CHAPTER III
INCORRECT ASSESSMENT OF CUSTOMS DUTIES

We found a few cases of incorrect assessment of customs duties during test check, having an implication of ₹ 28.25 crore. They are described in the following paragraphs. These observations were communicated to the Ministry through 16 draft audit paragraphs.

3.1 Unintended benefit due to existence of dual rates of customs duty

'Palm fatty acid distillate (PFAD)' and 'Palm kernel acid distillate (PKAD)' both falling under Customs tariff heading (CTH) 38231900 attract Basic customs duty (BCD) at the rate of 15 per cent (under serial no. 139) and 20 per cent (serial no.491) of the notification no. 21/2002-cus dated 1 March 2002.

M/s Godrej Industries Ltd., and five others imported (September/November 2010) 125 consignments of 'Palm fatty acid distillate and palm kernel acid distillate' through Customs House, Dahej, Ahmedabad Commissionerate and Customs House, Kandla, Commissionerate. The imported goods were cleared for home consumption between May 2008 and October 2010 by paying lower rate of duty by taking the advantage of dual rates in the tariff for the same commodities which resulted in unintended benefits to the importers amounting to ₹ 20.24 crore.

When we pointed this out (November 2011), the Ministry stated (December 2011) that when there are two different rates of duty available under exemption notification the importer is entitled to lower rate of duty. The Ministry further stated that this fact was judicially held by the Supreme Court (M/s Share Medical Care vs Union of India).

The fact remains that existence of dual customs duty rates for a product in the same notification is resulting in unintended benefits to the importers.

Recommendation
The Government may review the existence of dual rates in the same notification for the same goods and notify single rate of customs duty on PFAD and PKAD. This would pave the way for realisation of correct duty to the exchequer.

3.2 Cost recovery charges not realised

According to Central Board of Excise and Custom's (Board) circular F.No.11018/9/91-Ad.IV dated 1 April 1991 read with circular nos. 128/1995 and 52/1997, the custodian would bear the cost of customs staff posted at Inland Container Depot (ICD)/Container Freight Station (CFS). Custodians are required to pay at a uniform rate of 1.85 times of monthly average cost of

the post plus, DA, HRA, CCA etc. in respect of customs staff posted at ICD/CFS. Advance deposit is required to be made for staff for three months. Further, after implementation of recommendations of sixth pay commission, pay scales and other allowances of central government employees have been revised. Accordingly, differential establishment charges on the revised emoluments are required to be collected.

Test check of records of following three Customs Commissionerates between June 2009 and August 2010 revealed that there was total short recovery of establishment charges amounting to ₹ 392.71 lakh from 19 custodians as shown below:

Sl. No.	Customs Commissionerate	Custom House (CH)/No. of custodians	Period of short recovery	Short recovery (₹ in lakh)	Remarks
1	Ahmedabad	Customs House Surat (4 custodians)	January, 2006 to June 2009	77.92	Arrears of pay on account of implementation of sixth pay commission was not recovered
2	Kandla	Customs House MP & SEZ, Mundra (14 custodians)	October, 2008 to March 2010	303.36	Arrears of pay on account of implementation of sixth pay commission was not recovered
3	Jamnagar	Customs House Pipavav (1 custodian)	January, 2010 to December 2010	11.43	Differential recovery on account of increase in DA rate w.e.f. 1.1.2010 was not effected and grade pay of DC was taken as ₹ 400 instead of ₹ 6600
			Total	**392.71**	

When we pointed this out (June/November 2009, August/October 2010 & February 2011), the Customs Commissionerate, Ahmedabad recovered ₹ 77.92 lakh and Customs Commissionerate, Jamnagar effected recovery of ₹ 11.43 lakh. Further, Kandla Commissionerate reported (July 2010) recovery of ₹ 2.98 crore out of ₹ 3.04 crore. Recovery particulars of the balance amount (₹ 0.06 crore) from Kandla, Customs Commissionerate had not been received (January 2012).

We reported (September 2011) the matter to the Ministry; its response had not been received (January 2012).

3.3 Excess refund of additional duty of customs

In terms of paragraph 2 (d) of customs notification no. 102/2007 dated 14 September 2007 as amended, goods imported into India for subsequent sale are exempted from whole of the additional duty of customs provided the importer on sale of the said goods pays appropriate sales tax or value added

tax in addition to all duties including the said additional duty of customs at the time of importation of the goods. A claim for refund of the additional duty of customs paid could be made before the expiry of one year from the date of payment of duty. Further, Central Board of Excise & Customs (Board) in their circular no.6/2008 dated 28 April 2008 prescribed the procedures to be adopted for refund of additional duty of customs paid under notification 102/2007-cus. The procedure provides that the unsold stocks would not be eligible for the refund of such additional customs duty.

M/s Leaf Trading Company, Chennai, engaged in the trading of mobile phones, had filed a claim (April 2010) for refund of additional duty of customs amounting to ₹ 1.71 crore in respect of imports made under 46 Bills of entry (BEs) during the period April 2009 to February 2010. Refund of additional duty of customs of ₹ 1.70 crore was granted (June 2010) after disallowing a claim of ₹ 0.60 lakh in respect of one BE pertaining to Chennai (Sea), Commissionerate.

Audit noticed from the Certificates furnished by the Chartered Accountant and Assistant Commissioner (Commercial Taxes) that out of the 45 BEs where refund was granted, in 13 cases refund of ₹ 60.73 lakh was granted on the goods which were sold on the date of imports, in nine cases refund of ₹ 36.67 lakh was granted on the goods which were sold prior to the date of imports/payment of TR6 Challan/Out of Charge, in one case refund of ₹ 2.59 lakh was granted where no sale had taken place and in 16 cases refund of ₹ 41.14 lakh was granted where Sales Tax/Value Added Tax was not paid at the time of claim of refund. It was apparent that the goods sold prior to the date of import/payment of duty against the invoices were not the goods actually imported against the respective BEs and the importer was not eligible for refund of additional duty of customs. It was further observed from the certificate given by the Assistant Commissioner of Commercial Tax confirming the payment of VAT for the sales made by the importer during the period from April 2009 to February 2010 that as against the total VAT payable of ₹ 133.13 lakh, an amount of ₹ 43.23 lakh remained 'unpaid' till the date of filing of the claim. Thus, the condition stipulated in paragraph 2 (d) of the aforesaid notification dated 14 September 2007 had not been fulfilled. Further, the department in the earlier occasions had disallowed the claim in respect of sales made on the date of import/payment of duty. Hence, claim of ₹ 1.41 crore being ineligible should have been disallowed. The omission to disallow the ineligible claims resulted in excess refund of additional duty of customs of ₹ 1.41 crore.

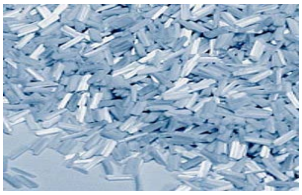
When we pointed this out (August 2010), the department issued a demand notice in September 2010. The department further stated (July 2011) that the sales invoices were raised either a day or two before filing of BE only after the goods were confirmed for dispatch by the supplier in order to tide over the financial difficulty and that the claimant had furnished the bank account to prove that the VAT amount was paid.

The reply of the department was not acceptable because the notification provides for exemption from additional duty of customs only for subsequent sales and not for sales made prior to importation and that the VAT was unpaid on the date of submission of refund claim.

We reported (November 2011) the matter to the Ministry; its response had not been received (January 2012).

3.4 Non levy of anti dumping duty

As per section 9A of the Customs Tariff Act, 1975, where any article is



exported from any country to India at less than its normal value, then upon the import of such article into India, the Central Government may, by a notification, impose an anti dumping duty. Accordingly, anti dumping duty was imposed from time to time on goods like 'Polytetra fluoroethylene (PTFE), Sodium saccharine, Glass fibre, Melamine, Colour picture tubes, Homopolymer of vinyl chloride and Injection moulding machine' etc. when these were imported from specified countries like China, Malaysia, Taiwan etc.

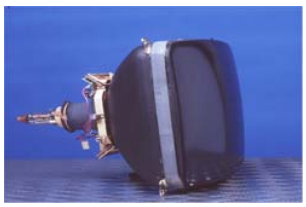
Audit scrutiny revealed that 13 consignments of such goods imported from these specified countries were cleared without levying of the applicable anti dumping duty of ₹ 1.12 crore.

When we reported (July/November 2011) the matter, the Ministry/Department accepted the short levy of ₹ 67 lakh in five consignments and reported recovery of ₹ 3.97 lakh. In respect of two consignments imported through JNCH Commissionerate, Mumbai (BE Nos. 752256 and 756819) the Ministry stated that the items imported (Glass Fibre chopped stands and Glass Wool) were exempt from levy of ADD.

The reply of the Ministry is not acceptable because the items imported were articles of Glass fibre and classified by the department under CTH 7019 hence leviable to ADD. Reply in respect of remaining consignments had not been received (January 2012).

3.5 Non levy on finalisation of provisional anti dumping duty

As per section 9A of the customs tariff act, 1975 read with Rule 20 (2) (a) of Customs tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination for Injury) Rules, 1995 (ADD Rules), where provisional duty has been levied and the designated authority has recorded a final finding of injury, ADD may be levied from the date of imposition of provisional duty.



Provisional anti dumping duty was levied under notification no. 90/2008-Cus dated 24 July 2008 on colour television picture tubes falling under Customs tariff heading (CTH) 854011 originating in, or exported from Malaysia, Thailand, Peoples Republic (PR) of China and PR of Korea, if the landed cost at which the items were imported was less than the rates prescribed in the notification. Subsequently, based on final findings by the designated authority, definitive anti dumping duty on such imports was

imposed vide notification no. 50/2009 dated 15 May 2009, with retrospective effect from the date of imposition of the provisional ADD i.e 24 July 2008.

M/s Videocon Industries Ltd., Aurangabad had imported (September to October 2008) from Malaysia and China 14 consignments of 'colour picture tubes' through Inland Container Depot, Walunj, Aurangabad. However, provisional anti dumping duty on these imports was not levied by the department under provisional notification no. 90/2008 because the landed cost was stated to be more than the rates prescribed in the notification. We found that on imposition of final anti dumping duty under notification no.50/2009 dated 15 May 2009, leviable from the date of imposition of the provisional anti dumping duty i.e. 24 July 2008, the landed cost of the aforementioned imports became less than the rates prescribed in the final notification. Accordingly, these imports were leviable to anti dumping duty amounting to ₹ 67.80 lakh. This amount was required to be recovered from the importer.

When we pointed this out (February 2010), the department stated (April 2010) that in one case importer had paid the ADD at the time of clearance and in remaining 13 cases objection was not acceptable. It stated that as per Rule 21 (1) of ADD Rules, 1995, if the anti dumping duty imposed by the Central Government on the basis of final finding of the investigation conducted by the designated authority was higher than the provisional duty already imposed and collected, the differential duty should not be collected from the importer.

The reply of the department is not acceptable. In the 13 consignments under reference, provisional anti dumping duty was neither levied nor collected; accordingly Rule 21 is not applicable and ADD has to be levied and collected at rates specified in the final notification of May 2009.

The department subsequently reported (November 2010) issue of protective demand notice (May 2010) in 20 cases including six cases pointed out by audit. Further progress had not been intimated (January 2012).

We reported (November 2011) the matter to the Ministry; its response had not been received (January 2012).

3.6 Non imposition of penalty

According to Section 116 of Customs Act, 1962, if any goods loaded in a conveyance for importation into India are not unloaded at the place of destination or if the quantity unloaded is short of the quantity to be unloaded at that destination, the person-in-charge of the conveyance shall be liable to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods as the case may be had such goods been imported.

Further, circular no. 96/2002-cus dated 27 December 2002, prescribes that in case of all bulk liquid cargo imports which are not discharged through regular pipelines and are cleared directly on payment of duty, the assessment shall be done as per the ship's ullage survey report. However, for the purpose of fixing liability under section 116 of the Customs Act, 1962, the liability would be

evaluated by comparing the ship's ullage quantity at the port of discharge with the ship's load port ullage quantity or the bill of lading quantity if the former is not made available by the Master/Agent.

M/s Reliance Industries was permitted (16 August 2007) to clear 2000 MT of Motor spirit valued at ₹ 6.16 crore through Customs House, Cochin on payment of provisional duty of ₹ 4.68 crore. The assessment was finalised subsequently based on the ullage report. Since the quantity of Motor spirit discharged was 1939.241 MT only as per the ullage report, the department refunded ₹ 10.11 lakh towards excess differential duty collected on undischarged quantity of the imported goods at the time of provisional assessment.

Audit noticed that the department had not recovered short landing penalty chargeable under the provisions of section 116 of the Customs Act, 1962 from the Master/Agent in charge of the vessel evaluating the liability by comparing the ship's ullage quantity at the port of discharge with the ship's load port ullage quantity or the bill of lading quantity. The penalty to be recovered on short landed quantity of 60.759 MT (2000 MT – 1939.241 MT) (by comparing the ullage quantity with the bill of lading quantity), worked out ₹ 28.67 lakh i.e. twice the amount of duty leviable on such quantity.

When we pointed this out (April/May 2010), the department stated (November 2011) that the short landed quantity was only 22.869 MT after considering the 37.890 metric tones which was short received on board the vessel at the load port itself. It added that the balance short landed quantity of 22.869 MT was only 0.20 percent of the total loaded quantity which was within the ocean tolerance limit of one percent cited in Ministry's communication in F.No. 55/33/66-Cus IV dated 3 February 1967 reproduced as standing order No. 31/67 dated 13 March 1967 by Customs House, Cochin. The department further stated that short landed quantity of 22.869 MT was alternatively worked out at 1.14 percent of the bill of lading quantity for Cochin port. The department also added that vide standing order No.31/1967, the Board has decided that in borderline cases where losses are between 1 percent and 1.3 percent, the department should adopt a liberal approach, accordingly there was no short landing which warrants action under section 116 of the Customs Act, 1962.

The department's stand and the suggested methodologies for arriving at the shortfall in landed quantity based on total loaded quantity/bill of lading quantity are not acceptable because;

- The data pertaining to ullage survey reports/shortfall in discharge at earlier ports of discharge has not been made available to Audit.

- Bill of lading quantity vide circular No. 96/2002 cus dated 27 December 2002 could be relied on only if the ullage survey report at the port of loading has not been made available by the Master/Agent of the ship which was not so in the instant case. Further, the liberal approach mooted in standing order dated 13 March 1967 would be possible (in respect of liquid cargo from black sea ports brought by Soviet vessels) only after a consideration of all relevant factors including documentary evidence

produced. This necessarily would imply the need for a speaking order which was absent in this case.

We reported (November 2011) the matter to the Ministry; its response had not been received (January 2012).

3.7 Incorrect assessment of notified commodities on the basis of Maximum retail price (MRP)

The Government of India vide notification no.2/2006-Central Excise (NT) dated 1 March 2006 has notified a list of commodities for assessment on the basis of their maximum retail price (MRP). The countervailing duty (CVD) on these items is to be assessed on the basis of their retail sale price (RSP) after allowing prescribed abatement from the RSP/MRP. The rate of abatement on parts, components and assemblies of automobiles was 40 per cent, 33.5 per cent and 31.5 per cent during the period January to April 2006, May 2006 to February 2008 and from March 2008 respectively {(notification 2/2006-CE-NT dated 1 March 2006, notification 11/2006-CE (NT) dated 29 May 2006 and notification no.14/2008-CE (NT) dated 1 March 2008}.

M/s Osram India Pvt. Ltd., and 17 others imported (March 2007 to October 2008), 144 consignments of automobile parts through New Customs House, New Delhi and ICD, Patparganj. The department cleared these consignments after incorrectly allowing abatement at the rate of 40/38 per cent and 33 per cent instead of applicable rate of 33.5 per cent and 31.5 per cent respectively during the relevant period of imports. This resulted in short levy of duty of ₹ 17.48 lakh.

When we pointed this out (March 2008 to February 2009), the department reported (November 2009/December 2009) recovery of ₹ 11.25 lakh and interest of ₹ 0.57 lakh in 126 cases. The recovery in respect of remaining cases was awaited (January 2012).

We reported (September 2011) the matter to the Ministry; its response had not been received (January 2012).

3.8 Incorrect assessment of High sea sale

As per Rule 3 (1) of Customs Valuation Rules 2007, the value of imported goods shall be the transaction value. The CBEC in its Public notice no. 145/2002 dated 3 December 2002 clarified that in case the 'actual high sea sale contract price' is known and the same is more than 'c.i.f. value plus two per cent of high sea sales charges', then the actual sale contract value paid has to be considered for the purpose of duty assessment. The assessable value would also include commission charges or other expenses incurred by the importer besides landing charges of one per cent.

M/s JSL Ltd., and 11 other importers purchased (July 2009 to June 2010) 14 consignments of various goods on high sea sale basis from various importers.

Audit scrutiny revealed that duties on these imports were assessed on invoice value declared by the importers and duty was paid accordingly. Even though, in all these consignments 'the high sea sale contract price' was more than 'the CIF value plus two per cent high sea sale value'. Thus, non adoption of 'contract values' for the purpose of assessments resulted in short levy of duty of ₹ 16.79 lakh.

When we pointed this out (October 2009 to June 2010), the department reported (March 2010 to February 2011) recovery of ₹ 9.33 lakh alongwith interest of ₹ 0.20 lakh in respect of 11 consignments. Recovery in respect of remaining three consignments was awaited (January 2012).

We reported (July 2011) the matter to the Ministry; its response had not been received (January 2012).

3.9 Interest paid on Terminal excise duty (TED) refunds

As per paragraph 8.3 (c) of the Foreign Trade Policy (FTP) 2004-09, deemed exports shall be eligible for refund of Terminal excise duty (TED) in respect of manufacture and supply of goods qualifying as deemed exports subject to the terms and conditions prescribed in the Handbook of procedure Vol.-I. Further, as per paragraph 8.5.1, simple interest at the rate of 6 per cent per annum will be payable on delay in refund of TED under deemed exports scheme in respect of reimbursement/refunds that have become due on or after 1 April 2007 but which have not been settled within 30 days of its final approval for payment by the Regional authority of Director General of Foreign Trade (DGFT) organisation.

Test check of TED payment records in the office of the Joint DGFT, Ludhiana, revealed that in 154 cases the claims for refunds were not settled within prescribed time limit resulting in payment of interest amounting to ₹ 15 lakh.

When we pointed this out (July 2011), the DGFT, Department of Ministry of Commerce and Industry, New Delhi stated (January 2012) that payment of interest was made as per the policy and claims could not be settled because of delay in allocation of funds from the Ministry of Finance, New Delhi.

The reply confirmed that the interest of ₹ 15 lakh had to be paid due to delays which had arisen because of lack of coordination between the two Ministries.

3.10 Short levy due to undervaluation

On the basis of intelligence regarding gross undervaluation and mis-declaration of description and specifications of various types of Aluminum wire being imported through Kolkata Port, gathered by the Dock Intelligence

Unit (DIU) under the Commissionerate of Customs (Preventive), West Bengal and reported in November 2008, directions were issued in December 2008 by the Commissioner of Customs (Port), Kolkata through the Special Investigation Branch (SIB) that all future consignments of such

products imported from China were to be thoroughly examined during shed examination and their valuation aspect was to be checked from National Import Database (NIDB) and the bench-mark prices given by the DIU, which were US $ 4.5/Kg and US $ 6.0/Kg for "Aluminum braiding wire and copper plated aluminum wire", respectively.

M/s Ucomax Kraft and Industries and M/s Hissaria Brothers imported (July 2009 to September 2009) six consignments of 'Aluminium Braiding Wire' and 'Copper coated aluminium (CCA) wire' from China through Kolkata Port, at declared prices which were much lower than the benchmark values for these products given by the DIU and ordered to be adopted by the Commissioner of Customs (Port). However, the department assessed these consignments at the values much lower than the DIU benchmark values, resulting in under-valuation and consequent short-levy of customs duty amounting to ₹ 9.43 lakh.

When we pointed this out (May 2010), the Commissionerate of Customs (Port), Kolkata authorities in their reply (May 2010) stated that one consignment has been duly assessed after enhancing the value to $ 4.5/Kg, while remaining consignments pertain to Haldia Port. The reply is not acceptable because, the item imported in the said consignment was CCA wire which should have been assessed at the value of $ 6.00/Kg. Meanwhile, the Assistant Commissionerate of Customs, Mini Custom House, Haldia in their reply (June 2011) in respect of remaining five consignments informed that a Show Cause-cum-Demand Notice for ₹ 4.65 lakh had been issued in respect of three consignments pertaining to Haldia port. However, it was re-confirmed from the EDI system that remaining two BEs (BE No. 490747 and 493785) out of five consignments also relate to Haldia unit. This was communicated to them in August 2011. Further progress had not been intimated (January 2012).

We reported (November 2011) the matter to the Ministry; its response had not been received (January 2012).