303704

Brief facts of the case:-

M/s. Mayur Uniquoters Ltd. Village Jaitapur, Jaipur Sikar Road, Jaipur - 303704 having IEC No. 1392003849, (hereinafter referred to as the noticee for the sake of brevity) is engaged in manufacturing of PVC Leathers. For manufacturing the PVC Leather, the said noticee is importing PVC Resins from various countries.

2. Specific intelligence gathered by the officers of Directorate of Revenue Intelligence indicated that the said importer was engaged in the regular import of "Poly Vinyl Chloride Resin of Paste Grade" from European union by suppressing the facts and mis-classifying the same under Customs Tariff Item 39041090 with intent to evade Antidumping Duty, leviable on PVC Resin of Paste Grade when imported from European union. The said noticee has cleared the goods i.e. PVC Resin of Paste grade declaring under CTI 39041090 in the Bills of Entry filed at Mundra Port through Custom Broker M/s. M/s SSS Sai Shipping Services P. Ltd, Mundra officers of DRI obtained representative samples from the consignment of PVC Resin, imported by the said importer and covered under Bill of Entry No. 8510532 dated 17.11.2012, and detained the consignment under Panchnama dated 22.11.2012 **(RUD No.1 of SCN)**.

3. The said sample was got tested at Custom House Laboratory, Kandla. Test report dated 17.11.2011 issued by the said laboratory **(RUD No.2 of SCN)** stated "*The sample is in the form of white powder. It has the characteristic of polyvinyl chloride resin, It is not contains any additive*". Further, vide letter F. No. KCL/01/Misc.-Corrs/Kandla/09-10 dated 26.11.2012 the said laboratory informed that "*In order to categorically confirm the paste grade PVC "K-Value" and some other constant of the sample needs to be tested for which the facility is not available in this lab*". Therefore, a sample was also sent to the Central Excise Laboratory at Vadodara who vide letter F. No. CRCL/DRI/Gandhidham/48 reported that "*The sample is in the form of white powder. It is composed of polyvinyl chloride (paste grade)*". **(RUD No. 3 of SCN)**

4. Whereas, it appeared that the product imported by the said noticee was declared and classified under CTI No. 39041090 which falls under the CTH No. 3904 as " - - - **Others**". There is specific entry of Poly (Vinyl chloride) Resin under the CTI No. 39042110 under the Custom Tariff Sub Heading 390421 which is of " - - **Non Plasticized**". The Rule 3 (a) of General Rules for the interpretation of Import Tariff, says that a specific entry shall prevail over a general entry. Thus PVC Paste Resin (Non plasticized) appeared to be classifiable under CTH No. 39042110 and ought to be cleared accordingly, but it appeared that the said noticee has knowingly and intentionally mis-declared and mis classified their import product under CTH No. 39041090 with an intent to escape from the payment of Anti Dumping Duty. The said noticee has mostly imported the PVC paste Resin from M/s. SoLvin S.A., Europe

declaring import Product as "POLYVINYL CLORIDE SOLVIN 382 NG PVC RESIN, POLYVINYL CLORIDE SOLVIN 376 NB PVC RESIN, POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN, POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN, POLYVINYL CLORIDE SOLVIN 375MD PVC RESIN". On browsing the site of M/s. SoLVin S.A., all these various kind/grades of PVC Resin are shown as Paste Resin. The said noticee had imported only two consignments from Vinnolit GmbH & Co. KG, Ismanong (Europe) declaring as PVC RESIN VINNOLIT P 80 and PVC RESIN VINNOLIT E 74 CC which are also Paste grade PVC Resin.

5. The Test Report dated 17.11.2011 issued by the Custom House Kandla Laboratory categorically stated that the sample has *the characteristic of polyvinyl chloride resin and it is not contains any additive*" Thus it was clarified that PVC Resin was without any additive i.e. any Plasticizer which means the PVC Resin are Non Plasticizer. The Central Excise Laboratory of Vadodara stated that "*The sample is composed of polyvinyl chloride (paste grade)*".

6. Further, the Notification No. 70/2010- Customs dated 25.06.2010 (as amended) was challenged before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) by Leather Cloth & Plastic Mfrs. Association and the Hon'ble CESTAT vide order No. AD/A/10/12-Cus dated 06.07.2012, had directed the Designated Authority and the Ministry of Finance to conclude the remand proceedings as well as issue a fresh Anti Dumping Duty notification, if required, within six months in the matter of imposition of Anti Dumping Duty on PVC Paste Resin imposed vide Notification No. 70/2010- Customs dated 25.06.2010 (as amended). Therefore, in wake of the aforesaid circumstances, following two Bills of Entry (**RUD No. 5 of SCN**) filed by the said noticee were provisionally assessed.

Sr. No.	Bill of Entry No & Date	Description of Goods	Country of Origin	Port of Loading	Custom Tariff Heading	Quantity (MTs)	Assessable Value (Rs.)	Remarks
01	8510532 17.11.12	POLYVINYL CLORIDE SOLVIN 382 NG PVC RESIN	France	Antwerp	39041090	99.000	5882411.70	Provisionally assessed
02	8557123 22.12.12	POLYVINYL CLORIDE SOLVIN 376 NB PVC RESIN	France	Antwerp	39041090	66.000	3821607.80	Provisionally assessed
Total						165.000	97,04,019.50	

7. Further, it was noticed that the said noticee have already imported PVC Resin Paste grade from European union at Mundra Port under the following Bills of Entry (**RUD No.6 of SCN**) :

Sr. No.	Bill of Entry No & Date	Description of Goods	Country of Origin	Port of Loading	Custom Tariff Heading	Quantity (MTs)	Exchange Rate (Rs.)	Assessable Value (Rs.)	Remarks
1	7512427/27.07.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	FRANCE	ANTWERP	39041090	49.500	55.5	3107689.20	Finally Assessed

2	7764706/25.08.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	39041090	22.000	55.9	1715628.42	Finally Assessed
3	7943388/14.09.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3371662.80	Finally Assessed
4	7943388/14.09.12	POLYVINYL CLORIDE SOLVIN 375ND PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3371662.80	Finally Assessed
5	8071412/28.09.12	POI YVINYL CLORIDE SOLVIN 375ND PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3284671.50	Finally Assessed
6	8071485/28.09.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3284671.50	Finally Assessed
7	8071485/28.09.12	POLYVINYL CLORIDE SOLVIN 375ND PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3284671.50	Finally Assessed
8	8071293/28.09.12	POLYVINYL CLORIDE SOLVIN 375MD PVC RESIN	GERMANY	ANTWERP	39041090	44.000	54.75	3284671.50	Finally Assessed
9	8072203/28.09.12	PVC RESIN VINNOLIT P 80	GERMANY	ANTWERP	39041090	103.500	54.75 (71.40 EUR)	6605462.12	Finally Assessed
10	8072284/28.09.12	PVC RESIN VINNOLIT E 74 CC	GERMANY	HAMBURG	39041090	157.500	54.75 (71.40 EUR)	10051790.18	Finally Assessed
11	8211699/15.10.12	POLYVINYL CLORIDE SOLVIN 373 ND PVC RESIN	GERMANY	ANTWERP	39041090	22.000	53.2	1585341.45	Finally Assessed
12	8327594/27.10.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	BELGIUM	ANTWERP	39041090	24.750	53.2	1462853.70	Finally Assessed
13	8327594/27.10.12	POLYVINYL CLORIDE SOLVIN 375 MD PVC RESIN	BELGIUM	ANTWERP	39041090	66.000	53.2	4681131.84	Finally Assessed
14	8327544/27.12.12	POLYVINYL CLORIDE SOLVIN 373 ND PVC RESIN	GERMANY	ANTWERP	39041090	66.000	53.2	4681131.84	Finally Assessed
15	8448169/08.11.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	FRANCE	ANTWERP	39041090	27.750	54.55	1499974.99	Finally Assessed
					Total	803.000		5,52,73,015.34	

8. Whereas it appeared in the instant case that the Notification No. 70/2010-Customs was issued well before the expiry of five years of imposition of Anti Dumping Duty Anti Dumping Duty. This Notification was set aside for de-novo consideration by the CESTAT which culminated in issuance of Notification No. 15/2013-Customs (ADD) dated 03.07.2013. Thus the above mentioned proviso appeared to be attracted and the Anti Dumping Duty appeared to remain in force during the period of sunset review and further

for the five years from the issuance of Notification No. 15/2013-Customs (ADD) dated 03.07.2013. Further, continuance of anti dumping duty at the rate as applicable on the date preceding issue of Notification No. 70/2010 dated 25.06.2010 on PVC Paste Resin falling under CTH 39042110 on a provisional basis as per the aforesaid order of CESTAT required to be finalized and needed to be recovered as per the fresh Notification No. 15/2013-Customs (ADD) dated 03.07.2013 which is outcome of the *denovo* proceedings as directed by CESTAT vide final order No. AD/A/101/12-Cus dated 06.07.2012.

9. Whereas it appeared that the noticee has taken the shelter of said ambiguity in imposition of Anti Dumping Duty imposed on PVC Paste Resin by the Designated Authority and resorted to mis-classification of PVC Resin Paste grade under CTH No. 39041090 at Mundra to remain outside the scope of actual classification of PVC Paste Resin so as to escape from the payment of Anti Dumping Duty. The said noticee has never declared their import product as PVC Resin of Paste grade. Therefore on the issuance of the Notification No. 15/2013-Customs (ADD) dated 03.07.2013, which was issued in accordance with the said order of CESTAT, it appeared that the antidumping duty is liable to be recovered which is calculated as under:

9.1. Anti Dumping Duty to be recovered after finalization of the following two Bills of Entry which are provisionally assessed.

Sr. No.	Bill of Entry No & Date	Description of Goods	Country of Origin	Port of Loading	Duty Amount (US Dollar)	Quantity (MTs)	Exchange Rate (Rs.)	Anti Dumping Duty liable to be recover (Rs.)
01	8510532/1 7.11.12	POLYVINYL CLORIDE SOLVIN 382 NG PVC RESIN	FRA NCE	ANTWERP	265.19	99.000	54.55	1432145.34
02	8557123/2 2.12.12	POLYVINYL CLORIDE SOLVIN 376 NB PVC RESIN	FRANCE	ANTWERP	265.19	66.000	55.5	971390.97
					Total	165.000		24,03,536.31

9.2 Anti Dumping Duty to be recovered from the following Bills of Entry which are finally assessed.

Sr. No.	Bill of Entry No & Date	Description of Goods	Country of Origin	Port of Loading	Duty Amount (US Dollar)	Quantity (MTs)	Exchange Rate (Rs.)	Anti Dumping Duty liable to be recover (Rs.)
1	7512427/27.07.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	FRANCE	ANTWERP	265.19	49.500	55.5	728543.23
2	7764706/25.08.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	265.19	22.000	55.9	326130.66

3	7943388/14.09.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
4	7943388/14.09.12	POLYVINYL CLORIDE SOLVIN 375ND PVC REJIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
5	8071412/28.09.12	POLYVINYL CLORIDE SOLVIN 375ND PVC RESIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
6	8071485/28.09.12	POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
7	8071485/28.09.12	POLYVINYL CLORIDE SOLVIN 375ND PVC RESIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
8	8071293/28.09.12	POLYVINYL CLORIDE SOLVIN 375MD PVC RESIN	GERMANY	ANTWERP	265.19	44.000	54.75	638842.71
9	8072203/28.09.12	PVC RESIN VINNOLIT P 80	GERMANY	ANTWERP	265.19	103.500	54.75	1502732.28
10	8072284/28.09.12	PVC RESIN VINNOLIT E 74 CC	GERMANY	HAMBURG	265.19	157.500	54.75	2286766.52
11	8211699/15.10.12	POLYVINYL CLORIDE SOLVIN 373 ND PVC RESIN	GERMANY	ANTWERP	265.19	22.000	53.2	310378.38
12	8327594/27.10.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	BELGIUM	ANTWERP	265.19	24.750	53.2	349175.67
13	8327594/27.10.12	POLYVINYL CLORIDE SOLVIN 375 MD PVC RESIN	BELGIUM	ANTWERP	265.19	66.000	53.2	931135.13
14	8327544/27.12.12	POLYVINYL CLORIDE SOLVIN 373 ND PVC RESIN	GERMANY	ANTWERP	265.19	66.000	53.2	931135.13
15	8448169/08.11.12	POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN	FRANCE	ANTWERP	265.19	27.750	54.55	401434.68
					Total	803.000		1,16,00,487.94

10. During the course of investigation, statement of General Manager of said Noticee and their appointed CHA were recorded:

10.1 Statement of Shri Rajesh Gupta, General Manager in M/s. Mayur Uniquoters Ltd., Jaipur was recorded under Section 108 of the Customs Act, 1962, before

the Assistant Director, Directorate of Revenue Intelligence, Gandhidham on 03.01.2014 (RUD No.7 of SCN) wherein he inter alia stated that the said noticee is engaged in manufacturing of PVC Leather and their raw materials are PVC Resin (Paste grade), blending Resin of suspension grade, Plasticizers, Pigments, additives etc.; that they classified the goods under Tariff item No. 39041090 in the Bill of Entry and not under CTH 39042210 because CTH 39042210 is for plasticized PCV Resin and their PVC Resin was not Plasticized PVC Resin; that the Plasticized PVC Resin contains Plasticizers and Non-plasticized PVC Resin does not contain Plasticizers; that during the year 2012-13, they imported PVC Resin of Paste grade from European union and they submitted all the Bills of Entry of PVC Resin from Mundra Port; that they paid Anti Dumping Duty in past in accordance with Notification No. 104/2004- Customs dated 07.10.2004, where the landed value was below 950.54 US\$; that during the period 25th June,2010 to 3rd July,2013, they cleared their goods under Advance licenses and no Anti Dumping Duty was paid; that the Notification No. 70/2010-Customs dated 25.06.2010 was set aside vide CESTAT's Final Order dated No. AD/A/10/2012-CU(DB) dated 06.07.2012 wherein the CESTAT has ordered Anti Dumping Duty at the rate as applicable on the date preceding issue of Notification No. 70/2010-Customs dated 25.06.2010 i.e. as per the Notification No. 104/2004- Customs dated 07.10.2004 and Anti Dumping Duty was paid as applicable under Notification No. 104/2004- Customs dated 07.10.2004 and since the import value was higher than the landed price given in Notification No. 104/2004- Customs dated 07.10.2004, no Anti Dumping Duty was paid after the said CESTAT's order.

10.2 Statement of Shri Manoj Kotak, Director in Custom House Agent Company M/s. SSS Sai Shipping Services Pvt. Ltd., Mundra was recorded under Section 108 of the Customs Act, 1962, before the Assistant Director, Directorate of Revenue Intelligence, Gandhidham on 10.03.2014 (RUD No.8 of SCN) wherein he inter alia stated that they were appointed as CHA by M/s. Mayur Uniquoters Ltd. Jaipur, for the export and import from Mundra Port and their branch at Jaipur was looking after the import and export work of the importer at ICD, Kanakpura, Jaipur; that Bills of Entry were prepared on the basis of invoice, packing list and Bill of Lading and submitted to the Customs Mundra for clearance; that Customs Tariff Heading "39041090" was declared in each Bills of Entry filed for clearance of PVC Resin (Paste grade), as directed by the importer; that the importer asked that the CTH No. should be declared as mentioned in the invoice of the overseas supplier and in those invoices the CTH was declared as 39041000; that since it was not correctly classified as 39041000, they had asked the importer to clarify in which tariff heading it should be classified; that the importer asked them to classify it as 39041090 as their product PVC Resin was not plasticized; that on the request and direction of the importer they classified it as 39041090 in each bills of entry for clearance of PVC Resin. He was shown the Chapter Heading No. 3904 mentioned in the Customs Tariff 2013-14 wherein various sub-headings are mentioned as per the characteristic and contents of the product. After seeing he stated that they have not mis-classified the PVC

as 39041090; that they followed the direction of the importer and accordingly they classified the product under CTI 39041090; that being a CHA, they were well aware of levy of Anti Dumping Duty on PVC Resin vide Notification No. 70/2010-Customs dated 25.06.2010, which was liable to be paid but they failed to pay. The reason for non-payment of Anti Dumping Duty was that their importer directed them that their products fall under CTH No. 39041090 and antidumping duty was not imposed on 39041090; that at the relevant time, the importer directed them to clarify before the Customs that value of PVC Resin was higher than the 950.94 US\$, so he replied according to importer's direction; that their importer directed them to classify PVC Resin Paste grade under tariff item 39041090 only and not under 39042110, 39042190 or 39042210, accordingly they classified under CTH 39041090 only; that they were fully aware that it is responsibility of the CHA to educate the importer with regard to proper classification, rate of duty and to comply rules and regulation in force at the time of import and they had never informed the importer to classify PVC Resin Paste grade under CTH 39042110, 39042190 or 39042210; that they did not suppress facts of actual classification of the product and attempted to evade antidumping duty; that they are not technically sound person and therefore, actual user can only clarify the facts, so they acted as per direction of the importer.

11. Even after samples drawn, the said noticee continued to import PVC Resin of Paste grade classifying the same under CTH 39041090 from European union at Mundra Port but cleared the same under Advance Authorization to avoid the payment of Anti Dumping Duty. Further, they imported PVC Paste Resin from European union at ICD, Kanakpura, Jaipur classifying under CTH No. 39042110 and these consignments were assessed provisionally by the Customs. Subsequently, on finalization of the assessment classifying under CTH 39042110 at ICD Jaipur, Show Cause Notice No. C.A. 7449401/20.07.2012 dated 11.04.2014 demanding antidumping duty as per Notification No. 15/2013-Customs (ADD) dated 03.07.2013 on clearance of PVC Paste Resin imported from European union was issued. The adoption of dual method of classification of same imported PVC Paste Resin at Mundra and ICD, Jaipur shows ulterior motive of the noticee in respect of evasion of Anti Dumping Duty.

12. Further, the said noticee changed their CHA from M/s. SSS Sai Shipping Servers P. Ltd to M/s. Sunrise Freight Forwarder Pvt. Ltd., Jaipur who might not be aware about the classification declared in import of PVC Paste Resin at Mundra Port. If the intention of the said noticee was bona fide, then they would have informed their CHA at ICD, Jaipur that they classified the same goods under CTH 39041090 at Mundra. Thus this deliberate act of not disclosing the details of their imports effected at Mundra indicates their intention to evade Anti Dumping Duty.

13. From the foregoing paras, it appeared that the said noticee has deliberately and willfully suppressed the facts and mis-classified their import product i.e. PVC Resin

Paste Grade, with intent to evade payment of antidumping duty. The said noticee is manufacturer of PVC Leather clothes of superior quality which requires PVC Resin of Paste Grade and it was in the knowledge of the noticee that the Anti Dumping Duty has been imposed on PVC Resin of Paste grade and even after knowing these fact he mis declared the goods and hide the facts from the customs with reason to evade Anti Dumping Duty. Shri Rajesh Gupta, General Manager, once stated that antidumping duty was not paid since the import value was higher than landed price of 950.54US\$ and then stated that being non- plasticizer their product was not covered under the Notification No. 70/2010-Customs dated 25.06.2010. However, the act of mis-classification of their import product under CTI 39041090 shows preconceived ulterior motive to keep their import goods outside the scope of appropriate classification under CTH No. 39042110. Further to misguide, the Customs the overseas supplier mentioned CTH No. 39041000 in their invoices being raised towards the importer. In the HSN of European union, no such CTH No. 39041000 is there under the Chapter Head of 39. Further, in universal practice, there is no trend to mention the Customs Tariff Heading in invoice, since most of the countries classify their product based on the Harmonized System of Nomenclature (HSN). Thus, it appeared that to get the invoice duly mentioned such CTH number is nothing but preconceived ulterior motive of the importer to willfully suppress the facts so as to evade the anti dumping duty. The said noticee is one of the largest manufacturer of PVC Leather cloth and is well aware that the raw material required for their manufactured product is **Non-Plasticized PCV Paste Resin and Anti Dumping Duty has been imposed on PVC Resin of Paste grade**, however they refrain from proper declaration and mis classified their product under CTI 39041090. Moreover, said noticee have imported PVC Resin (Paste) from European union and have cleared from Mundra Port as well as from ICD, Kanakpura, Jaipur. Further on detection of their act of evasion of antidumping duty, the noticee appeared to have started to classify imported PVC Resin (Paste) at Mundra Port under CTI 39041090 and clearing the same under Advance Authorizations but at the ICD Jaipur , classified imported PVC Resin (Paste) under CTI 39042110 and got clearance by provisional assessment pending payment of antidumping duty. The adoption of dual method of declaration and classification of imported PVC Paste Resin at Mundra and ICD, Jaipur also point out motive of the noticee in respect of evasion of antidumping duty. Failure to disclose any facts which was necessary to enable the Assessing Officer to ascertain the correctness of import product amounts to willful suppression of relevant facts. The suppression of facts to evade the payment of duty is a state of mind which has to be ascertained from the circumstances of the case. Thus it appeared from the circumstantial evidences that the noticee have willfully suppressed facts that their import product was PVC Resin of Paste grade to evade the payment of antidumping duty which attracts the extendable period to demand Anti Dumping Duty under Section 28(4) of the Customs Act, 1962

14. From the above discussion and facts, it appeared that the said noticee resorted to willfully suppress the facts that their import product was PVC Resin of Paste

grade and wrongly classified with an intention of evading payment of the Antidumping Duty. Therefore, antidumping duty is liable to be recovered under provisions of Section 9A of the Customs Tariff Act, 1975 and Section 18 of Customs Act, 1962. Aforesaid both the Bills of Entry were assessed provisionally, the differential duty (Antidumping Duty) is liable to be recovered by classifying under CTI 39042110 and finally assessing the said Bills of Entry under Section 18(2) of Customs Act, 1962 and Section 9A of the Custom Tariff Act, 1975. Thus, antidumping duty aggregating to Rs. 24,03,536/- in respect of 165 Mts of imported "PVC Paste Resin" cleared for home consumption through Bills of Entry No.8510532/17.11.2012 & 8557123/22.12.2012 , leviable on PVC Paste Resin imported from European country but not paid by said Importer, is liable to be recovered from them under provisions of Section 9A of the Customs Tariff Act, 1975 and Section 18(2) of Customs Act, 1962. Also applicable interest as per provisions of Section 18(3) of Customs Act, 1962 is also liable to be demanded and recovered on the said differential amount of duty. **The said importer is also liable for Penalty under Section 117 of the Customs Act, 1962 for the aforesaid acts.**

15. Whereas from the aforesaid facts, it appeared that the said noticee have knowingly evaded the antidumping duty and therefore the act of mis-classification by willfully suppression of the facts to evade anti dumping duty of Rs. 1,16,00,488/- as shown in Table shown in Para 11.2 of this SCN is liable to be recovered under Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA ibid. Further the said import of 803 Mt PVC Resin Paste grade from Mundra Port having total value of Rs. 5,52,73,015/- is liable for confiscation under Section 111(m) of the Customs Act, 1962, for the act of mis-classification (though the goods are not available for confiscation). Moreover, the goods are liable to be reclassification under CTI 39042110. The said noticee are also liable for penalty under Section 114A and 112(a) of the Customs Act, 1962 for the aforesaid endeavor of willful mis-classification and suppression of the fact with ulterior motive of evasion of antidumping duty.

16. In view of the above, the said noticee, M/s. Mayur Uniquoters Ltd., Village-Jaitapur, Jaitapur Sikar Road, Jaipur-303704 were issued a Show Cause Notice bearing VIII/48-33/Adj./Pr. Commr./MCH/2016-17 dated 23.12.2016 calling upon them to show cause to the Principal Commissioner/ Commissioner of Customs, Custom House, Mundra, Dist. Kutch, as to why:-

- (a) The classification of the "PVC Paste Resin" cleared for home consumption Under Bills of Entry No. 8510532 dated 17.11.2012 and 8557123 dated 22.12.2012 under Customs Tariff Item 39041090 should not be rejected and the same be classified under Customs Tariff Item 39042110 and the Bills of Entry be finally assessed accordingly, under Section 18(2) of Customs Act, 1962.
- (b) The anti-dumping duty amounting to **Rs. 24,03,536/- (Rupees Twenty Four Lakh Three Thousand Five Hundred and Thirty Six only)** leviable on the "PVC Paste

Resin" covered under Bills of Entry 8510532 dated 17.11.2012 and 8557123 dated 22.12.2012, should not be demanded and recovered from them under Section 18(2) of Customs Act, 1962 and Section 9A of the Customs Tariff Act, 1975, along with applicable interest under Section 18(3) of the Customs Act, 1962.

- (c) The classification of 803 Mts. of "PVC Paste Resin" imported from European country and cleared for home consumption under Bills of Entry appearing at Para 11.2 of the Show cause Notice under Customs Tariff Heading 39041090 should not be rejected and the same be classified under Customs Heading 39042110 of Customs Tariff Act, 1975 and the Bills of Entry be assessed accordingly.
- (d) The anti-dumping duty amounting to **Rs. 1,16,00,488/- (Rs. One Crore Sixteen Lakh, Four Hundred and Eighty Eight only)** leviable on "PVC Paste Resin" covered under Bills of Entry appearing at Para 11.2 of the Show cause Notice, should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 read with Section 9A of the Customs Tariff Act, 1975, along with applicable interest under Section 28AA (erstwhile Section 28 AB) of the Customs Act.
- (e) The 803 Mts. of PVC Paste Resin having assessable value of Rs. 5,52,73,015/- cleared under Bills of Entry appearing at Para No. 7 of the Show cause Notice and 165 Mts. Of PVC Paste Resin having assessable value of Rs.97,04,020/- covered under Bills of Entry No.8510532 dated 17.11.2012 and 8557123 dated 22.12.2012, should not be held liable for confiscation under Section 111(m) the Customs Act, 1962.
- (f) Penalty should not be imposed upon them under Sections 112(a) and 114A of the Customs Act, 1962 in respect of goods covered under Bills of Entry appearing at Para 11.2 of the Show cause Notice.
- (g) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962 in respect of goods covered under Bills of Entry No.8510532 dated 17.11.2012 and 8557123 dated 22.12.2012.

Defense reply :

17. The authorized signatory of M/s. Mayur Uniquoters Ltd. made written submissions vide their letter dated 23.02.2018 in respect to SCN No. VIII/48-33/ADJ/PR.COMMR./MCH/2016-17 dated 23.12.2016 and submitted that:-

- (i) For the period 25.6.2010 to 2.7.2013 no ADD can be charged irrespective of classification under Notification 70/2010 because CESTAT vide Final Order No.

AD/A/10/2012-CU[DB] dated 06.07.2012 has set aside Customs Notification No. 70/2010 dated 25-6-2010 along with amending Notification No. 8/2012 dated 16-1-2012 vide which Anti-dumping duty on imports of PVC paste Resin was imposed on the imports coming from European Union.

- (ii) The Notification No. 15/2013-Cus dated 03.07.2013 imposing duty at 4 digit level on all type of Poly Vinyl Chloride Paste Resin falling under CTH 3904 (barring few) is prospective in nature and will not affect their imports in question.
- (iii) The goods imported by the noticee are PVC resin not mixed with any other substance and thus its correct classification is under 3904 10 90 under which it is classified worldwide.
- (iv) In the instant case the noticee filed bills of entry dated 17.11.2012 and 22.12.2012 under the correct classification of 39041090, same HS Code as given on all import documents along with certificate of analysis and technical data sheets. However, department assessed the aforesaid bills of entry provisionally.
- (v) They have submitted that, the goods in question are correctly classifiable under customs tariff Heading No. 39041090 as these are Polymers of vinyl chlorides, in primary form – not mixed with any other substance.
- (vi) They have submitted that, as per Additional Rules of interpretation of customs tariff Act all the single dash (-) entries of a particular heading are parallel entries. If the product is falling under a particular single dash entry then all other single dash entries are ruled out and the sub headings of other single dash entry is definitely ruled out.
- (vii) The first single dash category of heading 3904 is Polyvinyl chloride not mixed with any other substance. Since the imported goods are not mixed with any other substance it will fall under tariff entry 3904 10 90. Since the product is specifically covered under tariff entry 3904 10 90, there is no need to look into any other entry of custom tariff act.

The test report dated 17.11.2011 issued by Customs House Laboratory; Kandla clearly suggests that sample has characteristics of PVC Resin and same is without any additives. It means that PVC Resin imported by the notice is not mixed with any other substance and it is Pure PVC Paste Resin.

- (viii) Further it has been alleged by the department in para 4 of the SCN that as per Rule 3(a) of the General Rules of Interpretation Specific entry shall prevail over general entry. It should be noted that Rule 3 is important and relevant only when goods equally merit classification under two different heading, and then for choosing one of them help of Rule 3 is taken.
- (ix) They have submitted that, their imported item in unequivocal term falls under a single heading and thus there is no conflict of general entry or specific entry. The imported goods fall under a unique 8 digit classification i.e. 3904 10 90 being pure

PVC paste resin and no other entry. 3904 10 90 is specific to their imported goods and by no stretch of imagination it can be classified under any other entry. Therefore, rule 3(a) of interpretation is being wrongly applied by the department.

(x) Further the department in para 5 of the SCN has wrongly interpreted the test report and assumed that since PVC Resin imported by notice **does not contain any additives i.e. any plasticizers**, therefore, the said goods should fall under CTH 39042110 as Non Plasticized PVC Resin and ADD should be paid as per Notification No.08/2012 –Cus (Add) dated 16.01.2012 as amended. Items under Tariff Entry 39042110 as well as Tariff Entry 3904 2210 are non-pure PVC. If PVC is mixed with plasticizer it will fall under Tariff entry 39042210 and if it is mixed with substances other than plasticizer, it will fall under Tariff Entry 39042110 as Non Plasticized PVC Resin.

(xi) Further, they have submitted that, the contention of department is untenable. The Sub heading 3904 21 falls under the category of other polyvinyl chloride **which are mixed with other substances but does not contain any plasticizers**. Since the PVC resins imported by them are not mixed with any other substances, therefore, appropriate entry for their goods should be CTH 3904 1090.

(xii) They have relying on the certificate issued by M/s Solvin SA who are the Original European manufacturer of PVC Resins wherein they have confirmed that the subject products are Homo polymers of PVC Resin not mixed with any other substance and covered under entry 3904 10 00.

(xiii) It is pertinent to mention here that invoices of the leading local manufacturer of PVC Resin – Paste Grade -124 in India – M/s. ChemplastSanmar Limited has also classified these resin under HS Code 39041090. For reference, they have submitted copy of Invoices issued by M/s. ChemplastSanmar Limited.

(xiv) Since the noticee has mentioned the correct classification of the imported goods i.e. under tariff Entry 3904 1090 of the Customs Tariff Act, 1975, the CTH 3904 21 10 as suggested by the department is not sustainable at all keeping in view of the fact that test report of Customs House, kandla laboratory supports the noticees stand. It is just because of wrong interpretation by the department, the instant SCN has been issued. Therefore, the instant SCN should be dropped on this ground alone.

(xv) They have submitted that, the finding of DA under Rule 17 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 is merely a recommendation and it is for the Central Government to accept or not accept the said recommendation under Rule 18. Precisely for this reason no appeal is allowed against the Recommendation of DA under Rule 17 and it is only after the issuance of notification by ministry of finance under Rule 18 that an appeal can be filed before appropriate forum because nobody is aggrieved until the issuance of notification under Rule 18.

(xvi) Under Rule 18, the Central Government may choose not to impose anti-dumping duty even when recommended by the DA or it may accept the recommendation partly. What is implemented is the notification issued by Central Government under

Section 9A (1) read with Rule 18. Therefore, the issue to be seen is whether the language used in notification 15/2013-Cus permits any kind of retrospective operation. The notice cited various case laws in their favour.

- (xvii) Noticee submitted that the operative part of notification imposing ADD does not speak about the notification being retrospective. Since the notification specifically does not mention of any retrospective operation, its operation has to be construed prospectively in view of settled legal position as discussed above. In view of this the impugned SCN is liable to be dropped.
- (xviii) They have submitted that, in the matter of Commissioner of Income tax, Kerala vs. Tata Agencies (2007) 6 SCC 429 the Supreme Court held that "the intention if the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said also to what has not been said".
- (xix) They have submitted that, the Tribunal has no power to impose a duty not prescribed by the law, thus the provisional duty imposed by the Tribunal while quashing the notification 70/2010 must refer to provisional duty of a nature as mentioned in Section 9A of Customs Tariff Act, 1975. The relevant portion of Section 9A is reproduced below:

SECTION 9A. Anti-dumping duty on dumped articles. - (1) Where [any article is exported by an exporter or producer] from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

- (xx) The provisional duty mentioned in the above enumerated Section is governed by Rule 21 of Customs Tariff (Identification, Assessment and Collection of anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 which is issued under Section 9A of Customs Tariff Act 1975, which provides that;

(1) *If the Anti-dumping duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the Designated Authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.*

(2) *If, the Anti-dumping duty fixed after the conclusion of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.*

(3) *If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (4) of rule 18, the provisional duty already imposed and collected, if any, shall be refunded to the importer.*

(xxi) From the provisions extracted above it is evident that even if it is presumed that Notification No. 15/2013-Cus is given retrospective effect it cannot be effected as the law does not permit collection of differential duty. This is the reason that in its wisdom the Govt. chose to make the notification no. 15/2013 prospective.

(xxx) Notification No. 15/2013 has increased the scope of the Product on which the ADD is levied as against the previous Notification No. 104/2004-Cus. The new notification has excluded some products from the PUC and added many more in the PUC. Further under the notification 104/2004 products on which ADD was levied were products falling under the heading 3904 21 10 whereas the Notification No. 15/2013 has expanded the scope of levy by imposing ADD on products falling under heading 3904. Thus many new products get covered under the ADD levy. In view of such new levy the Govt. chose to impose the ADD prospectively vide the Notification no. 15/2013, as the Govt. has no power to impose ADD retrospectively.

(xxxii) As per Rule 18 of the Anti-Dumping Rules, 1995, the Central Government is not bound by the recommendations made by the designated authority and may differ if it may find it necessary. The relevant provision of Rule 18 is extracted below:

18. Levy of duty.-

(1) *The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.*

(xxii) In fact, in a recent case concerning solar panels the DA, vide Final Finding Notification No. 14/5/2012-DGAD dated 22.5.2014, recommended imposition of Anti-dumping duty on the PUC. However, the Central Government chose not to impose any anti-dumping duty on the concerned goods at all.

(xxiii) The duties on import of subject goods become applicable from 03.07.2013 alone. Neither the notification nor the tribunal decision indicated that the new notification shall be effective from a date prior to its issuance. Notification No. 15/2013 – Cus

provides that it is valid upto June 24, 2015. This merely indicates the date of expiry of the notification and does not convert the notification into a retrospective levy.

- (xxiv) It is a settled principle of Law the legislation including notifications are prospective in nature. Retrospective legislation or levy can be done either by the legislature (Parliament) or through specific legal provisions enabling a delegated authority to issue retrospective levy. In this context, attention is invited to the decision of the Hon'ble Supreme Court In the case of State of Rajasthan Vs. Basant Agro Tech (India) Ltd. Reported in 2012 (302) ELT 3 (SC).
- (xxv) The notification is an exercise of subordinate legislation and can be given retrospective effect only with the approval of Parliament or if power is specifically conferred upon the Central Government under the Act.
- (xxvi) The review is conducted under Rule 23 of the customs Tariff (Identification, Assessment and Collection of anti-dumping duty on dumped articles and for determination of injury) Rules, 1995 (hereinafter referred to as the "Rules"). Rule 23 has made Rule 20 applicable to reviews, mutatis mutandis. Rule 20 reads as under:
- Rule 20: Commencement of duty- (1) The anti-dumping duty levied under rule 13 and rule 19 shall take effect from the date of its publication in the official gazette.*
- (xxvii) Rule 20 clearly states that the duty shall take effect from the date of its publication in the official Gazette. There is no provision for retrospective levy relating to sunset reviews. Provisional duties are not applicable to reviews, since Rule 13 has not been made applicable to review procedures under Rule 23. Therefore, the duty imposed is effective only, from the date of its publication in the Official Gazette, in terms of Rule 20 of the Rules. Neither the statute nor the decision of the Tribunal confers any authority on the Central Government to issue retrospective notification, in sunset reviews.
- (xxviii) Therefore, demand of ADD under notification no. 15/2013 on goods covered under bills of entry provisionally assessed at Para 11.1 of SCN and also under bills of entry finally assessed at Para 11.2 of SCN is arbitrary, improper and not sustainable under law.
- (xxix) The show cause notice issued to the Noticee on 23.12.2016 for the period 2012-13. Section 28 (1) (a) of the Finance Act, 1994 provides that SCN can be issued at any time within two years from relevant date. Further section 28(4) provides that the same can be issued within 5 years from the relevant date in case of fraud, collusion, suppression of facts, etc. being committed by the assesses with intent to evade payment of service tax.
- (xxx) They have submitted that, the department has reached the aforesaid conclusion based on incorrect facts. At all the time including at ICD Jaipur, the noticee has classified the said goods under CTH 39041090 and not under CTH 39042110. It is

the Department who has disputed their classification and provisionally assessed the goods under CTH 39042110.

- (xxxix) They further submitted that, they have classified the said goods under tariff Entry 3904 10 90 at ICD Jaipur, however the department suo motto has changed the classification of their products to 3904 21 10 and provisionally assessed their B/E. Therefore, the whole allegation against them that they have adopted dual method of declaration and classification of imported goods is misconceived and without any substantial basis.
- (xxxix) Further, to support their stand they have submitted that, they have classified the goods under tariff entry 3904 10 90 at Jaipur Commissionerate regularly and no objection has been raised by the department. They have submitted copy of the Bill of entries classified the goods under 3904 10 90 at Jaipur Commissionerate.
- (xxxix) Further, they submitted that the onus is on the department to prove that the Appellant has suppressed the facts with intent to evade payment of duty. In the absence of such proof from the department, the SCN is time barred in as much as in the absence of guilty intention, Section 28(4) of the Customs Act does not apply.
- (xxxix) Further, they submitted that as held by courts that mere non-disclosure of information is not 'suppression with intent to evade tax'. Reliance is placed on the various judgments viz. **C.C.E. v. Chempher Drugs & Liniments [1989(40) E.L.T.276 (SC)]**, **M/s Anand Nishikawa Co. Ltd. v. CCE Meerut [2005 AIR 4923]**, **Padmini Products v. CCE [AIR 1989 SC 2278 (2284)]**, **Kapoor Fire Works, Mainpuri&Ors. V. Commissioner of Trade Tax, STI 2006 All. HC 331dt. 10.3.2006** etc.
- (xxxix) Thus, in view of above submissions made and judgments cited, and in absence of any positive act of suppression or willful misstatement on the part of the noticee extended period of limitation cannot be invoked. The ingredient of *mensrea* with the intent to evade duty is an essential pre-requisite for invoking extended period of limitation under section 28(4) of the Customs Act, 1962 and the same is not present in the instant case.
- (xxxix) **That no interest and penalty are imposable.**
- (xxxix) *No penalty is imposable under section 112(a)*
- (xxxix) *No penalty can be imposed under section 114A.*
- (xxxix) Since there is no suppression of fact, fraud etc on the part of noticee and noticee has always acted in good faith and classified the imported goods under the correct CTH 39041090. Therefore, penalty under Section 114A of the Act cannot be imposed.
- (xi) **Confiscation and penalty for Mis-classification not sustainable**
- (xi) Further the appellant relies on **S. Narendra Kumar & Co. v. CCE, Mumbai-II, 2003 (156) E.L.T. 1001**, wherein the Tribunal held that no penalty is imposable for filing incorrect classification.

(xlii) Noticee further requested that in the light of the above facts and relied upon case laws SCN proposing confiscation and penalty is not warranted at all.

Personal hearing :

18. Personal hearing in matter was held on 10.04.2018 wherein Shri Rajesh Gupta, General Manager in M/s. Mayur Uniquoters Ltd., Jaipur along with Shri Pramod Kumar Rai, Advocate appeared on behalf of the noticee and stated that they have correctly classified the product as it did not contain any added substance as confirmed in the test report. He also explained that PVC resin comes in paste grade or suspension grade depending upon particle size. Mention of paste grade ipso facto does not mean that some substances have been added. He then mentioned that at ICD Jaipur they classified under heading 39041090 which was changed to 39042110 by the Customs in provisionally assessed Bill of Entry and showed the copy of B/E. Thereafter he referred to CESTAT order setting aside notification 70/2010 and 08/2012 and interpretation of words provisional duty in CESTAT Order. He mentioned that 15/2013 does not have retrospective operation in absence of such mention in the notification. In last he referred to CESTAT order in their own case passed on 28.07.2017 in respect of same matter arising at ICD Jaipur, wherein CESTAT rejected departments appeal. He prayed to drop the proceedings in view of the above facts.

Discussion & Finding :-

19. I have carefully gone through the records of the case, including the Show Cause Notice dated 23.12.2016, the written submissions dated 23.02.2018 and 10.04.2018, as well as the oral submission made during the course of Personal Hearing on 10.04.2018.

20.1 At the outset, it is pertinent to mention that, the issue before me for decision is regarding classification of "Poly Vinyl Chloride Resin". One of the important steps in assessing the duty payable is the classification of goods under the Schedule to the Customs Tariff Act. Thus, the crux of the issue in this case, around which all the above issues are revolved, which I am required to decide, is regarding the classification of the "Poly Vinyl Chloride Resin" imported from European Union by the said noticee, **within the ambit of the Schedule to the Customs Tariff Act, 1975**, for the purpose of levying of Anti dumping.

20.2 Now coming to the above said aspect in respect of the imported "Poly Vinyl Chloride Resin" under consideration, I am of the view that before proceeding for classification of an item, it is absolutely essential to determine, 'what is the item under classification dispute?' After such determination, a suitable heading or sub-heading in the tariff is to be located and then the same has to be considered, in light of Statutory Rules for Interpretation, the Section Notes and the Chapter Notes in the Tariff, to establish the proposed heading for classifying the item would be appropriate or not. Thus, the goods

are required to be classified taking into consideration the scope of headings/subheadings, related Section Notes, Chapter Notes and the General Interpretative Rules.

20.3 I find that the Show Cause Notice had been issued proposing the classification of the imported "Poly Vinyl Chloride Resin" under CTH 3904 2110 instead of classification under CTH 3904 1090 declared by the noticee. I find that the said noticee has mostly imported the PVC Resin (paste grade) from M/s. SoLVin S.A., Europe declaring import Product as "POLYVINYL CLORIDE SOLVIN 382 NG PVC RESIN, POLYVINYL CLORIDE SOLVIN 376 NB PVC RESIN, POLYVINYL CLORIDE SOLVIN 367 NK PVC RESIN, POLYVINYL CLORIDE SOLVIN 373ND PVC RESIN, POLYVINYL CLORIDE SOLVIN 375MD PVC RESIN". On browsing the site of M/s. SoLVin S.A., all these various kind/grades of PVC Resin are shown as Paste Resin. The said noticee had imported only two consignments from Vinnolit GmbH & Co. KG, Ismanong (Europe) declaring as PVC RESIN VINNOLIT P 80 and PVC RESIN VINNOLIT E 74 CC which are also Paste grade PVC Resin.

20.4 Further, I consider the test report dated 17.11.2011 issued by the Custom House Laboratory, Kandla wherein it was reported that "**The sample is in the form of white powder. It has the characteristic of polyvinyl chloride resin, It is not contains any additive**". Further, vide letter F. No. KCL/01/Misc.-Corrs/Kandla/09-10 dated 26.11.2012 the said laboratory informed that "*In order to categorically confirm the paste grade PVC "K-Value" and some other constant of the sample needs to be tested for which the facility is not available in this lab*". Therefore, a sample was also sent to the Central Excise Laboratory at Vadodara who vide letter F. No. CRCL/DRI/Gandhidham/48 reported that "**The sample is in the form of white powder. It is composed of polyvinyl chloride (paste grade)**". Thus on considering the test reports of laboratories at Kandla, it is evident that the **PVC resin sample is without any additive.**

For proper appreciation, the extract of Customs Tariff 2012-13 relevant for the present issue is reproduced below.:

Extract of Customs Tariff 2012-13

3904		Polymers of Vinyl Chloride or of other halogenated olefins, in primary forms
3904		- Poly (vinyl chloride), not mixed with any other substances:
	3904 10 10	-- Binders for pigments
	3904 10 90	-- Other
		- Other polyvinyl chloride:
390421		-- Non-plasticised
	3904 21 10	--- Poly (vinyl chloride) resins
	3904 21 90	--- Other
390422		-- Plasticised
	3904 22 10	--- Poly (vinyl chloride) (PVC) Resins (emulsion grade)
	3904 22 90	--- Other

Headings 39.01 to 39.14 covers goods in primary form only. The expression "Primary forms" is defined in note 6 of Chapter 39 of HSN and it applies to the various forms viz. (1) Liquids & pastes, (2) Powder, granules & flakes and (3) Blocks of irregular shape, lumps and similar bulk forms. Liquids and pastes may be the basic polymer which requires "curing" by heat or otherwise to form the finished material, or may be dispersions (emulsions and suspensions) or solutions of the uncured or partly cured materials. In addition to substances necessary for "curing" (such as hardeners (cross-linking agents) or other co-reactants and accelerator), these liquids or pastes may contain other materials such as plasticizer, stabilizers fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics.

Further, from the extract of Customs Tariff for Heading 3904 given above, it is clear that Heading 3904 includes PVC and other halogenated olefins. Under CTH 3904, the sub-headings 1010 and 1090 include PVC not mixed with any other substances. As such, PVC mixed with any other substances would be classified under Headings 3904 21 and 3904 22, the former would include non-plasticised varieties whereas the latter will include plasticized varieties. These Headings have been further sub-divided. 3904 21 10 includes non-plasticized PVC Resins whereas 3904 22 10 includes plasticized PVC Resins (Emulsion Grade). As per Additional Rules of interpretation of customs tariff Act all the single dash (-) entries of a particular heading are parallel entries. If the product is falling under a particular single dash entry then all other single dash entries are ruled out and the sub headings of other single dash entry is definitely ruled out. I find that the first single dash category of heading 3904 is Polyvinyl chloride not mixed with any other substance. Since the imported goods are not mixed with any other substance it will fall under tariff entry 3904 10 90. Since the product is specifically covered under tariff entry 3904 10 90, there is no need to look into any other entry of custom tariff act.

Further, the test report of the Central Excise & Customs Laboratory, Vadodara does not contradict the Custom House Laboratory, Kandla report and merely states that sample is in the form of white powder and is composed of polyvinyl chloride (paste grade). Mere mention of paste grade in the test report does not *ipso facto* mean addition of other substances (other than plasticizers). Therefore, no evidence could be adduced from the SCN to confirm the PVC resin imported by the noticee is not pure PVC, but contains other substances so as to take it out of the scope of heading 3904 10. Therefore, I hold that goods imported by the noticee are Poly Vinyl Chloride resin not mixed with any other substance and its appropriate classification is under CTH 3904 10 90 and the noticee has classified their goods under correct classification.

21.1. As the classification issue is finalized, I take up the issue regarding levibility of anti-dumping duty on the "PVC Paste Resin". Before discussing the issue, it is pertinent to through light on the background of Antidumping duty levied on PVC Paste resin. The Designated Authority (D.A.) had initiated Anti-Dumping investigation on a petition received from M/s. Chemplast Sanmar Ltd. Chennai on behalf of the Domestic Industry in regard to alleged dumping of PVC Paste Resin. The D.A. notified the final finding dated 20-8-2004 recommending anti-dumping duty on PVC Paste Resin falling

under Customs Tariff Heading 3904 21 10 originating in or exported from European Union. Pursuant thereto anti-dumping duty was imposed under Customs Notification No. 104/2004 dated 7-10-2004. The same was further extended vide notification No. 115/2009-Cus dated 06.10.2009.

Further, in another investigation, the Designated Authority vide notification No.15/27/2008-DGAD, dated the 31st March, 2009, had initiated sunset review in the matter of anti-dumping duty on imports of subject goods originating in or exported from European Union imposed vide notification of Government of India in the Ministry of Finance (Department of Revenue), No. 104/2004-Customs, dated the 7th October, 2004, and extended the same by notification No. 115/2009-Customs dated 6th October,2009. The Designated Authority vide notification No. 15/27/2008-DGAD, dated the 26th April, 2010, after conducting Sunset Review had recommended continued imposition of anti-dumping duty on imports of PVC paste resin falling under CTH 39042110, 39042190 & 39042210, originating in, or exported from European Union, which was imposed by the Ministry of Finance vide Notification No. 70 /2010- Customs dated 25th June, 2010 and amendment notification no.8/2012 dated 16.01.2012.

Further, Leather Cloth and Plastics Manufacturers Association (LCMPA) filed an appeal before CESTAT, challenging the continued imposition of antidumping duty on imports of product under consideration recommended vide final findings dated 26th April, 2010 and imposed vide Customs Notification No.70/2010-Customs dated 25th June, 2010 and amendment vide notification no 8/2012 dated 16.01.2012. The Hon'ble CESTAT in this case of M/s Leather Cloth & Plastic Manufacturer Association vs. Union of India [2012 (282) E.L.T. 438(Tri Del.)] vide its order dated 6th July, 2012 set aside the final findings dated 26th April 2012 of the DA, the Customs notification No.70/2010-Customs dated 25th June, 2010 and amendment notification no.8/2012 dated 16.01.2012 and remanded the matter back to Designated Authority for fresh decision after granting opportunity of hearing to the interested parties.

The Designated Authority vide notification No. 15/27/2008-DGAD dated 4th April 2013, after granting opportunity of hearing has recommended the continued imposition of definitive anti-dumping duty on all imports falling under CTH 3904, originating in, or exported from the European Union; which was imposed by the Ministry of Finance vide Notification No. 15 /2013- Customs (ADD) dated 3rd July, 2013, which is extracted below for clarity.

Notification No. 15/2013-Customs (ADD)

New Delhi, the 3rd July, 2013

Now, therefore, in exercise of the powers conferred by sub-section (1), read with sub-section (5) of section 9A of the said Customs Tariff Act, and rules 18 and 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty

on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, on the basis of the aforesaid final findings of the Designated Authority, **hereby imposes on the goods, the description of which is specified in column (3) of the Table below, falling under heading of the First Schedule to the said Customs Tariff Act specified in the corresponding entry in column (2), originating in the country specified in the corresponding entry in column (4), and produced by the producers specified in the corresponding entry in column (6), when exported from the country specified in the corresponding entry in column (5), by the exporters specified in the corresponding entry in column (7), and imported into India, an anti-dumping duty at a rate which is equal to the amount specified in the corresponding entry in column (8), in the currency specified in the corresponding entry in column (10) and per unit of measurement specified in the corresponding entry in column (9) of the said Table;**

Table

Sl. No.	Heading	Description of goods	Country of origin	Country of exports	Producer	Exporter	Duty amount	Unit	Currency
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1.	3904	Poly Vinyl Chloride Paste Resin	European Union	Any	Any	Any	265.19	Per MT	US Dollar
2.	3904	Poly Vinyl Chloride Paste Resin	Any	European Union	Any	Any	265.19	Per MT	US Dollar

Explanation.- For the purposes of this notification, "Poly Vinyl Chloride Paste Resin" shall not include "PVC Suspension Resin", "PVC Blending Resin", "Co-polymers of PVC Paste Resin", "Battery Separator Resin" and "PVC Paste Resin with K- value below 60".

2. This notification shall be valid upto and inclusive of 24th June, 2015.

21.2 Thus by virtue of above notification 15 /2013- Customs (ADD) dated 3rd July, 2013 all the products under the CTH 3904 came within the ambit of Antidumping duty in place of the products under CTH 39042110, 39042190 & 39042210 covered under the notification No. 70/2010-cus dated 25.06.2010 amended vide Notification no. 08/2012-cus(ADD) dated 16.01.12. Now the question is to be decided is regarding the applicability of Notification 15 /2013- Customs (ADD) dated 3rd July, 2013 on the imports made during the period prior to issuance of this notification i.e. applicability of Notification 15 /2013- Customs (ADD) dated 3rd July, 2013 retrospectively.

The noticee has contended that the operative part of the notification, as extracted earlier, is unambiguous and nowhere states that the operation of the notification is retrospective in such circumstance one cannot look into the preamble, objective or

background material for the issuance of the notification. I find force in the contention of the noticee that the Notification No. 15/2013-cus has got prospective application and thus cannot substitute notification 70/2010-CUS as amended vide notification no. 08/2012-cus(ADD). I find support of the above contention in the following case laws:

- (a) In Commissioner v. Himachal Aluminium Pvt. Ltd., 2009 (236) E.L.T. 47 (H.P.), the Hon'ble High Court has held that Notifications which affect the rights of the parties are treated to be prospective in nature unless the notification itself clearly indicates that it will have retrospective effect. Same view was taken by Madras High Court in Karvembu & Co. v. Under Secretary to Government of India, 2010 (20) S.T.R. 591 (Mad.).
- (b) In Presmet Products V. Commissioner of Central Excise, Kanpur 2013 (296) E.L.T. 503 (Tri. - Del.) relying on Supreme Court decision in the case of in Shri Bakul Oil Industries and Another Versus State of Gujarat and Another [1987 (27) E.L.T. 572 (S.C.)], it was held that Notifications to be held as having prospective effect unless such notifications specifically pronounced to have retrospective effect.
- (c) In Unicorn Industries v. Union of India 2013 (290) E.L.T. 33 (Sikkim), The Hon'ble High Court reiterated that it is settled law that every legislation is prospective unless made retrospective.
- (d) In JayaswalsNeco Ltd. v. Commissioner 2005 (188) E.L.T. 281 (Tri.-Mumbai), The Appellate Tribunal held that the anti-dumping Notification No. 69/2000-Cus., was prospective and effective only from the date of Notification i.e. 19-5-2000 because it does not mention specifically that it will have retrospective effect.
- (e) In Ravi Jagota v. Commissioner of Customs, Amritsar 2006 (198) E.L.T. 234 (Tri. - Del.), it was held that Anti-dumping duty Notifications are prospective in nature. Similarly, Sneh Enterprises versus Commissioner of Customs, New Delhi 2006 (202) E.L.T. 7 (S.C.), it was held that Notification dated 22-5-2002 levying anti-dumping duties on lead acid batteries, is prospective in operation and not retrospective.

21.3 I further observe that Hon'ble Tribunal in the case of M/s Leather Cloth & Plastic Manufacturer Association vs. Union of India [2012 (282) E.L.T. 438(Tri Del.)] vide its order dated 06.07.2012 ordered continuation of the antidumping duty, as applicable on the date preceding the issue of Notification No. 70/2010 dated 25th June 2010, on a provisional basis for a period of 6 months and directed the Designated authority to conclude the proceedings within that period. The Tribunal effectively extended the duties levied by the Original notification i.e. 104/2004 for a period of 6 months from the date of tribunal order i.e. 06.07.2012 to the 1st week of January 2013. The Designated authority failed to complete the sunset review pursuant to the remand order, within a period of 6 months. By its finding dated 04 April 2013, the designated authority recommended imposition of duties pursuant to the remand order. The Central Government vide its notification No. 15/2013-cus dated 03.07.2013 imposed a specific duty of US\$ 265.19 MT

on the imports from European Union. This duty was effective upto and inclusive of June 24, 2015. The effect of the tribunal order was that the original duty, which was a variable duty equal to the difference between the landed value and US\$ 950.94 PMT, was made applicable for the period 6th July 2010 till 6th January 2013. Therefore, even if the resin imported by the noticee is held classifiable under heading 3904 2110, no antidumping duty would be leviable as the landed value in the subject imports under the SCN was always higher than US\$ 950.94 PMT. I observe that the Notification No. 70/2010-Customs dated 25.06.2010 was set aside vide CESTAT's Final Order dated No. AD/A/10/2012-CU(DB) dated 06.07.2012 wherein the CESTAT has ordered Antidumping Duty at the rate as applicable on the date preceding issue of Notification No. 70/2010-Customs dated 25.06.2010 i.e. as per the Notification No. 104/2004- Customs dated 07.10.2004. As per said notification dated 07.10.04 Antidumping Duty was to be paid on the goods originating in, or exported from European Union falling under CTH 3904 2110 at a rate which is equivalent to the difference between, 950.94 US\$ PMT and the landed value. The "landed value" was defined in explanation (a) to the said notification read as under:

(a) "landed value" means the assessable value as determined under the Customs Act, 1962 (52 of 1962) and includes all duties of customs except duties levied under sections 3, 3A, 8B, 9 and 9A of the said Customs Tariff Act;

I find that in the case of all 17 Bills of Entries (2 provisionally assessed + 15 Finally assessed) the declared value is more than 950.94 Per MT and as such no antidumping duty is leviable on the impugned goods imported even if they are classified under CTH 3904 2110 instead of CTH 39041090.

21.4 Further, the provisional duty is governed by Rule 21 of Customs Tariff (Identification, Assessment and Collection of anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 which is issued under Section 9A of Customs Tariff Act 1975, which provides that;

- (1) If the Anti-dumping duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the Designated Authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.*
- (2) If, the Anti-dumping duty fixed after the conclusion of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.*
- (3) If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (4) of rule 18, the provisional duty already imposed and collected, if any, shall be refunded to the importer.*

Thus from the provisions extracted above it is evident that even if it is presumed that Notification No. 15/2013-Cus is given retrospective effect it cannot be effected as the law does not permit collection of differential duty over and above the provisional duty.

21.5. I further rely on the judgment of CESTAT Principal bench, New Delhi in the case of noticee themselves viz. Commissioner of Customs, Jodhpur vs. Mayur Uniquoters Ltd. [2017(357) E.L.T. 1101(Tri. Del.)] wherein the tribunal has dismissed the appeal of department. The department has not filed any appeal against the said judgement of tribunal and has accepted the same on merits. While dismissing the said appeal of revenue the tribunal observed as follows :

"5. First of all, we note that the only ground, on which the present appeal is filed, is without any legal basis. Notification No. 70/2010-Cus was set aside by the Tribunal. There is no question of effective or valid period for the said notification. Even otherwise, the provisional duty ordered to be continued for six months by the Tribunal is as per the rate applicable on the date preceding the notification no. 70/2010 Cus. We note that the notification no.15/2013-Cus is not legally made retrospective and it cannot revive notification no. 70/2010-Cus, which has been set aside. The operative portion of the notification is clear and there is no ambiguity at all. In any case, the treatment of provisional duty has been elaborated under Rule 21 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped and Articles and for Determination of Injury) Rules, 1995. The said rule clearly stipulates that if the AD imposed on the basis of the final findings of the investigation conducted by the DA is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer. Further, Rule 23 read with Rule 20 of these Rules make it clear that the AD duty levied shall take effect from the date of its publication in the official gazette. We note that the difference between the provisional duty under AD and provisional assessment for regular Customs duty has not been appreciated by the Revenue while preferring this appeal. The finalization of provisional assessment for AD duty is to be in terms of Rule 21, stated above.

6. In view of the above discussions and analysis, we find no merit in the present appeal by the Revenue. Accordingly, the same is dismissed."

21.6. Thus in view of the above discussion, I find that the notification no.15/2013-Cus cannot be made applicable retrospectively and it cannot substitute notification no. 70/2010-Cus, which has been set aside by the tribunal vide order dated 06.07.2012.

22. Thus, from the discussion made above, I find that the "Poly Vinyl Chloride Resin of Paste Grade" imported by M/s. Mayur Uniquoters Ltd. , Jaipur from European Union, not mixed with any other substance, is appropriately classified under CTH 3904 10 90 by the noticee. Further, the notification no.15/2013-Cus cannot be made applicable retrospectively covering the product of the noticee within its ambit. Also, the product imported by the notice is not leviable to Antidumping duty either in terms of

classification or in terms of value during the material period.

23. Further, on the facts discussed in aforesaid paras, it is evident that there is no mis-declaration or suppression on part of the notice to evade payment of antidumping duty. Therefore, charge that they have rendered the goods imported liable for confiscation under section 111(m) of the Customs Act, 1962 is not tenable. Hence, I find that the noticee is also not liable for penalty under section 112(a) & 114A of the Customs Act, 1962.

24. In view of the above discussion, I hold that the charges raised against the noticee do not sustain. Accordingly, I pass the following order:

: ORDER :

I hereby drop the proceedings against M/s. Mayur Uniquoters Ltd. Village Jaitapur, Jaipur Sikar Road, Jaipur -303704 initiated vide Show Cause Notice No. F. No. VIII/48-33/Adj./Pr.Commr./MCH/2016-17 dated 23.12.2016.


(Sanjay Kumar Agarwal)
COMMISSIONER

F.No. VIII/48-33/Adj./Pr. Commr./MCH/2016-17

Dated: 20.04.2018

BY REGD. POST A/D

To,

M/s. Mayur Uniquoters Ltd.,
Village Jaitapur,
Jaipur- Sikar Road,
Jaipur -303704

Copy to:

- 1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, alongwith a copy of the Show Cause Notice.
- 2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad, for information.
- ✓ 3) The Assistant Commissioner (RRA/Recovery Cell/ EDI) Customs House, Mundra.
- 4) The Assistant Commissioner (Import Gr-II), Customs House, MP & SEZ, Mundra.
- 5) Guard File.