ITEM NO.20 COURT NO.9 SECTION XVII-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 12233/2018

BMW INDIA PVT. LTD. Appellant(s)

VERSUS

COMMISSIONER OF CUSTOMS CHENNAI V Respondent(s)

(IA No. 184393/2018 - EX-PARTE STAY
IA No. 1027/2019 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

WITH
C.A. No. 9383/2019 (XVII-A)
(IA No. 173467/2019 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT
IA No. 173466/2019 - PERMISSION TO FILE LENGTHY LIST OF DATES
IA No. 173464/2019 - STAY APPLICATION)

C.A. No. 6521/2021 (XVII-A)
(IA No. 140662/2021 - EX-PARTE STAY)

C.A. No. 2882/2022 (XVII-A)
(IA No. 54881/2022 - EX-PARTE STAY)

C.A. No. 4588/2022 (XVII-A)
(IA No. 86615/2022 - EX-PARTE STAY)

Date : 24-09-2024 These matters were called on for hearing today.

CORAM :
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE NONGMEIKAPAM KOTISWAR SINGH

For Parties Mr. Arvind P. Datar, Sr. Adv.
Mr. Rohan P. Shah, Adv.
Mr. Kumar Visalaksh, Adv.
Mr. Rahul Khurana, Adv.
Mr. Udit Jain, Adv.
Mr. Pranav Bansal, Adv.
Mr. Abhishek Vikas, AOR

Mr. B. Krishna Prasad, AOR

Ms. Mahua Kalra, AOR
Mr. Mayank Nagi, Adv.
Ms. Husnal Nagi, Adv.
Mr. Tarun Singh, Adv.

Contd..

Mr. Arvind P. Dattar, Sr. Adv.
Mr. Rohan P Shah, Adv.
Mr. Kumar Visalaksh, Adv.
Mr. Udit Jain, Adv.
Mr. Mahfooz Ahsan Nazki, AOR
Mr. Pranav Bansal, Adv.
Mr. Rahul Khurana,, Adv.

Mr. N. Venketraman, A.S.G.
Mrs. Swarupama Chaturvedi, Sr. Adv.
Mr. Anukalp Jain, Adv.
Mr. Sughosh Subramaniyam, Adv.
Mr. Rajat Nair, Adv.
Mr. Zoheb Hussain, Adv.
Mr. G.S. Makker, Adv.
Mr. Mukesh Kumar Maroria, AOR

UPON hearing the counsel the Court made the following

O R D E R

Appeals admitted.

Hearing expedited.

List on 27.11.2024.

(NEETU SACHDEVA)
ASTT. REGISTRAR-cum-PS

(DIVYA BABBAR)
COURT MASTER (NSH)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH AT CHENNAI

Appeal No.: C/40966/2015

(Arising out of Order-in-Original No. 35113/2015 dated 13.02.2015 passed by the Commissioner of Customs (Imports), Chennai-V)

BMW India Pvt. Ltd. : Appellant

Vs.

Commissioner of Customs, Chennai-V : Respondent

Appearance:-

Shri Rohan Shah, Sr. Advocate
Shri Karthik Sundaram, Advocate,
Shri Kumar Visalaksh, Advocate
Shri Rahul Khurana, Advocate
Ms. Divya Jaskant, Advocate,
For the Appellant

Shri P.R.V. Ramanan, Special Counsel
Shri P. Hemavathy, Commissioner (A.R)
For the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: **04.05.2018**

Date of Pronouncement: 17.09.2018

Final Order No. 42430 / 2018

Per Bench

M/s. BMW India Pvt. Ltd. (hereinafter referred to as 'appellant') have been importing through Chennai Sea Port, goods declared in the Bills of Entry as "BMW CARS IN CKD" classifying them under Customs Tariff Heading (CTH) 8703. In these imports, BMW claimed concessional rate of customs duty @ 10% under clause (i) of Sl. No. 344 of Table appended to Notification 21/2011-Cus. and sub-clause (1)(a) of Sl. No. 437of Notification 12/2012-Cus. The Department took the stand that as the imported goods namely, "Engine Assembly" and the "Transmission Sub-assembly/Gear Box" were in a pre-assembled form, the appellant was not eligible to avail the concessional rates provided in the said Notifications.

2. Accordingly, a Show Cause Notice dt. 26.08.2013 was issued to the appellants *inter alia* demanding differential customs duty in respect of CKD kits for motor cars imported during the period 24.03.2011 to 11.04.2013 and imports of motor cars in a form other than CKD for the period 01.03.2011 to 23.03.2011. The Show Cause Notice *inter alia* proposed demand of differential duty amounting to

Rs. 757,61,37,381/- with interest thereon and imposition of penalties under Sections 112(a) and 114A of the Customs Act, 1962.

3. In adjudication, the adjudicating authority vide the impugned Order dt. 13.02.2015, inter alia concluded as follows :

(a) The subject 'engine assembly' and 'transmission assembly' in its imported form constitutes a complete and functional pre-assembled engine.
(b) The term 'sub-assembly' used in the phrase 'transmission sub-assembly' is a misnomer by the importer (appellant) to suppress the fact that the imported item actually constitutes a complete automatic transmission/gearbox.
(c) The 'transmission sub-assembly' goods constitute complete and functional 'automatic transmission'/automatic gearbox.
(d) The assignment of the UID and model no. for the subject goods in their imported form clearly reflects their status as complete and functional 'automatic transmission'/automatic gearbox.
(e) The add-on products are merely for integrating the gearbox/engine assembly with the car body and mounting the same on the chassis/body of the car.
(f) Engine assembly in its imported form constitutes complete and functional pre-assembled engine.

4. Based on these conclusions, the adjudicating authority demanded differential customs duty of Rs. 7,04,67,90,260/- in respect of 706 Bills of Entry with interest thereon, penalty of Rs.696,44,66,115/- under Section 114A of the Act, penalty of Rs. 3,00,00,000/- under Section 112(a) ibid., confiscation of the goods imported under provisionally

assessed Bills of Entry under Section 111(m) and (o) ibid; however, appellant was given option to redeem the same on payment of fine of Rs. 3,00,00,000/- under Section 125(1) ibid. Aggrieved, appellants are before this forum.

5. Hearing for the above appeal took place on several dates.

6. On behalf of the appellant, Ld. Sr. Advocate Shri Rohan Shah took us through the history and chronology of events related to the dispute in the present appeal as under :

i) Notification No.21/2002-Cus. was issued on1.3.2002 providing for a 60% rate of Basic Customs Duty (BCD) for motor cars imported as Completely Built Unit (CBU) and a 30% rate, if imported in any other form.

ii) Notification No.26/2003-Cus., dated 1.3.2003 was issued, which provided for a 25% rate of BCD for motor cars imported as Completely Knocked Down ("CKD") kit, and a 60% rate if imported in any other form. However, no definition of CKD was provided for. Notification No.18/2004-Cus., dated 12.1.2004 was issued, which reduced the rate for CKD imports from 25% to 20%. Notification

No.11/2005-Cus., dated 1.3.2005 was issued, which reduced the rate for CKD imports from 20% to 15%.

iii) In the absence of a definition of CKD, and in order to obtain certainty on the position *qua* its proposed imports, the appellant applied for an Advance Ruling. The entire set of items imported by the Appellant was submitted as Annexure-III to the Application. Vide Order dated 28.10.2005, *In Re: Bayerische Motoren Werke Aktiengesellschaft,* 2006 (193) ELT 138 (AAR), the question framed for consideration was as follows :

> *"Whether the import of car parts, listed at Annexure III would be considered as import of completely knocked down ("CKD") unit, eligible to the concessional rate of customs duty of 15% being covered by Entry 344 of CTH No.8703 (1) of Notification No.21/2002-Cus., dated March 1,2002 as amended by Notification No.11/2005-Cus., dated 1.3.2005?"*

After considering the Report provided by the ARAI on the referred issues, the Authority for Advance Rulings ("AAR") was pleased to hold as follows :

> ***44***. *[ ]From the perusal of these reports, the position that emerges is that parts listed in Annexure-III to the application represent the CKD Unit and with the assembly of seats, which will be procured locally, the parts would constitute a complete car. There are some parts, which could be taken as component form while there are other parts which could be termed as SKD form. It is true that there are no definitions of the terms "CKD" and "SKD" in the Customs Act or Rules framed thereunder. But from the material furnished by the applicant for comparison of CKD and SKD, it appears that the components for the CKD vehicle are*

> *procured from the suppliers who supply to main BMW production facility at the CKD location and approximately 1400 single parts and body parts are transported to the CKD country. In the case of SKD, the vehicles are completely built up in a main BMW production facility in Germany and subsequently certain components are disassembled; the partially disassembled vehicles are mounted on transport skids and shifted to the respective countries where the disassembled components are fitted. The reports of the expert, as may be seen, refer to Annexure–III as CKD unit. The notification does not use the term "SKD". The Notification for purposes of concessional duty refers to two categories : (i) imported as completely knocked down (CKD) unit dutiable 15%; and (ii) imported in any other form 60%. The reports of the expert do not mention that the car is not imported in completely knocked down (CKD) unit. What they say is that some parts of the car are in SKD form, thereby meaning, they can be further knocked down into components. This, in our view, may not be a relevant factor because it is clear from the report that Annexure–III represents completely knocked down unit of motor cars. If that be so, the contention of the Commissioner that Sl. No. 344 (2) prescribing 60% duty would apply, cannot be accepted; the applicable rate of duty would be 15%.*(emphasis supplied)

Accordingly, on the basis of the expert report, the AAR ruled that the imports by the Appellant would qualify as CKD, and would be entitled to the lower rate of BCD.

(iv) The appellant commenced production of motor cars at its Chennai plant after achieving certainty on the legal position *qua* imported goods from the BMW AAR.

v) Notification No.20/2007-Cus., dated 1.3.2007 was issued, which reduced the rate for CKD imports from 25% to 20%.

vi) As and when the appellant initiated imports of new models of cars (5 series, XI Series and X3 Series), which were in the same state

of disassembly as the 3 Series submitted before the AAR, the appellant wrote to the department to obtain confirmation that the benefit of the Customs Exemption Notification would continue to be available. As and by way of illustration, the appellant addressed letter dt.5.7.2010 seeking confirmation that the benefit of the lower rate of BCD would be equally applicable to the X1 and X3 Series. The Department responded vide letter dt. 23.7.2010 confirming that the benefit of the Customs Exemption Notification can be extended to the X1 and X3 Series, subject to first check examination.

vii) Thereafter, Harley-Davidson Motor Company, made an application before the AAR seeking to claim CKD benefits even if the engine and gearbox were mated / inter-connected in a single unit, in a motor cycle (here, it must be noted that the language of the exemption entries and the amendments thereto have always been identical for motor cars and motor cycles). The AAR vide its Ruling [*In Re: H-D Motor Company India Pvt. Ltd*., 2011 (270) ELT 432 (AAR)] ("H-D AAR") ruled that the CKD benefits are available even to an engine and gearbox which were mated / inter-connected together in a motor cycle. The Government raised serious objection to H-D's

position *qua* a mated engine-transmission being eligible for the CKD rate. The objections of the Government were overruled by the AAR and the benefit of the CKD was extended even to an import containing mated engine and transmission sub-assembly. The terms "assembly" and "sub-assembly" appear to be used interchangeably throughout the ruling of the AAR.

viii) Post the H-D AAR ruling, while the Government initiated the process for a review of the said ruling, in the parallel the Government also initiated interactions with the industry through the Society and Indian Automobile Manufacturers ("SIAM"), *inter alia* vide a meeting with SIAM on 6.12.2010, on a proposed definition of CKD to be inserted in the Customs Exemption Notification. In the review before the AAR, the Government framed its issue as follows :

> *"Apart from the aforesaid substantive argument, the Commissioner has made several other points for seeking modification / rectification / amendment of the advance ruling, such as :*
>
> *[ ]*
>
> *- To treat and classify a complete engine and transmission assembly/sub-assembly as a 'component' is a serious error of law"*

At this juncture, it is also important to notice that in the above issues framed for review by the AAR, the Government itself uses the words "assembly" and sub-assembly" interchangeably.

ix) Vide Order dated 18.2.2011 *[Ref: In Re: H-D Motors Company India Pvt. Ltd. - 2012 (277) ELT 113 (AAR)]*, the review of the H-D AAR sought by the Government was rejected. On the same date, SIAM submitted its proposal for a CKD definition to the Ministry of Finance, which used the language of "inter-connected sub-assemblies" to exclude mated sub-assemblies from the CKD rate.

x) Immediately post the rejection of the review of the HD-AAR, and within less than a month, the Government introduced the new definition of CKD under the Customs Exemption Notification with effect from 1.3.2011. In the aftermath of the amendment, SIAM wrote to the Government *vide* letter dt.1.3.2011, again stressing on the need for the usage of the word "interconnected" in the first exclusion clause of the CKD definition. SIAM also met with the Government on 8.3.2011 to discuss the newly inserted definition.

xi) Meanwhile the Volkswagen Group India also wrote to the Government seeking the following clarifications :

1. *That all operations not running as a kit basis are not affected by this change*

2. *Reading the Explanation and the memorandum together gives us an impression that one is eligible to import all critical components including a pre-assembled engine, gearbox, transmission mechanism as a CKD so long as these are not installed on the chassis or body assembly.*

3. *If only the three critical components namely engine, gearbox and transmission mechanism are imported as standalone subassemblies and not interconnected to each other, the same should qualify for clearance as parts.*

xii) The CBEC clarified as follows vide Instruction F.No.354/38/2011-TUR, dated 11.3.2011 :

4. *In view of the above, it is to inform you that while point nos.1 and 3 of the interpretation of the new definition, as mentioned in your letter dated 4th March, 2011 are correct, the interpretation at point no.2 is not correct.*

xiii) In view of the above, it was categorically stated that the understanding set out at point no.3 was accurate, viz. that standalone sub-assemblies would qualify for clearance as parts (i.e. under the main clause of the CKD definition – "components, parts or sub-assemblies for assembling a complete vehicle"). It is further submitted that point no.3 could not conceivably refer to non-CKD imports, as such imports were separately dealt with at point no.1.

xiv) Further to the aforesaid developments, a further amendment was made to the Customs Exemption Notification to alter the

language in relation to the CKD definition, and to introduce a three-tier-rate slab.

xv) Simultaneously, TRU Circular bearing no.B-1/3/2011-TRU dated 25-Mar-2011 was also issued to clarify the import of the aforesaid amendment. In this regard, a tabular correlation of the clarifications issued *qua* each sub-clause of the CKD definition, along with the corresponding rate.

xvi) Post the aforesaid amendment, the appellant continued the imports of its CKD kits by availing the 10% rate of duty, after giving prior intimation (vide letter dated 30.3.2011) to the Customs Department of its intent to do so. The Department did not respond to the appellant's letter dated 30.03.2011 nor did it seek any clarification from the appellant post the said letter dated 30.03.2011.

xvii) The Customs Department, on a series of occasions from April 2011 to April 2013 (i.e. 20 times in 25 months), subjected the imports of the appellant to a physical examination to determine whether or not the goods were eligible for the exemption as claimed. On each and every one of these occasions, the Customs Department concluded that the appellant were eligible for the said exemption. Brief extracts from the Bills of Entry, the Examination Order and

Inspection Reports are set out in page 12, 13 of the written submissions.

xviii) The appellant subsequently received the SCN dated 26.8.2013 and filed its reply dated 12.12.2013. Thereafter, the impugned Order-in-Original No.35113/2015 dated 13.02.2015 was issued by the respondent.

7. Ld. Senior Advocate also made various submissions on merits which can be broadly summarised as under :

(i) The correct interpretation of the scheme of the relevant exemption notifications is that the concessional rate of 10% customs duty can be denied only if the engine and transmission are 'mated or inter-connected' in the form as imported

(ii) It is well settled law, that whenever a court is called to interpret an amended provision it has to bear in mind the history of the provision, the mischief which the legislature attempted to remedy, the remedy provided by the amendment and reasons for providing such remedy. Reliance in this regard is placed on the decisions of the Supreme Court in the case of *State of Madras Vs K.M. Rajagopalan* - AIR 1955 SC 817.

(iii) Taking resort to the 'mischief rule of interpretation' it is clear that the purpose of the two March, 2011 amendments are only to overcome the position in law set out in the AAR Ruling in the *Harley Davidson* case, the amendments notifications should, therefore, be read and interpreted in light of the same. Therefore, the finding in the impugned order, that the argument that the said amendment dated 24.03.2011 was also to overcome the effect of the Advance Ruling in the case of M/s.H-D Motor Co. Pvt. Ltd. is without any iota of documentary evidence, is without any sustainable basis in fact or in law and is contrary to well settled principles of statutory interpretation.

(iv) The term 'and' has been specifically inserted in the Exemption Notification as a 'conjunctive' and full effect should be given to the same whilst the 1st March, 2011 amendment used the expression "(a) *a kit containing a pre-assembled engine or gearbox or transmission mechanism*" the 24th March, 2011 amendment specifically uses the words "*engine, gearbox and transmission mechanism not in a pre-assembled condition*". The word 'and' is used in the 24th March, 2011 Notification instead of the word 'or' in clause (a) of the customs

exemption notification. Full effect therefore needs to be given to the 24th March, 2011 amendment and the use of the word *'and'* in such amendment, which term has been sued as a 'conjunctive' . The introduction of the word *'and'* was meant to address the concerns of the automobile industry and to provide that the term 'pre-assembled' refers to a situation where both engine and transmission are in a mated condition prior to importation. It is clear that *'and'* is in the present context used a 'conjunctive' as the word 'or' has specifically been substituted by the word 'and'. It is well settled law that when *'and'* is used as a conjunctive, the condition should be read collectively and not disjunctively.

(v) Different clauses of an exemption notification should be constructed harmoniously without rendering any of the provisions otiose. Reliance in this regard is placed on the decision of the Supreme Court in the case of *Sultana Begum v. Prem Chand Jain* (1997) 1 SCC 373. It is further well settled law that the words in an exemption notification have to be construed keeping in view the said object and purpose of the exemption.

(vi) There is, therefore, a need to adopt a harmonious and purposive interpretation to make the notification workable, as otherwise if clause (b) of Sr.No.344 of Notification No.31/2011 dt. 24.03.2011 (as amended from time to time) were to be read literally without keeping in mind the objective of the notification, it would lead to an incongruous situation where an engine alone though pre-assembled but not combined with a gear-box and transmission assembly would be under the rate of 10% under clause (a) but would at the same time fall under 30% under clause (b). It is submitted that it is settled law that in certain circumstances the word *'or'* should be read as *'and'* when giving *'or'* its natural meaning would defeat the very object and intention of the provision and lead to absurdity.

(vii) If **clause (b)** of the relevant Exemption Notification is read as referring to "... with engine (***and***) gear box ***or*** transmission mechanism in preassembled form but not mounted on a chassis or a body assembly" which would attract a higher rate of 30%, then there would be no incongruity or repugnance between **clause (a)** and **clause (b)** as where the imports of engine, gearbox and

transmission assembly when taken together are not in preassembled condition the applicable duty rate would be 10% (basic customs duty) under clause (a) and when in pre-assembled condition would attract 30%, and, therefore this is the correct interpretation to be adopted.

(viii) Therefore, in terms of the well settled rules of statutory interpretation, the proper and correct construction of Exemption Notifications is that :

a. Imports of engine sub-assembly or transmission sub-assembly which are not mated / assembled together will qualify as CKD imports entitled for the concessional rate of BCD at 10%.
b. Imports of engine and transmission assembly mated / assembled together as a single assembly, but which is not mounted on a chassis or a body assembly, will qualify as CKD imports but be subject to a higher rate of BCD at 30%.
c. Imports of mated engine and transmission assembly which is mounted on a chassis or a body assembly or a CBU will be taxed at the highest rate of BCD at 60%.

(ix) Imports made by the appellant are not of engine or transmission in pre-assembled form for inter-alia the reasons that :

a) Various parts as listed and detailed herein, are added onto the imported 'engine assembly' and transmission sub-assembly' in the Chennai plant of the appellant including various essential parts to make the engine and transmission – complete and functional.

b) Towards making the imported 'engine assembly' and transmission sub-assembly' complete and functional, various processes in the nature of assembly operations are undertaken at the Chennai plant of the appellant. The various processes undertaken by the appellant are in the nature of assembly operations wherein components are assembled either by means of simple fixing devices (screws, nuts, bolt, etc.) or by riveting or welding.

c) The processes are undertaken by trained and qualified personnel using various capital goods at the Chennai plant of the appellant.

d) The entire control and functionality of the 'engine' and 'transmission' is based on software which is coded and flashed onto the respective ECU's of the engine and the transmission at the Chennai plant of the appellant.

e) Testing of the complete and functional engine and transmission after (i) addition of various parts in India; and (ii) flashing / coding of software into the ECU's of the engine and transmission after incorporation and assembly into the completed motor car happens in India at the Chennai plant of the appellant.

(x) The finding in the impugned order that the 'engine assembly' as imported by the appellant is complete and functional, and, the parts added in India are only in the context of placing the preassembled engine into its slot within the overall power train of the fully assembled car is wholly contrary to the opinion of the technical experts, whose reports specifically deal with this issue and has been relied upon by the appellant but has not been controverted by the Department by any other technical report.

(xi) The factual position, that the 'automatic transmission' is made complete and functional in the Chennai plant of the appellant, by the various activities undertaken at the Chennai plant, is also evident from the two technical reports of the experts which has been relied upon by the appellant and has not been controverted by any other technical report by the Department.

(xii) No reliance can be placed by the Department on the report of Shri Ramesh Babu. The expert has issued the report remised on incomplete facts and without fully understanding or analysing the assembly operations undertaken by the appellant without even visiting the Chennai plant of the appellant and without physically observing the assembly operations undertaken at the said plant on the imported 'engine' and 'transmission' sub assemblies. Dr. N. Ramesh Babu, has not been offered for cross examination despite many requests by the appellant. It is well settled law that when cross examination of the expert is not afforded, then no reliance can be placed on such expert report.

(xiii) Submissions on Extended period of limitation

(a) Invocation of the "extended period of limitation" in the OIO is erroneous and unsustainable inasmuch as there is no wilful or deliberate non disclosure of correct information by the appellant. The appellant has always kept the Department in the know-how of the legal position followed by them. The Department has also during the relevant period physically inspected various consignments of imports declared to be in CKD form and approved of the availment of the Exemption Notification by the appellant. This position is evident from the following.

(b) The appellant on June 17, 2005 while filing the Applicaton for Advance Ruling with the AAR submitted the complete list of parts used in assembling the cars at the Chennai plant for 3 Series model of cars in Annexure III (containing list of parts imported for assembling the card model E 90 at their Chennai plant) of the application. The department was party to the application and was well represented before the AAR.

(c) The OIO itself at paragraph 11.10.2 (page 21 of the OIO0, 11.11.1 (page 22 of the OIO), 11.11.2 (page 22 of the OIO) and 12.3

(page 36 of the OIO) clearly records that there has been no change in the import pattern from the time of the AAR ruling in the appellant's case to the period covered under the SCN. Therefore, since the entire list of parts to be imported were furnished to the department at the time of the AAR Ruling in 2005, and, details as regards import of models were furnished to the Department at different points in time, the Department was fully aware at all times of the nature of imports made in CKD form as well as the level of disassembly of such imports.

(d) The appellant itself post-introduction of the relevant exemption notifications had specifically vide letter dated 30th March 2011 specifically informed the Department that the appellant would continue to avail the concessional rate of duty under the exemption notification namely 10%; and that the appellant was ready to provide any clarification to the Customs Department on the subject issue.

(e) The goods in question at the time of import during the period March 2011 to April 2013 have on various occasions been physically examined by the Customs Department and the benefit of the

relevant exemption notification allowed after such physical examination. The Inspection Report issued by CFS officer with respect to the above Examination Reports obtained by the appellant from the Customs Department clearly show that upon verification, the CFS officer has held that consignment are in CKD kit form with 'engine, gearbox and transmission mechanism not in a pre-assembled form'.

(xiv) Submission on penalty and interest and confiscation

(a) The extended period of limitation has wrongly been invoked for the reasons set out hereinabove, there can be no levy of penalty under section 114A of the Act on goods which have already been cleared. In terms of Section 114A of the Act, penalty is attracted only when short levy is caused by reason of collusion or wilful misstatement or suppression of facts and that in the present case, none of these circumstances exist as has already been set out herein above. It is submitted that the appellant has not violated any provision of the Act or the Rules there under as alleged or at all to warrant the levy of penalty.

(b) Furthermore, as the issue involved is only one of interpretation of the provisions of the exemption notification, it is well settled law that no penalty can be imposed in such a case.

(c) As the duty demand on the appellant is itself not sustainable in light of the submissions set out hereinabove, there can be no question of payment of any interest by the appellant under section 28AB of the Act.

(d) It is well settled law that provisions relating to confiscation will only stand when misdeclaration is proved and if there is no case of misdeclaration, confiscation cannot be made.

(e) It is well settled law that penalty can be levied in terms of Section 112 (a) of the Act only when there are grounds for confiscation of the goods in terms of Section 111 of the Act. In terms of the submissions set out hereinabove, as there exists no grounds for confiscation under Section 111 of the Act, no penalty under section 112 (a) of the Act can be levied on goods which have been assessed and provisionally cleared.

8. On behalf of the Revenue, Ld. Special Counsel Shri. P.R.V. Ramanan also made oral and written submissions which are summarized as under :

(i) It is settled law that a Notification has to be interpreted in accordance with the language of the Notification and there is no scope for any addition or deletion or giving an extended meaning to the expressions used in the Notification. There is, therefore, no warrant to read the expression 'engine, gear box and transmission mechanism not in a pre-assembled condition' to mean engine, gear box and transmission mechanism which are 'mated or interconnected'. This would certainly mean adding an expression to give an extended meaning. Such an interpretation is not permissible.

(ii) As may be seen from the two Circulars issued by the CBEC, extracted at Appendices 1 and 2, the legislative intent has all along been to extend the concessional rate of duty to the imports in the form of CKD kits, where all the parts and components including engine, gearbox and transmission assembly are present in completely knocked down condition. In other words, if any pre-assembled engine, gearbox or transmission mechanism is imported as a part of such unit, or if any of these three components are pre-installed on the chassis or body assembly, the concessional rate of duty will not be available. The claim that the Circular dated 24.03.2011 has accepted the representation of SIAM and clarified

accordingly, is totally misconceived if you take into account the full text of the aforesaid clarification.

(iii) Revenue would rely on the following case law in support of the above submissions :

(a) 2005 (186) E.L.T. 263 (S.C.) – EXCON Bldg.Material Mfg.Co.Pvt. Ltd.

(b) 2011 (270) E.L.T. 465 (S.C.) – Saraswati Sugar Mills

(iv) Automatic gear box and auto transmission are synonymous with each other. This fact has not been disputed by BMW. Hence, the use of the word 'and' has to be read as 'or' because it would lead to an absurdity if we adopt the appellant's interpretation since both gearbox and transmission mechanism cannot be mated with an engine.

(v) As may be seem from the letter dt. 18.02.2011, SIAM's suggestion for incorporating a certain definition of 'CKD kit' was not accepted as it was not in line with Government's policy. This is evident from TRU letter dated 11.03.2011 – Para 3, reiterated by the Circular dt. 24.03.2011. The AAR decision in *Harley Davidson case* was rendered on 24.07.2010 and SIAM was requested to give their suggestion on 06.12.2010. Thus, changes made w.e.f. 01.03.2011 was

not on account of rejection of application for review filed by department in HD case.

(vi) If appellant's interpretation of notification is to be adopted it would mean that mere fastening by four bolts to hold together the pre-assembled engine and pre-assembled gearbox or pre-assembled transmission should result in 20% rate difference.

(vii) The ordinary meaning of the expression 'not pre-assembled' means 'not already assembled' if adopted would clearly show that the goods imported would qualify to be regarded as a pre-assembled engine or transmission.

(viii) Ld. Special Counsel relied upon the ratio of the case laws in:

(a) Sodra Devi's case [AIR-57-SC-382]

(b) Excon Bldg. Material Mfg. Co. Pvt. Ltd. Vs. C.C.E, Bombay [2005 (186) E.C.T. 263 (S.C.)]

(c) Aeon's Construction Products Ltd. Vs. C.C.E., Chennai [2005 (180) E.L.T. 209 (Tri. - Chennai)]

He submitted that applying the ratio of the above decisions, the wording "not in a pre-assembled condition" as given in the subject Notification dated 24.03.2011 has to be read with each of the items, viz., Engine, Gear Box and Transmission Mechanism. There is no warrant to interpret the word 'and' to mean "Engine, Gear Box and

Transmission Mechanism as mated or integrated or interconnected". Further, it is settled law that a Notification has to be interpreted in accordance with the language of the Notification and there is no scope for any addition or deletion or giving an extended meaning to the expressions used in the Notification.

(ix) For availing of concessional rate of Customs Duty @ 10% for consignments of motor vehicles imported as CKD kits, the engine, gearbox and transmission mechanism imported within the CKD kit should not be "in a pre-assembled condition". The primary test for verifying the "pre-assembled condition" of an article would be to ascertain whether all the essential parts that go to make the assembled article (i.e., 'engine'/'gearbox') are present in an assembled form in the said article. Secondly, there shall be no further assembly as an 'engine' or a 'gearbox' with any parts of the article. This would be reflected in the nature of 'add-on parts' and the processes of assembly undertaken in the receiving factory. The Department has applied these tests to arrive at the conclusion that the goods imported were in a pre-assembled condition.

(x) In the case of engines, the imported article contains in assembled form all the essential parts of an engine such as, cylinder head, flywheel, engine block, connecting rod, crankshaft, crank case, camshaft, piston and rings and exhaust manifold. In the case of automatic transmission, the imported article contains in assembled form all the essential parts, such as planetary gear sets, hydraulic system, clutches, seals and gaskets, torque converter and mechatronic parts. Thus, in both cases, all the integral components are incorporated in the article under import in a pre-assembled condition.

(xi) The argument that the imported goods are not operational is not relevant to the present case. The expression used in the Notification merely refers to the physical condition of the goods in question. Nowhere there is any mention of the operational aspect in the subject Notifications.

(xii) The expression 'complete and functional' was used in the SCN and O-I-O since the engine and transmission under import were complete and no parts integral to the engine and transmission were absent. They were functional on account of the same. The operational aspect was never alluded to in the SCN or O-I-O.

(xiii) On a scrutiny of the copy of Annexure III submitted to the AR Authority by the importer, it was observed that among the parts listed therein were parts of description 'ASSY ENGINE N46 E90 B20 OL LHD A' (under heading : Engine, Compressor and Generator) and 'LU AUTO TRANSM 6HP 19 CODE MB N46 OL'(under heading : Gearbox/Transmission Wiring Harness). The importer has declared the disputed engine part of the CKD kit as engine assembly and not as a sub-assembly of an engine. Further, under the heading 'Engine, Compressor and Generator' appearing in the annexure parts of description like cylinders, connecting-rods, crankshaft, flywheel, camshaft, piston, etc., which are essential elements for assembling an engine, were not found listed.

(xiv) Moreover, it is pertinent to note that no part by description 'Transmission sub-assembly' is found among the parts listed in the Annexure III. It is also accepted by BMW vide the statement of Ms. Payal Tuli given on 06.05.2013 that from 2005 till date there has been no change in the level of dis-assembly with respect to the imported engines and transmissions.

(xv) In the case of engines, the imported article contains in assembled form all the essential parts of an engine such as, cylinder

head, flywheel, engine block, connecting rod, crankshaft, crank case, camshaft, piston and rings and exhaust manifold. In the case of automatic transmission, the imported article contains in assembled form all the essential parts, such as planetary gear sets, hydraulic system, clutches, seals and gaskets, torque converter and mechatronic parts. Thus, in both cases, all the integral components are incorporated in the articles under import and were thus complete engines and auto transmissions. They were in fact described in their technical literature and marketed by the suppliers as engines and auto transmissions. In trade parlance they were known as such. Further, no part integral to the engine and transmission was added to them at BMW's factory. Thus, they were complete and functional as engine and transmission on account of the same.

(xvi) BMW have referred to List of Add-on Parts to contend that these parts are required before a complete car can be assembled. These parts, however, merely provide linkage for the imported engine/gearbox assembly with the rest of the car parts and are useful only for integrating the imported engine assembly and automatic gearbox with the rest of the car. Thus, the engine

assembly and the transmission assembly imported by BMW were complete as engine and gear box for automatic transmission respectively.

(xvii) Point raised in appeal : <u>The invocation of extended period of limitation is not sustainable.</u>

(a) After receiving Ministry's clarification vide Circular dt. 11.03.2011 issued after the amendment dated 01.03.2011, which only reconfirmed the necessity of the engines and the gearboxes not being in pre-assembled condition to avail 10% BCD and the introduction of amendment vide Notification No. 21/2011-Cus. dt. 24.03.2011, BMW did not seek any further clarification either from SIAM or from CBEC or from Chennai Customs as admitted by Ms. PayalTuli in her voluntary statement given on 06.05.2013. On the other hand, they started projecting their imported engines and gearboxes as being in the form of sub-assemblies.

(b) BMW have not been able to demonstrate or describe as to how the imported part declared by them as "transmission sub-assembly" in the "Detailed Packing List" is different from a "gearbox" and they have also not been able to describe or

demonstrate as to how the said transmission sub-assembly would constitute a sub-assembly of the gearbox.

(c) Hence, the submission made by BMW India in their letter dt. 30.03.2011 that they imported their engines and gearboxes in sub-assembly form appears to be a clear misdeclaration aimed at misleading the Customs Authority.

(d) BMW have also never declared in any of their Bills of Entry or import documents, the description/nomenclature/the level of assembly or disassembly of the imported parts, viz., engines and gearboxes and establishes suppression of facts and deliberate default to claim ineligible notification benefit.

(e) Very few Bills of Entry filed by BMW [i.e., 20 out of 712 consignments] were taken up (on random selection by system) for assessment and examination. Most of the Bills of Entry filed by BMW during the disputed period were cleared under their own Self-assessment without any examination by Customs based on their status as an Accredited Client under the Accredited Client Programme. Out of 20 examination reports only two mentioned about the pre-assembled nature of

engine and transmission. On this basis, generalization cannot be made.

(f) From the above discussion of internal correspondence of BMW, it appeared that the importer had taken a conscious decision not to express to the proper officer their apprehension/doubt regarding their eligibility for availing 10% BCD and not to submit to Customs *suo motu* the documentation regarding the level of disassembly of their imported engines/gearboxes. Their decision to continue to avail 10% BCD by resorting to self-assessment under Section 17(1) while they were required to go through provisional assessment under Section 18(1)(a) would indicate deliberate suppression of facts regarding the pre-assembled nature of the imported engines and gearboxes on their part to evade payment of the higher rate of 30% BCD.

(xviii) Point raised in appeal : <u>Views of the Technical experts endorse the view that the goods described as 'engine assembly' and 'transmission sub-assembly', as imported, are not pre-assembled.</u>

(a) The adjudicating authority has correctly found that the views expressed by the said "technical experts" did not help

to reach a conclusion as to the applicability of the said Notification to the goods under import. Thus, the parts described as 'transmission sub-assembly' by BMW are complete and functional units to be appropriately termed as pre-assembled 'automatic gearboxes/automatic transmissions'. Accordingly, the adjudicating authority rightly concluded that the expert was discussing the relevance of every support system for the automatic gearbox from the point of view of its fitment in the larger system of drive train which drives the fully assembled car and not from the limited point of view of the completeness and functionality of the automatic gearbox *per se.* This observation is factually correct and cannot be faulted.

(b) The adjudicating authority has also correctly held that the experts nowhere address the technical literature uploaded by BMW and manufacturers of transmission mechanism, the assembly process, constituent parts and the testing of the subject goods carried out prior to export, based on which the manufacturers themselves are describing and marketing the

products as fully assembled 'automatic transmission' and 'engine'.

(xix) Point raised in appeal : No reliance can be placed on the report of Dr. Ramesh Babu.

(a) With regard to the contention of appellant that reliance cannot be placed on the report of Dr. Ramesh Babu, the said expert had inspected the representative samples of imported goods declared by BMW as "ASSY Engine"/"ZB Engine" and "Transmission sub-assembly"/"ASSY Auto Gearbox" and was of the opinion that the above representative samples of engines were "pre-assembled engines which could be readily integrated to build the motor car" and that the samples described as "transmission sub-assembly" and "ASSY Auto Gearbox" respectively were "automatic transmission units, which were otherwise known as automatic gearboxes,…..".

(b) The report brought out the pre-assembled nature of the imported engines and gearboxes. The Expert had also gone through the "List of Add-on Parts" and concluded that the same "merely comprised nuts, screws, clips, brackets, washers, plugs, hoses, pipes, temperature and pressure

sensors and wires, apart from A/C compressor and starter motors" (in respect of the engines) and "screws, nuts, brackets and metal tubes, except the driveshaft assembly, which actually was a separate and independent item" (in respect of the gearboxes).

(c) The above report of the expert thus corroborated/validated the Department's position discussed hereinabove that the "ASSY Engine" and "transmission sub-assembly"/"ASSY Auto Gearbox" units imported by M/s. BMW India in their CKD kits of motor cars are pre-assembled engines and gearboxes respectively.

(d) With regard to the denial of cross-examination of Dr. Ramesh Babu, the Ld. Special Counsel submitted that the Department's case does not rest solely on the opinion of Dr. Ramesh Babu.

(xx) <u>Imposition of Penalties</u>

For the reasons discussed extensively at Para 10 above, it emerges clearly that BMW's conduct in the matter was not above board. There was deliberate default on their part which certainly entailed severe penal action.

9. Heard both sides and have gone through the records of the case.

10. In our opinion, the issues involved in the present case are as under :

I. Whether imports made by the appellant :

(i) are CKD imports for the period 1.3.2011 to 23.3.2011, entitled to a rate of Customs duty at 10% (as claimed by the appellant) or a rate of Customs duty at 60% (as claimed by the Department);

(ii) are CKD imports for the period 24.3.2011 to 11.4.2013, entitled to a rate of Customs duty at 10% (as claimed by the Appellant) or a rate of Customs duty at 30% (as claimed by the Department)

II. Whether in the facts and circumstances of the present case, the longer period of limitation under Section 28 (4) of the Customs Act, 1962 could be invoked ?

III Whether in the facts and circumstances of the present case, the imposition of penalty under Section 114A and Section 112

(a) of the Customs Act, 1962, as well as the imposition of redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962, is justified ?

11.1 The concessional rate of duty for motor cars and motor vehicles imported as Completely Knocked Down (CKD) unit came into being w.e.f. 1.3.2003 vide Notification No.26/2003-Cus. by which such imports benefited from a lower Basic Customs Duty of 25%. This concessional rate was further reduced to 20% vide Notification No.18/2004-Cus. dt. 12.1.2004 and to 15% vide Notification No.11/2005-Cus. dt. 1.3.2005, however none of these notifications provided any Explanation or definition of what constituted a CKD unit.

11.2 It is in this scenario that the appellants approached the Advance Ruling Authority. The question that was raised by the appellant for Advance Ruling was as under :

> *"Whether the import of car parts, listed at Annexure III, would be considered as import of completely knocked down ('CKD") unit, eligible to the concessional rate of customs duty of 15% being covered by Entry 344 of CTH No. 8703 (1) of Notification No. 21/2002-Cus., dated March 1, 2002 as amended by Notification No. 11/2005-Cus., dated 1-3-2005?"*

11.3 In their Ruling dt. 28.10.2005, as reported in 2006 (193) ELT 138 (AAR), the majority ruling of the Three-Member Authority ruled that the import of parts assembly in Annexure-III to the application would be considered as import of motor car in CKD, eligible to concessional rate of duty under Notification No.21/2002-Cus. as amended by notification No.11/2005-Cus. The relevant portion of the majority ruling, namely para-44 thereof is excerpted as under :

> ***"44.*** *It may be noted from the clarification report that (1) there are no specific guidelines prescribed for defining CKD and SKD kits; (2) there are some parts in the Annexure which could be taken as component form while there are other parts which could be termed as SKD form. (3) on the basis of the analysis carried out by ARAI and the discussions held with BMW, it was learnt that seats would be manufactured locally and then installed in the vehicle; (4) inasmuch as without seats the vehicle could not be treated as complete, the words "by and large" have been used. From the perusal of these reports, the position that emerges is that parts listed in Annexure-III to the application represent the CKD Unit and with the assembly of seats, which will be procured locally, the parts would constitute a complete car. There are some parts, which could be taken as component form while there are other parts which could be termed as SKD form. It is true that there are no definitions of the terms "CKD" and "SKD" in the Customs Act or Rules framed thereunder. But from the material furnished by the applicant for comparison of CKD and SKD, it appears that the components for the CKD vehicle are procured from the suppliers who supply to main BMW production facility at the CKD location and approximately 1400 single parts and body parts are transported to the CKD country. In the case of SKD, the vehicles are completely built up in a main BMW production facility in Germany and subsequently certain components are disassembled; the partially disassembled vehicles are mounted on transport skids and shifted to the respective countries where the disassembled components are fitted. The reports of the expert, as may be seen, refer to Annexure–III as CKD unit. The notification does not use the term "SKD". The Notification for purposes of concessional duty refers to two categories : (i) imported as*

completely knocked down (CKD) unit dutiable 15%; and (ii) imported in any other form 60%. The reports of the expert do not mention that the car is not imported in completely knocked down (CKD) unit. What they say is that some parts of the car are in SKD form, thereby meaning, they can be further knocked down into components. This, in our view, may not be a relevant factor because it is clear from the report that Annexure–III represents completely knocked down unit of motor cars. If that be so, the contention of the Commissioner that Sl. No. 344 (2) prescribing 60% duty would apply, cannot be accepted; the applicable rate of duty would be 15%. We hasten to make it clear that the motor cars if imported in any form other than completely knocked down (CKD) unit, the rate of duty applicable would be 60%."

11.4 It is interesting to note that in the said AAR Ruling, the Authority have found that "*there are some parts in the total list which could be taken as component form while there are other parts which could be termed as SKD form*". The Authority has also noted the usage of words "*by and large*" in the report of the Automotive Research Association of India, Pune (ARAI) and noted that "*inasmuch as without seats the vehicle could not be treated as complete, the words "by and large" have been used*.

11.5 However, in the said AAR Ruling, one of the dissenting Members held that the goods proposed to be imported by BMW are **not** covered by the main text of the description of goods specified in Column (3) against Sl.No.344 of the Notification No.21/2002-Cus., as amended by Notification No.11/2005-Cus; that the description of the goods in the said Sl.No.344, cannot be interpreted in a manner so as

to include incomplete or unfinished 'motor car' or 'other motor vehicle' within its ambit, hence the benefit of exemption under notification is not available to the goods in question.

11.6 The moot point that should be kept in mind is that for obvious reasons, the application by the appellant to the Authority for Advance Ruling was made before any actual imports had taken place. In consequence, the Advance Ruling Authority and for that matter, the ARAI, had gone only by the list of car parts submitted by the appellants in Annexure III to their application. We find that the said Annexure III has been filed in page 160 onwards of the compilation. At the beginning of Annexure-III it is clarified that "*all of these items though assigned one part No. are separate*", an obvious reference to the identical part numbers given to "body shell, doors, bonnet, boot lid, fuel flap". In page 162, Assy. Engine has been indicated as Part No.7826191 under the sub-group "Engine, Compressor and Generator". So also, under a separate sub-group, "Gearbox / Transmission Wiring Harness" the ASSY. TRANSM. WIHARNESS and "LU AUTO TRANSM " are listed with Part Nos.7548981 and 754J090. We do not find any indication or mention in this Annexure III as to whether the said engine assembly and

transmission assembly are separate or whether mated to each other etc. Nor is there any indication that whether the engine or gearbox / transmission mechanism is preassembled or for that matter, whether any or more of those assemblies are installed onto the body assembly of vehicle. It would therefore not be unreasonable to conclude that at the point of time when the Advance Ruling was sought by the appellant, the requirements of the definition of CKD which were brought about for the first time only w.e.f 1.3.2011 by Notification No.21/2001-Cus. was not required to be looked into.

11.7 The Harley-Davidson Motor Company (referred to as H-D) had also approached the Authority for Advance Ruling on the question whether import of motor cycle *"in the form of components, parts and sub assemblies proposed to be imported by the applicant would constitute import of motorcycle in CKD form and as such"* would be eligible for concessional ratio of BCD as provided in Notification No.21/2002-Cus. as amended. The Authority, vide a ruling dt. 27.7.2010, reported in 2011 (270) ELT 432 (A.A.R), held that if the engine and transmission assemblies are designed to be housed in a single housing, and are so assembled, the engine and transmission assembly is generally referred to as "Engine Assembly" only and

merits to be treated as a component for the purposes of CKD units. The authority noted that in the list of components and parts and sub-assemblies in Annexure III of the application filed by BMW related to the earlier ruling, the engine assembly and the transmission assembly have been indicated as two separate assemblies. The authority ruled that motor cycles imported by H-D will be eligible for concessional rate of import duty if they are imported in the form of identifiable basic sub-assemblies or components as per the illustrative list of components, parts and sub assemblies. The authority also ruled that benefit of exemption would however be applicable only in case the engine and transmission assembly imported as a single part is designed to be housed and is so assembled, in a single housing.

11.8 As discussed with respect to the BMW Advance Ruling, the ruling in the H-D case was also made before any definition of what constituted CKD was brought about in the exemption notification, In the case of motor cycles, this came about vide amendment caused in Notification No.21/2011 dt.1.3.2011 by inserting an *Explanation* for the meaning of "Completely Knock Down Unit" for the purposes of Sl.No.345.

11.9 The objection filed by the Revenue for reconsideration of its decision, the Authority for Advance Ruling vide an Order dt. 18.2.2011, reported in 2012 (277) ELT 113 (A.A.R) rejected the petition and upheld its Order.

12. From the submissions of the Ld. Advocate, it appears that pursuant to the decision given by the AAR in their case, the appellant commenced production of their motor cars at their Chennai Plant from February, 2007 without any problem or dispute. It also appears that appellants had informed the Customs Department, Chennai vide letter dt. 21.03.2007 seeking approval for import of cars of 5-Series model in CKD form at concessional rate under exemption Notification and that Department vide a letter dt. 26.04.2007 had apparently allowed such imports in CKD condition at concessional rates. So also, appellants had preferred a letter dt. 28.04.2010 with the Department seeking approval for import of X1 and X3 models as CKD import at concessional rates under the Notification. The Department after seeking clarifications from the appellant, apparently allowed the import of the said X1 and X3

series models in CKD condition at concessional rates vide a letter dt. 2.07.2010.

13. It further emerges that pursuant to the AAR ruling in the *Harley Davidson* case, there were some interactions between the Society for Indian Automobile Manufacturers (SIAM) and the Ministry of Finance, in relation to the proposed definition of CKD for the purpose of the exemption Notification. As per the documents filed by the appellant in Page No. 270 to 271 of the Compilation, SIAM had suggested a definition of CKD as follows :

> *"CKD: As imported, in unassembled or dis-assembled condition, means* ***import of all components or sub-assemblies****, which may be used for assembling a finished vehicle or a semi-finished vehicle,* ***but does not include any of the following*** *:*
>
> *(i)* ***Inter-connected*** *sub-assemblies of two or more of the following :*
>
> *(i)Engine, (ii) Gear Box, (iii) Transmission shaft, (iv) Axles, (v) Suspensions, (vi) Steering system, (vii) Glasses, (viii) Seats, (ix) Instrument cluster, (x) Wiring Harness*
>
> *(ii) A chassis/Body assembly of a vehicle on which any of the above components or sub-assemblies is installed."*

The definition of CKD, as finally approved by the law makers, inserted by Notification 21/2011 dt. 01.03.2011 in respect of motor cars and motor vehicles, read as under :

*"**Explanation.** – For the purposes of this exemption, "Completely Knocked Down" unit means a unit having all the necessary components, parts or sub-assemblies for assembling a complete vehicle but does not include, -*

*(a) A kit containing a **pre-assembled** engine or gearbox or transmission mechanism; or*

(b) A chassis or body assembly of a vehicle on which any of the component or sub-assembly viz., engine or gearbox or transmission mechanism is installed;"

Evidently, the actual definition of CKD as brought about vide Notification 21/2011 dt. 01.03.2011 was different from that apparently suggested by SIAM.

14. Immediately, on the same day of the date of issue of Notification dt. 01.03.2011, SIAM sent a communication to the Revenue Secretary, Ministry of Finance, conveying that the definition of CKD was highly restrictive and sought urgent clarification and also suggested alternative options. It also emerges that on 04.03.2011, M/s. Volkswagen India also sent a communication to the Revenue Secretary seeking confirmation as to their following **interpretations** of the new definition :

1. *That all operations not running as a kit basis are not affected by this change.*
2. *Reading the Explanation and the memorandum together gives us an impression that one is eligible to import all critical components including a pre-assembled engine, gearbox, transmission mechanism as a CKD as long as these are not installed on the chassis or body assembly.*
3. *If only the three critical components namely engine, gearbox, transmission mechanism are imported as standalone sub-assemblies and*

not inter-connected to each other, the same should qualify for clearance as parts.

In reply, the CBEC, Ministry of Finance, clarified that the definition introduced w.e.f. 01.03.2011 has two independent criteria for their qualification as CKD units :

- That imported units will be termed as CKD units attracting BCD @ 10%, if it is a unit having all the necessary components, parts or sub-assemblies for assembling a complete vehicle;
- That accordingly, if any pre-assembled engine, gearbox or transmission mechanism is imported as a part of such unit or if any of these three components are pre-installed on the chassis or body assembly, the concessional rate of duty will not be available.

Accordingly, M/s. Volkswagen India were informed that Point Nos. 1 and 3 of their interpretation are correct, but that Point No. 2 is incorrect.

15. The definition of CKD was further tweaked vide Notification No. 31/2011 dt. 24.03.2011 and three differential rates of duty were indicated. The amended entry reads as under :

344	8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars, new, which have not been registered anywhere prior to importation, if imported, - (1) As a Completely Knocked Down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with, - (a) Engine, gearbox and transmission mechanism not in a pre-assembled condition; (b) Engine or gear box or transmission mechanism in pre-assembled form but not mounted on a chassis or a body assembly (2) In any other form	10% 30% 60%

The clarifications in respect of these changes made in the definition of CKD were conveyed by the TRU, CBEC, vide letter dt. 25th March, 2011 as under :

> *"9. As you are aware, a definition of Completely Knocked Down Unit had been prescribed in the Budget. However, considering the representations by the industry, the custom duty rate on vehicles imported in the form of completely knocked down kits having all the necessary components, parts and sub-assembly including the pre-assembled engine, gearbox and transmission mechanism of Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02) including motor cycles is being reduced from 60% to30%. Such imports of vehicles in completely built form or in any other form including in a form where any of the three viz. engine, gear box or transmission assembly are imported fixed to a chassis will attract 60% BCD. The imports in form of CKD kits where all the parts and components including engine, gearbox and transmission assembly are present in completely knocked down condition will attract 10% BCD."*

16. Discernibly, the changes brought about by Notification No. 31/2011-Cus. not only created an additional slab of concessional duty, but also further clarified what exactly would be considered as CKD. Notification 31/2011-Cus. in fact expanded the types of imports which could be considered as CKD unit. In the Notification 31/2011 if the engine, gearbox and transmission mechanism was not in a pre-assembled condition, this would be considered as a CKD kit, meriting the lowest rate of 10% BCD.

At the same time, even if the engine, gearbox and transmission mechanism was in a pre-assembled form, however not mounted on the chassis or a body assembly, even if such imported kit may well be considered as a CKD kit for the purposes of the notification, that will be required to suffer BCD @ 30%. If the imports do not fit into any of these two categories, they would have to pay customs duty @ 60%. As clarified by the TRU in their letter dt. 25.04.2011, only those CKD kits where **all** the parts and components **including** engine/gearbox and transmission assembly which are imported in a completely knocked down condition, will alone benefit from the lowest rate of 10% BCD.

17. Thus, as per the amended Notification (31/2011-Cus.) when all the parts and components are imported in completely knocked down condition, the lower rate of 10% BCD will be applicable. A combined reading of the Notification No.31/2011-Cus. as also the TRU letter dt.25.4.2011 serves to clarify that 'not in a preassembled condition' meant imported in 'completely knocked down condition'. However, even when the engine or gearbox or transmission mechanism was imported in preassembled form, with the remaining parts, components etc., the entire kit would still be treated as a CKD kit, though required to suffer a higher rate of 30% BCD. This type of imports are covered by entry 344 (1) (b) of the Notification, which reads as under :

> *"Engine or gearbox or transmission mechanism in preassembled form, but not mounted on a chassis or a body assembly"*

18. Quite evidently, the sub-assemblies covered in sub entry 344 (1) (b) are only "engine" **or** "gearbox" **or** "transmission mechanism". From a plain reading of this sub entry, it is also clear that it will not cover engine mated to a gear box or transmission. Hence if the goods as imported for an engine mated to a gearbox or

transmission, they will go out of the scope of entry 344 (1) (b) and will necessarily fall within the residual entry namely 344 (2) "in any other form" and suffer BCD @ 60%. Hence, in our view, therefore not only will entry 344 (1) (b) **not** include automobile kit imported with engine or gearbox or transmission in preassembled form **and** mounted on a chassis / body assembly but also will not include such sub-assembly engine and / or gearbox and / or transmission mechanism **if** they are imported mated to each other.

19. It is also pertinent to note that if the imported automobile CKD kit has the engine or gearbox or transmission in preassembled condition, the entire kit will not get the benefit 10% BCD under entry 344 (1) (a) but will have to suffer 30% BCD under entry 344 (1) (b).

20. The Ld. Advocate has been at pains to emphasise that various representations were made by SIAM, Volkswagen, etc., to the Ministry after Notification No.21/2011- dt. 1.3.2011 was issued, wherein for the first time, the definition of "Completely Knocked Down" was defined. Possibly, due to all these representations and the discussions between the stakeholders, the definition of CKD

which was introduced by Notification No.21/2011-Cus. was enlarged in scope. Whereas Notification No.21/2011-Cus. excluded from the scope of CKD automobile kit containing even a preassembled engine or gearbox or transmission mechanism, such preassemblies were considered as a CKD unit in the subsequent Notification No.31/2011-Cus. though, required to suffer a higher BCD of 30%. The decision in the case of *Sunil Kumar Rana Vs State of Haryana & Others* (2003) 2 SCC 628 was relied by the Ld. counsel for appellant to argue that purposive construction has to be applied to interpret the notification. That the legislative intent was to get over the mischief shooted from the AAR Ruling in *Harley Davidson* case. As already discussed we do not agree with the submission that the notification under consideration was a consequence of the AAR decision in *Harley Davidson*. Even though SIAM was asked to suggest definition for CKD, the same was not accepted by the Government which would itself show that the notification did not intend to get over any mischief but intended to give a definition for CKD.

21. Further amendment to its duty rate was caused about by Notification No.12/2012-Cus.dt. 17.03.2012 wherein the following rates were brought into effect :

TABLE

S.No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
...	...	...	...	...	...
437	8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars, new, which have not been registered anywhere prior to importation, if imported,- (1) As a Completely Knocked Down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with,-		-	-
		(a)engine, gearbox **and** transmission mechanism not in a pre-assembled condition;	10%	-	-
		(b)engine or gearbox or transmission mechanism in Pre-assembled form but not mounted on a chassis or a body assembly.	30%	-	-
		(2) in any other form,-			
		[(a) with CIF value more than US $ 40,000 or with engine capacity more than 3000 cc for petrol–run vehicles and	[100%]		

		more than 2500 cc for diesel-run vehicles, or with both] (b) other than (a) above	 60%	-	-

It is thus seen that definition of CKD kit has continued to remain unchanged except that for the words "engine **or** gearbox **or** transmission mechanism not in a preassembled condition" meriting rate of 10% BCD, the Notification 12/2012 had the words "engine, gearbox **and** transmission mechanism not in a preassembled condition", also with the same concessional BCD rate of 10%.

22. Having understood the scope and canvas of the relevant notifications, we proceed to apply this knowledge to the actual impugned imports.

23. From the samples of the Bill of Entry and related documents filed by appellants in page 32 onwards of compilation of documents Vol-I, we find that in a sample Bill of Entry No.7949107 dt.14.09.2012, the imported goods were declared as "BMW cars in CKD". In the Bill of Entry the imported goods are declared as falling within the Customs Tariff Heading 87039090 and claiming benefit of Notification No.12/2012-Cus. Entry 431 (1) (a) namely claiming BCD @ 10%. The related corresponding Invoice No.GCO 7402 dt. 23.07.2012 describes the consignment as "BMW CKD Cars – BMW CKD automobile parts". It is also mentioned in the invoice that "*for description of quantity and nature of goods supplied, please refer to packing list or as alternatively invoice attachment*". The detailed packing list found in page 51 onwards of the said compilation gives description, part number and quantity consigned, however there is no indication in the detailed packing list that the engine or gearbox or transmission mechanism are mated to each other or otherwise.

24. Ld. Advocate has argued that introduction of the words "and" would only refer to a situation where both engine and transmission are in a mated condition prior to the importation. Ld. Advocate has also relied upon the judgment of the Hon'ble Apex Court in *Hyderabad Asbestos Cement Products Vs UOI* - 2000 (115) ELT 20 (SC) to argue that since the words "gearbox and transmission" are separated by a conjunction '**and**' they have to be read conjointly. However we note that the Hon'ble Apex Court in that judgement was dealing with use of the conjunctive between the two provisos of the erstwhile Rule 56A of the Central Excise Rules, 1944. But in the present case, the meaning of the word "**and**" has to be understood and read in the context of the entire sentence as a whole, namely "engine, gearbox and transmission mechanism not in a preassembled condition". It is pertinent to note that to qualify for inclusion under this description, the imported goods will primarily require to be "*not in a preassembled condition*". We also note the use of the punctuation mark — namely, the 'comma' (,) between the words "engine, gearbox". In our view therefore, the sentence as a whole should be interpreted only as 'engine or gearbox or transmission mechanism in a preassembled condition' i.e. the word

"**and**" between gearbox and transmission has to necessarily to be read as "**or**", since, any other interpretation would lead to absurdity and defeat the intention of the legislature, which obviously is to extend the lowest concessional rate to the highest level of "knocked down parts".

25. True, in the ordinary course the word "and" is normally employed to express the relation of addition, adding of something to that, which preceded and generally has a cumulative sense requiring the fulfilment of all the conditions that it joins together. However, even in such a connection, it is, by force of contents, read as "or" (*Ishwar Singh Bindra v. State of Uttar Pradesh - AIR 1968 SC 1450 / (1969) (1) SCR 219; Mohd. Abubakar Siddique v. Mustafa Shahidul Islam* (*2000) 2 SCC 62.* The word "or" is normally disjunctive and the word "and" is normally conjunctive. But at times, the word is read "*vice versa*" to give effect to manifest the intention of the legislature as disclosed from the context. [*Cable Corporation of India Vs Commission of Labour* (2008) 7 SCC 680]. In our view, the word "and" in the above sentence necessarily have to be read in the disjunctive sense, as "or", since otherwise it would lead

to a absurd interpretation. The intention of the law makers is clear which is manifested by clarification letter of the Tax Research Unit dt.25.03.2011 where in para-9 it has been explicitly clarified as under :

> *"the imports in the form of CKD kits where **all** the parts and components **including** engine, gearbox and transmission assembly are present in completely knocked down condition will attract 10% BCD"* **[EMPHASIS ADDED]**

Hence any attempt to give a different spin or meaning to the wording of the notification, as the Ld. Advocate has attempted to do, will only lead to interpretations which were never intended by the legislature.

26. In the circumstances, the effect of notification No.31/2011-Cus. and also Notification No.12/2012-Cus.is that 10% BCD will be available only when the CKD kit imported contains engine / gearbox / transmission assembly in completely knocked down condition, i.e. not in preassembled condition.

27. So also, in respect of another Bill of Entry 9190798 dt. 01.02.2013, the description of the imported goods is given as "BMW Cars in CKD". The Custom Tariff Heading declared was 87039090

claiming concessional rate of 10% BCD available as per Sl. No. 437(1)(a) of Notification 12/2012-Cus. The corresponding invoice GCQ 8426 dt. 07.01.2013 describes the goods as "CKD Cars – BMW CKD Automotive Parts". Here also, the invoice advises to refer to packing list or alternatively, the invoice attachment, "for description of quantity and nature of goods supplied".

28. From the detailed packing list, it is seen that the assemblies and sub-assemblies imported have been listed with their corresponding Part No., for eg., transmission sub-assembly has been listed with Part No. 764206900, assembly "ASSY RR AX Gearbox" has been listed with Part No. 7592200500, is seen at page 132 of the compilation, "ASSY Engine N47 TUE F25 D20 OL 4WD CKD RU" with Part No. 781852800 is found at page 133. There is no indication whatsoever in the packing list or in the other accompanying documents as to whether or otherwise the said engine, gearbox and transmission mechanism are in a pre-assembled condition and/or are mated to each other.

29. Ld. Advocate has contended that further, parts are required to be fitted to the imported transmission unit at their Chennai plant to argue that the imported unit is therefore not a pre-assembled unit.

However, we find that the adjudicating authority has adequately addressed this contention in page 23 of the impugned Order. The adjudicating authority has found that the list of "Add-on Parts" includes parts like "nuts, screws, hoses, cables, drive shafts, gear shaft, levers, cross members and mounting brackets". The adjudicating authority has correctly found that the manufacturer was supplying the subject goods in the form of a single product only without supplying any other part and supplying the single product under the nomenclature "Automatic Transmission"; that all the other so-called "Add-on Parts" are merely required for integrating the gearbox/engine assembly with the car body and mounting the same on the chassis/body of the car. We find ourselves in agreement with these conclusions.

30. There is also no *caveat* in the concerned Notification that non-inclusion of such "Add-on parts" would have the effect of treating the otherwise pre-assembled engine/transmission mechanism/gearbox as "**not**" pre-assembled.

31. The adjudicating authority has also exhaustively alluded to the parts physically contained in the said assemblies in their imported form as per the technical literature of the manufacturers-

suppliers, the technical literature uploaded by the manufacturers at their websites, the technical details of their documents including bill of material and test certificates of M/s. ZF, Germany, the Detailed Packing List, test certificates, list of parts assembled at Chennai plant, etc., to arrive at such a conclusion. Similar analysis and conclusions have been made in respect of "engine assembly".

32. So also, in para 12.8 of the impugned Order, the adjudicating authority has alluded to the statement of BMW India dt. 22.03.2013 wherein it is admitted that the Chennai plant does not assemble essential components like engine, cram shaft, cylinder heads, crank cases, cylinder head, flywheels, pistons, exhaust, etc; that the imported engine assembly incorporates all these essential components; that the assembly mating of engine with transmission mechanism, done by aligning the Torque converter end of the "transmission sub-assembly" with the flywheel end of the "engine sub-assembly" is done seamlessly at the appellant's Chennai plant, which only proves that both the transmission mechanism and engine imported are complete assemblies, ready to be mated.

33. The following evidences analysed by the adjudicating authority also support the view that the CKD kits imported by the

appellants contain engine/transmission mechanism/gearbox which were in pre-assembled and hence not eligible for the 10% BCD rate. On scrutiny of the "Detailed Packing List" furnished by the importer during investigation in respect of the above six consignments, it is observed that the engine and the individual part pertaining to gear box/transmission mechanism are declared as follows :

Sl.No.	**Bill of Entry No. & date**	**Description of engine**	**Description of gear box/trans. mechanism**
1	9484836/5.3.2013	ASSY ENGINE N47 E84 D20OL RHD	TRANSMISSION SUB ASSEMBLY 8HP45 N4701HI
2	9535996/11.3.2013	ZB ENGINE N47CTUE R60 D20UL RK VR	ASSY.AUTO GEARBOX GA6F21WA ANG
3	9536934/11.3.2013	ASSY ENGINE N47 E84 D20OL RHD	TRANSMISSION SUB ASSEMBLY 8HP45 N4701HI
4	9560287/13.3.2013	ASSY ENGINE N47 E84 D20OL RHD	TRANSMISSION SUB ASSEMBLY 8HP45 N4701HI
5	9621600/20.3.2013	ASSY ENGINE N47 E84 D20OL RHD	TRANSMISSION SUB ASSEMBLY 8HP45 N4701HI
6	9827661/11.4.2013	ASSY ENGINE N16 A US/KOREA	ASSEMBLYTRANSMISSION GA6F21WA ANJ

The detailed packing list does not include any items of description like cylinder heads, cylinder blocks, pistons, connecting rods, crankshaft, cam shaft etc. which are the components that go

into the assembling of an engine. It therefore appears to reason that "assembly engine" imported is already a complete preassembled engine. So also, the packing list does not contain items like gearsets, torque converters, mechatronic parts etc. which are components that go into the assembling of an automatic gearbox. Hence it appears to reason that the imported "transmission sub-assembly / assembly auto gearbox / automatic transmission" are gear box / transmission which are already preassembled at the time of import.

34. Reference is also made to letters of appellants dt. 22.03.2013 and 04.04.2013 wherein it has been clarified that they do not assemble internal components of engine and automatic gearbox at the Chennai plant.

35. "List of add-on parts" contains parts like flange nuts, clip nuts, hex nuts, spacer bolts, head screws, self-tapping screws, packing washers etc. which are locally assembled on to the imported engine and transmission sub-assemblies merely provides linkage for these mechanism with the rest of the car parts and are useful only for completing the integration. It is therefore evident that these "add-on parts" are not of the genre that are required to complete "pre-

assembly" of the engine / transmission / gear box mechanisms imported.

36. In para 26 (xii), the adjudicating authority has analysed the nature of the imported "transmission sub-assemblies" in more than five pages of the impugned order. The discussion is very lucid, well researched and logical and we are unable to find any infirmity with the same. The conclusions arrived at by the adjudicating authority make for interesting reading :

> *"Thus, though the importer describes the parts locally assembled on to the 'transmission sub-assemblies' (gearboxes) in abstract technical terms as "mechanical, hydraulic, electronic parts", it can be noted/observed from the "list of add-on parts" that they are merely in the nature of* ***fasteners*** *(nuts, screws, brackets, etc. which merely provide the linkage for other parts of the car with the imported gearbox, drive shaft, gear shift lever, etc.),* ***wiring harness*** *(which is described by the importer as "electronic part" but which actually consists of insulated wires with connector pins at the ends),* ***hose/pipe/tube*** *(which is described by M/s.BMW India as "hydraulic part" for the simple reason that fluids pass through them), transmission control parts like gear shift lever and fixtures like brackets for fitment of the gearbox, other transmission parts like drive shaft, output shafts and other items to the body of the car. Thus, it appears that all the other parts like drive shafts and many of the nuts and bolts are merely required for making the gearbox/engine assembly ready for integrating the same with the car body and mounting the same on the chassis/body of the car."*

37. <u>Unique Identification number and model</u> : From facts on record, it emerges that the goods described as "transmission sub-assemblies" were nothing but "automatic transmission" with model

No.8HP45 actually manufactured by M/s.ZF Friedrichshafen AG. It does not appear to common sense that the manufacturer supplier of the gearbox would supply unfinished goods transmission mechanism to the appellants for onward exportation to their Indian arm (appellant). In any case, it has been found that each individual gearbox imported has a unique identification number which is engraved on each individual unit's metal casing by the manufacturer. The adjudicating authority has therefore correctly concluded that no manufacturer supplier would assign such a unique identification number as well as model name to a sub-assembly and refrained from supply remaining parts of that product.

38. Testing of transmission sub assembly / automatic transmission / auto gear box. From the facts on record, it emerges that the automatic transmission / gear box supplied by M/s.ZF, Germany have undergone standard testing procedures before they are supplied to M/s.BMW AG Germany, a fact which has been admitted by BMW India. It has also been admitted by appellants that the imported transmission sub assembly is not tested in any manner at

the Chennai plant before the car assembling process. The adjudicating authority has correctly concluded that a critical part like gearbox cannot be assembled onto the car without first undergoing all mandatory tests and checks which clearly indicates that the product so tested and marketed as an "Automatic Transmission" by the manufacturer-supplier is a complete and functional automatic transmission and does not constitute any sub-assembly thereof.

39. So also, the imported engine assemblies already incorporated parts and components like crankshaft, cylinder heads , crank cases, cylinder head covers, flywheels, pistons, exhaust and inlet valves etc. Such critical parts and components are not separately imported. Secondly, even in their import documents appellants have described the said mechanism as "Assy. Engine". The parts of description "Assy. Engine" imported in the CKD kit are then nothing but "complete engine assemblies" which have been imported in pre-assembled form. Like in the case of transmission mechanism list of 'add on parts' claimed to be crucial and integral constituent parts of engine are seen in the nature of fasteners like nuts, clips, screws,

parts like wiring harnesses and parts like braidings etc. Like in the case of transmission assemblies, the 'add-on parts' in respect of these 'assemblies' only serve the purpose of connecting /mounting/ integrating the engine with the other assemblies or rest of the car.

40. The Ld. Advocate has vigorously argued that no reliance can be placed by the department on the report of Shri Ramesh Babu on the grounds that it has been issued on incomplete facts and without fully understanding or analyzing the assembly operations undertaken by the appellant and without even visiting the Chennai plant of the appellants and physically observing the assembly operations undertaken. Persuasive as it may be, we are nonetheless unable to appreciate this argument of the Ld. Advocate. The levy of Customs duty on imported goods is always on the goods in the condition they are imported. Hence the examination of goods at the point of port alone would be able to determine their exact nature and by implication their value for assessment as well as the eligibility or otherwise of any exemption notification. We find that Dr. Ramesh Babu has also perused copies of the detailed packing list, supplied by sub-assembly chart of engine and transmission

submitted by BMW as also the list of parts pertaining to engine and transmission to be assembled to the imported engine and transmission assembly as claimed by the appellants. Only after a comprehensive analysis of all these aspects, has Dr. Ramesh Babu opined that "parts list merely comprises of nuts, screws, clips etc.; that the imported engine assemblies are actually fully assembled condition which can be readily integrated to build motor car; that similarly transmission sub assemblies are automatic transmission units, otherwise known as automatic gear box. On the other hand, it is pertinent to note that the experts appointed by the appellants namely Professor A.R.Mohanty and Shri Balraj Bhanot have not mentioned in their reports that they have examined the kits in the stage that they were imported. Both have submitted their reports based on their visits to the Chennai plant of BMW India. On the other hand, Dr. N.Ramesh Babu, whose report has been relied upon by the Department, has inspected the imported goods at the stage of import itself.

41. A grievance has also been brought by appellant that cross-examination sought by them of Dr. Ramesh Babu was not granted.

True, refusal to grant cross-examination in such cases would may possibly put to question the admissibility of the evidence given in the said report. Be that as it may, in our view, the technical opinion of the experts appointed by the appellants also cannot be given any relevance since, as discussed above, they have not examined the goods in the condition as they were imported but only at the factory of the appellants. In any case, the goods as imported, and as per packing list has to be critically examined vis-à-vis the conditionalities of the exemption notification, as per the discussion herein above. We have found that the imported goods as per the packing list would not satisfy the condition of "engine, gear box or transmission mechanism not in preassembled condition" and hence by no stretch of imagination would they be able to benefit from the lowest B.C.D rate of 10%.

42. For arguments' sake, even if there had been an ambiguity in the Notifications No.31/2011-Cus. and No.12/2012-Cus. as claimed by appellant, in our view, that will not have bearing effect in the case on hand. The benefit of such ambiguity even if it existed, cannot be claimed by the appellant-importer BMW and as laid down by the

Hon'ble Apex Court, the same must be interpreted in favour of the Revenue. There are number of judgments and the higher courts of the land which have consistently reiterated that exemption notifications should be interpreted strictly. In a very recent judgment in the case of *Commissioner of Customs (Import) Mumbai Vs Dilip Kumar and Company & Ors.* in Civil Appeal No.3327 of 2007, a five Judge Bench of the Hon'ble Apex Court held that when there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue. The relevant portion of the Hon'ble Apex Court judgement is reproduced as under :

> **"52.**To sum up, we answer the reference holding as under –
>
> (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

> (3) The ratio in ***Sun Export case*** (supra) is not correct and all the decisions which took similar view as in ***Sun Export Case*** (supra) stands over-ruled".

43. We have then no doubt in our mind that the goods imported by the appellants were not of the type and nature which would merit the lowest B.C.D rate of 10% as extended vide the Notification No.21/2011-Cus. and later in No.31/2011-Cus. as amended by Notification No.12/2012-Cus. The allusion made to the rulings of the AAR will also not help the case of the appellants since as pointed out, the rulings not only in the appellant's own case but also in the matter of *Harley-Davidson* (supra) were made firstly without any actual import of the kits and secondly before any definition of what constituted a "CKD kit" was inserted into the Exemption Notification No.21/2011-Cus. We are therefore of the considered opinion that the goods imported by the appellants will not benefit from the B.C.D rate of 10% but will only be eligible for higher B.C.D. rate since the CKD kits imported contained engine or gearbox or transmission mechanism in preassembled form (but not mounted on chassis or body assembly). Both for the periods 01.03.2011 to 23.03.2011 as also 24.03.2011 to 11.04.2013, the appellants are not

entitled to a rate of B.C.D. @ 10% but will necessarily have to discharge B.C.D @ 60% and 30% respectively only. **Issue No.I is answered in favour of Revenue.**

44. The appellants have also argued on the ground of limitation. Ld. Advocate has drawn our attention to Examination Order of the concerned examining officer dt. 09.02.2013. It is seen that the order for examination includes to examine whether engine, gearbox and transmission mechanism are pre-assembled or not. The examining officer, by a report dt. 07.02.2013, has reported that engine, gearbox and transmission mechanism are not in a pre-assembled condition (PTC). Ld. Advocate has contended that the fact of these examination reports would only serve to prove that the CKD Kit was imported in the very condition satisfying the requirements of Notification 12/2012 to become eligible for concessional rate of BCD @10%. Once the goods have been cleared with such examination reports, it is but obvious that the Department cannot now rake up an argument that the engine/gearbox/transmission mechanism were in fact pre-assembled and/or were brought mated to each other at the time of import.

45. True, that the Revenue would also argue that since many of the consignments would have been cleared by the Risk Management System (RMS) Module electronically without human interface or intervention, only a few random examination orders may only have been an aberration and not the rule. But, at the same time, it is pertinent to note that the appellant had written to the Commissioner of Customs, Chennai vide a letter dt. 05.07.2010, referring to a meeting and requesting that the CKD import duty rate being given to their 3-series CKD Kits may also be extended to their X1 and X3 models as well.

46. In response, the appellants were informed vide a letter dt. 23.07.2010 that "import of BMW X1 and X3 series car in CKD condition can be extended the benefit of Notification 21/2002-Cus., Sl. No. 344(1)".

47. Even after the issue of Notifications 21/2011-Cus. dt. 01.03.2011 and 31/2011-Cus. dt. 24.03.2011, appellant appears to have sent another communication to the Commissioner of Customs, Chennai, on 30.03.2011, submitting that the engines, gearboxes and transmission mechanism imported by them as a part of their CKD kits, are in the form of sub-assemblies; that their CKD operations fall

within the purview of 344(1)(a) of the definition of CKD; that they will continue to file their Bills of Entry as was done in the past.

48. During the hearings, Ld. Senior Advocate had submitted details of 20 such instances where the imported kits had been examined by Customs Officers during the period March 2011 to April 2013 and in most of these reports, it has been confirmed that the impugned goods have been found in CKD condition. No objection was raised in the concerned inspection report. In certain cases it was also directed to verify whether the engine, gearbox and transmission mechanism are in a pre-assembled condition or not, which was also examined and answered in the negative.

49. These are facts and happenings that will stare the Customs Authorities in the face and demolish the allegation that appellant has suppressed facts of import of pre-assembled engine and pre-assembled transmission mechanism or that they have misstated the description of the goods to avail concessional rate of duty.

50. In arriving at these conclusions, we draw sustenance from the ratio laid down by the Hon'ble Apex Court in *Pushpam Pharmaceuticals Company Vs CCE Bombay* - 1995 (78) ELT 401 (SC). The relevant portion of the judgment is reproduced below :

> *"**4.** Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

So also, the Hon'ble High Court of Punjab and Haryana in the case of *CC Amritsar Vs Jyoti Industries* - 2007 (209) ELT 180 (P&H) has upheld the following findings of the Tribunal that mistake committed on the part of Customs officer in proper assessment of goods cannot be held as suppression / misrepresentation of goods to justify invocation of extended period of limitation :

> "We have seen the photocopy of the Bill of Entry No. 82 dated 26-5-94, which is in dispute and found that the Assessing Officer has himself assessed the goods under Heading 9017.30 by changing the classification adopted by the importer. The examination report of the

> Customs Officer as recorded on Bill of Entry clearly shows that they had found the goods as per description in Bill of Entry and invoice. On examination, when the officers have not pointed out that the goods are to be classified not as "universal measuring instrument" but as "micrometer", then it could only be said a mistake on the part of the Customs Officers and it cannot lead us to conclusion that there has been suppression on the part of the importer (respondent).
>
> We find that the assessment was done by the Customs Officers. The goods were also examined by the Customs Officers and they have found that goods as per description given in the invoice. Therefore, if there has been mistake on the part of Customs Officer in proper assessment of the goods, the respondents cannot be held liable for any suppression of facts as they have neither colluded or suppressed the facts. Therefore, the findings of the Commissioner are correct and based on evidence on record. We, therefore, find no reason to interfere with the order of the Commissioner in dropping the demand for imports made under Bill of Entry No. 82, dated 26-5-94. The appeal of Revenue is accordingly rejected."

51. Precisely for these reasons, we have no hesitation in holding that the extended period of limitation cannot be invoked in this case and hence, the differential duty liability can be confirmed and demanded only for the normal period of limitation from the date of issue of the Show Cause Notice. For this limited purpose, the matter would be required to be remanded to the adjudicating authority to work out the duty liability afresh limited to the normal period of

limitation. So ordered. **Hence Issue No.II is answered in favour of appellant**.

52. Coming to the issue of penalties, we find that the adjudicating authority has imposed penalty equal to the duty determined under Section 114A of the Customs Act, 1962. For the very reason that ingredients justifying invocation of extended period not being present in this case, further also taking into account that the issue per se revolves around interpretation of the notification which itself underwent a number of changes, we hold that the penalty under Section 114A of the Customs Act, 1962 is not just and fair and is therefore set aside. So ordered.

53. However, with regard to confiscation of the goods, as there has been definite contraventions of Section 111 (m) and (o) of the Customs Act, 1962, the confiscation ordered by the adjudicating authority is upheld. However, we reduce the redemption fine to Rs.1,00,00,000/- (Rupees One Crore only) imposed under Section 125 of the Customs Act, 1962.

54. So also, while upholding the imposability of penalty under Section 112 (a) ibid, we find that the penalty of Rs.3,00,00,000/-

imposed is on the higher side and in our view penalty of Rs.1,00,00,000/- (Rupees One Crore only) would merit the interest of justice in this case. So ordered. **Issue No.III is answered as held in paras 52 to 54**.

To sum up —

(1) The demand is upheld, however restricted to the normal period of limitation. Only for the purpose of re-quantification of the demand for the normal period with interest liability as applicable, the matter is being remanded to the adjudicating authority.

(2) Penalty imposed under Section 114A of the Act is set aside.

(3) Confiscation of goods under Section 111 (m) and (o) of the Act is upheld. Imposability of Redemption fine under Section 125 (1) ibid is upheld. However, the redemption fine imposed is reduced to **Rs.1,00,00,000/- (Rupees One Crore only).**

(4) Imposability of penalty under Section 112(a) of the Act is upheld. However, penalty imposed is reduced to **Rs.1,00,00,000/- (Rupees One Crore only)**

Appeal is partly allowed and partly remanded on above terms.

(Pronounced in open court on 17.09.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Sdd/Gs