**BY E-MAIL / COURIER**

**File No.48/2024-Opinion**

05.03.2024

Aurolab Trust,

No.1, Sivagangai Main Road,

Veerapanjan,

Madurai – 625 020.

Attn.: Mr. V. Vishnu Sankar, Manager-Imports <import@aurolab.com>

**Mobile: 94425 93952**

**Sub.:  Demand for payment of Penalty.**

Dear Vishnu Sankar,

1.         With regard to the above, please find attached the following.

i. Draft of the Reply which can be given to Customs in response to their Audit Consultative letter dated 10.01.2024.

ii. Our Bill towards fees for consultation and drafting of the reply.

2.         After making changes, if any, the draft reply can be typed in Aurolab Trust letterhead and after due signature, submitted to the department along with the enclosure mentioned therein. Proper acknowledgement also may be taken.

3. Kindly arrange for payment of the attached bill.

Regards,

**Murugappan**

Attached: as above.

sm/ss

**Draft Reply:**

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_

To:

The Assistant Commissioner of Customs,

(TBA Circle-II),

O/o The Commissioner of Customs (Audit),

Custom House, No.60, Rajaji Salai,

Chennai – 600 001.

Sir,

**Sub.: Mis-classification of items declared as “Power Supply” under CTH 85045090 and 9033 imported vide Bills of Entry No.3058937 dated 08.03.2021 and 3 others – Reg.**

**Ref.: Audit Consultative Letter dated 10.01.2024 issued from File No.CHE/010/TBA-II-03/2024-AUDIT.**

1. Please refer to your above Audit Consultative Letter dated 10.01.2024 and our subsequent reply dated 25.01.2024. A copy of our letter mentioned above is attached for ready reference.

2. In terms of the consultative letter we have been asked to pay the applicable duty, interest and also penalty as prescribed under Section 28(4) of Customs Act 1962. Through our above letter dated 25.01.2024 we have intimated you that we have paid differential customs duty together with interest as demanded in your letter. We have been asked to pay the penalty also as originally mentioned in your letter.

3. In this regard, para 4 of your letter is reproduced below:

“4. You are requested to pay the above-mentioned differential duty amount and in addition to that applicable Interest and Penalty as prescribed under section 28(4) of the Customs Act, 1962. You are also hereby offered an opportunity to put forth your contentions in writing along with documentary and legal support within fifteen days from the date of communication of this letter.”

4. For the sake of appreciating the correct legal position, we have extracted below the provisions of Section 28(1), (2), (3) and (4).

***“Section 28. Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. -***

*(1) Where any duty has not been levied or not paid or short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts,-*

*(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*

***Provided****that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;*

*(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-*

*(i) his own ascertainment of such duty; or*

*(ii) the duty ascertained by the proper officer,*

*the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*

***Provided****that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.*

*(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:*

***Provided****that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.*

*(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (2).*

*(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-*

*(a) collusion; or*

*(b) any wilful mis-statement; or*

*(c) suppression of facts,*

*by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.”*

5. The above is the relevant extract of Section 28 as in force today. Section 28(4) refers to non-payment of duty on account of collusion, wilful mis-statement etc. and the power to customs officials for issue of demand for a period of five years in such cases. It does not refer to payment of penalty at all. In our case the differential duty is not on account of any suppression or collusion and this clause will not have any applicability in the present situation.

6. Section 28(1) proviso refers to payment of differential duty and interest on own ascertainment or as ascertained by the proper officer along with interest payable under Section 28AA. Section 28(2) states that once payment has been made of the duty and interest as above, then, the proper officer shall not serve any notice under clause (a) of that sub-section in respect of duty or interest so paid or any penalty leviable under the provisions of Customs Act. Here, the reference is to duty and interest paid and any penalty that may be leviable. Therefore, once duty and interest are paid, there is no basis for issue of any show cause notice or for demanding any penalty.

7. Apart from the above, proviso to Section 28(2) stipulates that even when a show cause notice is issued, no penalty will be levied and the proceedings against whom the notice is served shall be deemed to be concluded if duty and interest are paid.

8. In the present case, the matter has not reached even the stage of pre-notice consultation letter as required under the relevant section. What was issued was only an audit consultative letter. No show cause notice as contemplated under Section 28 has been issued as will be evident from the above facts.

9. Under such circumstances, the demand for payment of penalty is not in accordance with the present legal provisions and not in accordance with law.

10. Considering the above and as we have already paid the applicable duty and interest, we request you to close the proceedings in terms of Section 28(2) of Customs Act as mentioned above.

Thanking you,

Yours faithfully,

for **Aurolab Trust**

**V. Vishnu Sankar**

**Manager (Imports)**

Encl.: as above.