DIN-20241071ML000000B9A9

OFFICE OF THE COMMISSIONER

CUSTOM HOUSE, KANDLA

NEAR BALAJI TEMPLE, NEW KANDLA

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DIN-20241071ML000000B9A9		
A	File No.	GEN/ADJ/COMM/376/2022-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KND-CUSTM-000-COM-11-2024-25
C	Passed by	M. Ram Mohan Rao, Commissioner of Customs, Custom House, Kandla.
D	Date of Order	15.10.2024
E	Date of Issue	15.10.2024
F	SCN No. & Date	GEN/ADJ/COMM/376/2022-Adjn-O/o Commr-Cus-Kandla dated 25.10.2022
G	Noticee / Party / Importer / Exporter	M/s. Zip Zap Exim Private limited and others

1. ThisOrder-in-Original is granted to the concerned free of charge.

2. Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

Customs Excise & ServiceTax AppellateTribunal, West Zonal Bench,

2ndFloor, Bahumali Bhavan Asarwa,

Nr.Girdhar Nagar Bridge,GirdharNagar,Ahmedabad-380004

3. Appeal shall be filed within three months from the date of communication of this order.

4. Appeal should be accompanied by a fee of Rs.1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/-in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh(Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs(Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. The appeal should bear Court Fee Stamp of Rs.5/-under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the CourtFees Act, 1870.

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

7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules, 1982 should be adhered to in all respects.

8. An appeal against this order shall lie before the Appellate Authority on payment of 7.5% of the duty demanded wise duty or duty and penalty are in disupte, or penalty wise if penalty alone is in dispute.

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BRIEF FACTS OF THE CASE-

M/s. Zip Zap Exim Pvt. Ltd (hereinafter referred to as SEZ Unit) was situated st Shed no. 397, AS-IV, Sector-I, Kandla Special Economic Zone, Gandhidham, Kutch. Letter of Approval (LOA) dated 12.01.2017 was granted to them vide F.No.KASEZ/17/2016-17 (RUD-1) by the Development Commissioner, Kandla, SEZ under Section 15(9) of the SEZ Act, 2005 read with Rule 18 of the SEZ Rules, 2006 to operate as an SEZ unit and carry out authorized operations of trading activity. Whereas, the Unit Approval Committee (UAC) after due deliberations had approved the requests of the said SEZ unit for inclusion of certain items in their Trading activity and accordingly, LOA had been issued to them.

2. On the basis of intelligence developed by the Officers of DRI, Ahmedabad Zonal Unit, an investigation was initiated against the said SEZ unit. Further, proceedings like search, seizures and recording of statements were carried out as per provisions of the Customs Act, 1962 read with the SEZ Act, 2005 by DRI officers. Further, it is pertinent to put on record that the findings of the investigation included recovery of parallel invoices, analysis of payments made through non-banking channels and Hawala transfers to Chinese companies using codes, analysis of digital evidences like backups of emails/mobile phone/we-chat, audio recordings, unraveling of dummy/fake firms etc. Subsequently a Show Cause Notice dated 08.09.2021 (RUD-2) issued vide F.No. GEN/ADJ/COMM/218/2021-Adjn-O/o-Commr-Cus-Kandla and Corrigendum/Addendum dated 28.02.2022 to the SCN (RUD-3) were served upon various members of Smuggling Syndicate, including the said SEZ Unit. The findings of the investigation carried out by the DRI indicated that the said SEZ unit in connivance with some DTA clients had cleared the imported goods declared as “Polyester Knitted Fabrics” into DTA by resorting to gross under valuation for which they were charging commission and thereby defrauding the Government Exchequer by evading the payment of Customs Duty.

3. The information received by the KASEZ office indicated certain allegations of short levy of Customs Duty and IGST for goods declared as “Polyester Knitted Fabric” on account of mis-classification, incorrect availment of exemption and mis-declaration of value of the imported goods at the time of clearance of the subject goods from SEZ to DTA. It is pertinent to put on record that the subject matter of the DTA clearance of the said goods declared as “Polyester Knitted Fabrics” has been part of investigation carried out by DRI and subsequently covered in the SCN dated 08.09.2021 issued in the matter. The DRI investigation revealed certain facts related to gross undervaluation of the imported goods covered under 26 DTA Bills, as mentioned in Annexure-A (at Sr.No. 1 to 26) to the subject Show Cause Notice dated 25.10.2022. Further, the information received by KASEZ office indicated certain allegations of short levy of Customs Duty and IGST for the 26 DTA Bills (as mentioned in Annexure-A at Sr.No. 01 to 26) on the account of mis-classification & incorrect availment of exemption of the short levy of the Customs duty for goods covered under subject 26 DTA Bills (as mentioned in Annexure-A at Sr.No. 01 to 26). It is pertinent to mention to note that the said SEZ unit had cleared/removed “Polyester Knitted Fabric” covered under 23 DTA Bills as mentioned in Annexure-A (at Sr.No. 01 to 23) by means of mis-classification and incorrect availment of exemptions from SEZ to DTA. The same had resulted in short levy of Customs duty and IGST on account of mis-classification, incorrect availment and exemption and mis-declaration of value of the imported goods.

4. Further, in respect of 03 DTA Bills of entry out of 26 Bills covered under the subject SCN (as mention in Annexure-A at Sr.No. 24 to 26) issued by Kandla Customs, it was observed that the goods had not been cleared against the said DTA documents. It was observed that the same goods had been subsequently cleared by filing new DTA Bills under the correct CTH (as mentioned in Annexure-A at Sr.No. 27 to 29) which were subsequently filed by the SEZ unit are not part of subject SCN issued by Kandla

Custom authorities. The relevant details of subject 03 Custom Transactions had been mentioned in Annexure-A (at Sr. No. 24 to 26) to this SCN for record and reference. Keeping in mind the fact that the same goods had subsequently been cleared by filing new DTA Bills under the correct CTH but at mis-declared value, the issue of short levy of Custom Duty had been discussed separately for the 03 new DTA Bills as detailed in Annexure-A (at Sr.No. 27 to 29).

5. From the above, issue of short levy of Customs Duty & IGST for the goods covered under said 23 DTA Bills (as detailed in Annexure-A at Sr.No. 01 to 23) on account of mis-classification, incorrect availment of exemption and mis-declaration of value of imported goods at the time of DTA clearances needs re-examination. Further, the issue of short levy of Customs duty & IGST for the goods covered under said 03 DTA Bills (as detailed in Annexure-A at Sr.No. 27 to 29), which were filed subsequently, on account of mis-declaration of value also needs re-examination. Both the issues are discussed in detail in the following paragraphs:-

Issue of 23 DTA Bills for which goods had been cleared on the basis of same Bills (Sr.No. 01 to 23 of Annexure-A):

6. During the scrutiny of the records pertaining to DTA clearances of the goods declared as "Polyester Knitted Fabric" covered under the subject SCN, it had been observed that the said 26 Bills of entry had been filed by the said SEZ unit (as detailed in Annexure-A at Sr.No. 1 to 26). Further it is observed that there appeared to be a short levy of the Customs duty due to mis-classification of the subject goods, incorrect availment of exemption notifications and mis-declaration of the value of the imported goods at the time of clearance from SEZ to DTA, as detailed in Annexure-A to the SCN. The goods had been cleared from SEZ into DTA in case of 23 Bills of entry as mentioned in the subject SCN (as detailed in Annexure-A at Sr.No. 1 to 23). During the scrutiny of the documents, it is noticed that the said SEZ unit had cleared/removed "Polyester Knitted fabric" covered under 23 Bills of entry as mentioned in Annexure-A from SEZ into DTA by classifying it under CTH 6005 3200 which covered "Warp Knit Fabrics other than those of Heading 6001 to 6004- Of Synthetic Fibers—Dyed". Further it appeared that goods were cleared to DTA clients by SEZ Unit, by classifying under Tariff Item 6005 3200 by availing benefit of Notification No. 72/2005-Cus, as amended by Notification No. 89/2006-Cus (Sr.No. 181) and on payment of Custom duty @ 8%, 2%, 1% & IGST @5%.

7. By virtue of the Finance Act, 2016, the Tariff items 6005 3100 to 6005 3400 and the entries relating thereto were substituted by the Tariff Items 6005 3500 to 6005 3900. By virtue of coming into effect of the Finance Act, 2016 and substitutions of certain Tariff headings thereof, it appeared that the said goods should have been correctly classified under CTH 6005 3700. By virtue of Notification No. 80/2017-Customs dated 27.10.2017, the goods classifiable under CTH 6005 3700 shall attract Custom duty @ 25%, 2%, 1% and IGST @ 5% w.e.f. 27.10.2017. Further by virtue of Notification No. 82/2017-Customs dated 27.10.2017 (Sr.No. 164) read with Notification No. 72/2005-Customs as amended by Notification No. 89/2006-Cus (Sr.No. 181), it appeared that the goods classifiable under CTH 6005 3700 shall attract customs duty @16%, 2%, 1% and IGST @5%. In view of the above, it appeared that the subject goods were mis-classified and incorrect exemption notification benefit were availed at the time DTA clearance and same had resulted in evasion/short payment of Customs Duty. Whereas, the findings of the investigation carried out by the DRI indicated that the said SEZ unit had cleared the imported goods declared as "Polyester Knitted Fabric" into DTA by resorting to gross undervaluation in respect of goods covered under said 23 DTA Bills of entry as mentioned in Annexure-A (Sr.No. 1 to 23) and thereby defrauding the Government Exchequer by evading the payment of customs duty. Whereas, it is to put on record that the 23 DTA Bills of Entry were also part of subject SCN issued by the Kandla Custom authorities. Whereas, keeping in mind the facts revealed during DRI investigation, it appeared that there had been a

short levy of the Custom duty arising due to gross undervaluation of the imported goods covered under said 23 DTA Bills (as detailed in Annexure-A at Sr.No. 01 to 23).

8. In view of the above facts and circumstances, it appeared that there was a short levy of the Customs duty due tomis-classification, incorrect availment of exemption notifications and mis-declaration of the value of the imported goods at the time of clearance of the subject goods from SEZ to DTA, as detailed at Sr.No. 01 to 23 of Annexure-A to this Show Cause Notice, in respect of said 23 DTA Bills. It is pertinent to note that the differential duty calculation, as detailed in Annexure-A, has been arrived after taking into account the certified details for the subject clearances submitted by the said SEZ unit, data retrieved from SEZ Online system administered by NSDL and the findings of the investigation carried out by DRI, AZU in respect of gross under-valuation of the subject goods cleared into DTA in fraudulent manner.

Issue of 03 DTA Bills i.e. (Sr.No. 24 to 26 of Annexure-A) for which goods were cleared subsequently on the basis of 03 new DTA Bills (Sr.No. 27 to 29 of Annexure-A):

9. During the scrutiny of the records pertaining to DTA clearances of the goods declared as “Polyester Knitted Fabric” covered under the subject SCN, it had been observed that the said 26 Bills of entry had been filed by the said SEZ Unit (as detailed in Annexure-A at Sr.No. 01 to 26) wherein a short levy of the Customs duty due to mis-classification of the subject goods, incorrect availment of exemption notifications and mis-declaration of the value of the imported goods at the time of clearance of the subject goods from SEZ to DTA, as detailed in Annexure-A to the show cause notice, was noticed. It is pertinent to put on record that goods had been cleared from SEZ into DTA in case of 23 DTA Bills of Entry as mentioned in the subject SCN (as detailed in Annexure-A at Sr.No. 01 to 23). However, in respect of 03 DTA Bills of Entry covered under the subject SCN (Sr.No. 24 to 26), it is observed that the goods were not cleared against the said DTA documents which subsequently cleared by filing new DTA Bills under the correct CTH 6005 3700. It is to put on record that the 03 new DTA Bills of entry (as detailed in Annexure-A at Sr.No. 27 to 29) which were subsequently filed by the said SEZ Unit were not part of subject SCN dated 08.09.2021. The findings of investigation carried out by DRI indicated that the SEZ unit had cleared the imported goods declared as “Polyester Knitted Fabric” into DTA by resorting to gross undervaluation and thereby defrauding the Government Exchequer by evading the payment of Customs duty. Keeping in Mind the facts revealed, it appeared that the issue of short levy of Customs duty arising due to gross-undervaluation of the said imported goods which were subsequently cleared under the correct CTH needed re-examination.

10. The differential duty calculation in respect of 03 DTA Bills of Entry has been arrived after taking into account the certified details for the subject clearances submitted by the said SEZ unit, data retrieved from SEZ Online system administered by NSDL and the findings of the investigation carried out by DRI, AZU in respect of gross under-valuation of the subject goods cleared into DTA in fraudulent manner.

11. The said SEZ Unit and DTA buyers did not disclose the material facts relating to the actual specification, characteristics, nature and description of the subject products cleared into DTA. The above discussed facts revealed that while clearing the subject goods i.e. “Polyester Knitted Fabrics” to DTA, the said SEZ Unit had mis-classified and mis-declared the subject goods, totally valued at Rs. 8,75,95,506/- by deliberately suppressing the material facts relating to specifications and particulars of the same. They mis-classified and mis-declared the subject goods in terms of value and wrongly availed exemptions, with an intent to evade the payment of appropriate duty on the same during clearance to DTA. For the said act of omission & commission for suppression of material facts, the goods totally valued at Rs. 8,75,95,506/- are liable for confiscation under Section 111(m) of the Customs Act, 1962 since the said goods did not correspond in respect of value and classification with the entry filed

before the Customs. A letter of Approval dated 12.01.2017 (RUD-1) had been granted to the said SEZ Unit by the Development Commissioner, KASEZ under Section 15(9) of the SEZ Act, 2005 read with Rule 18 of the SEZ Rules, 2006 to operate as an SEZ unit and carry out authorized operations of Trading activity of goods declared as "Polyester Knitted Fabric" covered under Tariff item 6005 3200. For the said act of suppression of material facts, the goods mentioned in Annexure-A, totally valued at Rs. 8,75,95,506/- are liable to confiscation under Section 111(d) of the Customs Act, 1962, since the said Tariff head does not fall under the category of authorized operation approved by the Development Commissioner as per LOA granted to the said SEZ Unit. For the said act of suppression, the goods valued at Rs. 8,75,95,506/- are liable to confiscation under section 111(o) of the Customs Act, 1962 since the SEZ unit along with DTA clients deliberately paid lesser customs duty by availing incorrect notification benefits with a malafide intention to evade payment of Customs duty.

12. Accordingly a SCN F.No. GEN/ADJ/COMM/376/2022-Adjn dated 25.10.2022 was issued to M/s. Zip Zap Exim Pvt. Ltd, KASEZ asking them as to why:-

(a) The classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing at Sr.No. 01 to 23 in Annexure-A to the notice, should not be rejected and re-classified under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) The goods mentioned in Annexure-A to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 8,75,95,506/- (Rupees Eight Crore Seventy Five Lakh Ninety Five Thousand Five Hundred and Six only) for the subject goods cleared by them into DTA by means of trading should not be held liable for confiscation under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962, though the same are not physically available.

(c) Penalty under Section 114A/112 of the Customs Act, 1962 should not be imposed on them;

(d) Penalty under Section 114AA of the Customs Act, 1962 should not be imposed on each of them;

(e) Bond-cum-legal Undertaking in Form-H furnished by the said SEZ Unit should not be enforced towards the liabilities arising out of subject goods removed from said SEZ Unit to DTA as detailed in Annexure-A.

12.1 Further, the DTA Client, M/s. Bhuria Overseas were also called upon to show cause as to why:-

(a) The classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-1 to the notice, should not be rejected and re-classified under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) The goods mentioned in Annexure-1 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 2,72,10,992/- (Rupees Two Crore Seventy Two Lakh Ten Thousand Nine Hundred and Ninety Two only) should not be held liable for confiscation under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962, though the same are not physically available.

(c) Differential Customs Duty of Rs. 34,98,968/- (Rupees Thirty Four Lakh Ninety Eight Thousand Nine Hundred and Sixty Eight Only) as mentioned in Annexure-1 should not be demanded and recovered from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962 alongwith applicable interest under Section 28AA of the Customs Act, 1962 for the subject goods.

(d) Penalty under Section 114A/112 of the Customs Act, 1962 should not be imposed on them;

(e) Penalty under Section 114AA of the Customs Act, 1962 should not be imposed on each of them;

12.2 Further, the DTA Client, M/s. Milestone Eximp were also called upon to show cause as to why:-

(a) The classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-2 to the notice, should not be rejected and re-classified under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) The goods mentioned in Annexure-2 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 1,67,03,816/- (Rupees One Crore Sixty Seventy Lakh Three Thousand Eight Hundred and Sixteen only) should not be held liable for confiscation under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962, though the same are not physically available.

(c) Differential Customs Duty of Rs. 17,66,426/- (Rupees Seventeen Lakh Sixty Six Thousand Four Hundred and Twenty Six Only) as mentioned in Annexure-2 should not be demanded and recovered from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962 alongwith applicable interest under Section 28AA of the Customs Act, 1962 for the subject goods.

(d) Penalty under Section 114A/112 of the Customs Act, 1962 should not be imposed on them;

(e) Penalty under Section 114AA of the Customs Act, 1962 should not be imposed on each of them;

12.3 Further, the DTA Client, M/s. Radha Trading were also called upon to show cause as to why:-

(a) The classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-3 to the notice, should not be rejected and re-classified under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) The goods mentioned in Annexure-3 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 4,36,80,698/- (Rupees Four Crore Thirty Six Lakh Eighty Thousand Six Hundred and Ninety Eight only) should not be held liable for confiscation under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962, though the same are not physically available.

(c) Differential Customs Duty of Rs. 54,28,305/- (Rupees Fifty Four Lakh Twenty Eight Thousand Three Hundred and Five Only) as mentioned in Annexure-3 should not be demanded and recovered from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962 alongwith applicable interest under Section 28AA of the Customs Act, 1962 for the subject goods.

(d) Penalty under Section 114A/112 of the Customs Act, 1962 should not be imposed on them;

(e) Penalty under Section 114AA of the Customs Act, 1962 should not be imposed on each of them;

13. The Show cause notice dated 25.10.2022 could not be adjudicated within one year from the date of show cause notice as prescribed under Section 28(9b) of the Customs Act, 1962. Therefore, the time limit for issuance of order in the instant case was extended by one more year i.e. till 24.10.2024 by the Hon'ble Chief Commissioner, Customs, Ahmedabad.

PERSONAL HEARING-

14. The opportunity of personal hearing was provided to the noticees on 07.12.2023 and 25.06.2024. Dr. G K Sarkar, Shri A K Sinha and Shri Prashant Srivastava appeared for personal hearing and requested to file their written submission within fifteen days of the hearing.

DEFENCE SUBMISSION-

15. Dr. G K Sarkar in his submission dated 07.12.2023/11.09.2024, made on behalf of M/s. Zip Zap Exim Pvt. Ltd, M/s. Bhuria Overseas, M/s. Milestone Eximp, M/s. Radha trading has, interalia, stated that-

A. It is submitted that the impugned show cause notices issued by the Commissioner of Customs in purported exercise of powers under section 28 of the Customs Act read with Section 30 of the SEZ Act 2005 for recovery of alleged short levy of customs duty on goods cleared from SEZ to DTA is ex-facie devoid of jurisdiction**.** The provisions of Customs Act in the instant case are clearly inapplicable and the Commissioner of Customs has no jurisdiction to make assessment or reassessment under the Customs Act. It is submitted that the goods cleared from SEZ to DTA are chargeable to duty of Customs under Section 30 of the SEZ Act. Section 30 of the SEZ Act is reads as under:

> "*30.* ***Domestic clearance by Units.***
> *Subject to the conditions specified in the rules made by the Central Government in this behalf: -*
> *(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and*
> *(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.*"

A1 Rule 47 of the SEZ Rules deals with provisions relating DTA sale of goods, relevant portion thereof reads thus:

> *(1) "A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by-products arising during the manufacturing process or in connection therewith, in the Domestic Tariff Area on payment of Customs duties under section 30, subject to the following conditions, namely. -*
> -------
> -------"

A2 Even if it is assumed that section 30 of the SEZ Act only provides rates of customs duty which would be leviable when goods are cleared from SEZ into DTA but the duty would be charged

under Section 12 of the Customs Act, it may be seen that duty under Section 12 of the Customs Act is chargeable only in case of goods imported into and exported out of India. Duty is chargeable under Section 12 only in the case of import of goods into, or exported from India. Therefore, Section 12 has no application in the case where goods cleared from SEZ to DTA as removal of goods from SEZ cannot be considered as import.

A3 It may also be pertinent to note that even SEZ Act does not recognise clearance from SEZ into DTA as import. The term "Import" has been defined under Section 2(o) of the SEZ Act as under:

> *(o)* ***"import****" means-*
>
> *(i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or*
>
> *(ii) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone;"*

A4 The term 'import' is defined under section 2(23) of the Customs Act as '"import", with grammatical variations and cognate expressions, means bringing into India from a place outside India'. Thus, it may be seen that even Customs Act does not recognize clearance from SEZ to DTA as import. It is submitted that before introduction of GST, goods cleared from SEZ to DTA attracted VAT. The Department of Revenue issued Notification No 45/2005-Customs dated 16.05.2005 exempting SAD payable under Section 3(5) of Customs Tariff Act in case of goods cleared from SEZ to DTA subject to the condition that such goods when sold in the DTA, are not exempted from VAT/Sales Tax. Thus, levy of VAT on goods cleared from SEZ to DTA further substantiates the contention that goods cleared from SEZ into DTA are not import otherwise VAT would not have been leviable. Since, goods cleared from SEZ into DTA is not import, duty of customs as stated in Section 30 of the SEZ Act, cannot be charged under Section 12 of the Customs Act.

A5 Thus, it is beyond doubt that the goods cleared from SEZ into DTA is not "Import" and no duty can be demanded under Section 28 of the Customs Act. Demand of duty under Section 28 of the Customs Act in case of short payment or non-payment of duty on goods cleared from SEZ into DTA is not tenable under the given provisions of law. In support of the above contention, the Noticee relies upon decision of the Hon'ble Gujarat High Court in the case of Adani Power Ltd vs UOI [2015(330) ELT 883(Guj). The Hon'ble High Court in the case of Adani Power Ltd held thus:

> ***"34.*** *Section 30 of the SEZ Act is divided into two parts. First part creates liability only on removal of goods from SEZ to DTA. Section 30 does not provide for levy of duty on goods removed from SEZ processing area into non-processing areas. To the extent of Section 30 provides for levy of duty on goods removed from SEZ into DTA for the purposes for levy of duty on goods removed from SEZ into DTA for the purposes of quantification by reference, the duty is to be calculated with reference to the provisions of the said Act and CTA for determining the rate of duty classification and valuation. This is referred to as incorporation of reference but Section 30 of the SEZ Act is independent from Section 12 of the said Act. Section 30 of the SEZ Act is distinct and different from Section 12 of the said Act and the two operate in different fields. Section 30 of the SEZ Act does not refer to the word "import". Section 30 of the SEZ Act does not*

provide for levy of goods imported into SEZ as per the word "import" defined in SEZ Act. For goods imported into SEZ, customs duty is levied under Section 12 of the said Act, but on account of Section 26 of the SEZ Act, there is an exemption from payment of such customs duty. The provisions of Section 12 of the said Act are applicable to SEZ only insofar as and limited to import of goods into SEZ from a place outside India. The provisions of the said Act are not applicable at any stage thereafter insofar as SEZ Act is concerned. At the point of entry of the goods into the territorial waters of India from a place outside India where the provisions of the Customs Act are applicable insofar as SEZ is concerned, no customs duty is payable by virtue of the exemption under Section 26 thereof. The provisions of the Customs Act are thereafter exhausted and have no further role to play. Consequently, when goods are removed from SEZ into DTA, it is the provision of Section 30 of the SEZ Act which shall prevail. This is also provided for in Section 51 of the SEZ Act which contains the overriding provision. Section 51 of the SEZ Act provides that notwithstanding anything contained in any other law for the time being, the provisions of SEZ Act shall prevail. Therefore, the Parliament cannot make any law providing for levy of customs duty on removing the goods from SEZ into DTA, and any such law being so made shall be ultra vires Entry 83 of List I of Schedule VII to the Constitution of India read with Section 12 of the said Act. Thus, impugned notification cannot provide for levy on goods removed from SEZ into DTA or non-processing areas which is a field covered and occupied by Section 30 of the SEZ Act. The impugned notification is also ultra vires Section 30 of the SEZ Act which has an overriding effect and shall prevail."

"*43.* *Section 30 of the SEZ Act, 2005 is the charging section whereby duty is imposed in respect of goods removed from SEZ to DTA. Section 30(a) provides that any goods removed from SEZ to DTA shall be chargeable to customs duties, etc. as leviable on such goods when imported. Section 30(b) provides that the rate of duty applicable shall be the rate on the date of removal. The said section, therefore, incorporates by reference rates of customs duties as applicable when goods are imported into India from outside India for goods removed from SEZ to DTA and that the levy of duty is not under the Customs Act. Section 51 of the SEZ Act gives overriding to the provisions of SEZ Act and that being so, the same will prevail over any other law including the Customs Act. Thus, when no customs duty is payable on goods imported in India, no duty would be payable on similar goods transferred from SEZ to DTA in view of Section 30 read with Section 51 of the SEZ Act".*

A6 The Hon'ble Supreme Court dismissed the Petition for Special Leave to Appeal (C) No. 30868 of 2015 filed by Union of India & Ors. against the above Judgment of the Hon'ble Gujarat High Court. Thus, the decision of the Hon'ble Gujarat High Court has been approved by the Hon'ble Supreme Court [Union of India v. Adani Power Limited - 2016 (331) E.L.T. A129 (S.C.)]

A7 Without prejudice to the above, it is submitted that the judgment of the Hon'ble Bombay High Court, in the case of M/s. Renaissance Global Limited Vs Union of India [2022 (11) TMI 1015] fully supports the contention of the Noticee. The factual matrix of the case was that the SEZ unit imported a consignment of gold and silver jewellery for remaking. The Consignment was

intercepted by the Air Intelligence Unit of the Office of the Commissioner of Customs at Sahar Airport and ordered to be provisionally release. The unit however, did not take provisional release as according to the unit, the detention of the Consignment was ab-initio null and void. The Customs Authority issued Show Cause Notice proposing confiscation of the consignment under Section 111(d) and (m) and imposition of penalty under Section 112 and 114A of the Customs Act. The duty was also demanded under Sections 28, of the Customs Act. The Development Commissioner informed the court that import of jewellery for remaking is permissible under SEZ Scheme.

A8 The issue before the Hon'ble Bombay High Court was whether Customs have properly exercised jurisdiction and whether the provisions of the Customs Act as stated in the show cause notice are applicable in the facts of the case before it. The Hon'ble High Court was also required to validate which of the conflicting views is correct, that is, whether the view of the DC that import of new/unused jewellery for remaking by petitioner was permissible under the SEZ Act and the Rules or whether the provisions of the Customs Act under which the impugned order has been passed. Considering facts of the case before it, the Hon'ble High Court held that Customs Authority wrongly invoked Section 111 (m).

A9 As regards applicability of Section 28, the Hon'ble High Court held that when goods are imported by SEZ units, exemption from duty is granted under Section 26 of the SEZ Act. Customs duty under Section 28 of the Customs Act can only be demanded from the SEZ unit if the exemption under Section 26 of the SEZ Act is withdrawn. The relevant extract of the decision of the Hon'ble High Court is reproduced below:

> **"*III. Section 28 of the Customs Act:***
>
> *36. Apart from making sweeping and bald statements both in the show cause notice as well as in the impugned order, respondent no. 2 has not dealt with the issue of demanding customs duty under Section 28 of the Customs Act at all. Respondent no. 2 has arbitrarily invoked Section 28 that too by way of a Corrigendum to the show cause notice, without even dealing with as to how violations, if any, of provisions of SEZ Act or SEZ Rules, disturbs the blanket exemption available to petitioner in terms of Section 26 of the SEZ Act, the relevant extract of which is reproduced hereunder:*
>
> > ***(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: --***
> >
> > ***(a) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur.***
>
> *37. Customs duty under Section 28 of the Customs Act can only be imposed on imports into SEZ if the exemption under Section 26 of the SEZ is withdrawn. However, since there is not a whisper in either the show cause notice or impugned order of such withdrawal of exemption, duty under Section 28 of the Customs Act, cannot be demanded from petitioner.*
>
> *38 During the course of the hearing, Mr. Kantharia argued that exemption from payment of Customs Duty will not be available since petitioner has violated/breached the conditions of the LOP issued by the DC. Firstly, no such allegation has ever been raised*

in the adjudication proceedings. Further, and in any event, in case the conditions of the LOP had been breached, until and unless the SEZ permission was cancelled and the area was delicensed by the DC, it cannot be said that the customs duty exemption will not be available to petitioner.

39 In this connection, Sections 15 and 16 of the SEZ Act, the relevant extract of which is reproduced hereunder, would be relevant:

Section 15- Setting up of Unit

> *(1) Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed:*
>
> *Provided that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under this Act.*
>
> *(2) On receipt of the proposal under sub-section (1), the Development Commissioner shall submit the same to the Approval Committee for its approval.*
>
> *(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal in accordance with the provisions of sub-section (8):*
>
> *xxxxxxxxxxxxx*
>
> *Section 16 - Cancellation of letter of approval to entrepreneur.*
>
> *(1) The Approval Committee may, at any time, if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligations subject to which the letter of approval was granted to the entrepreneur, cancel the letter of approval:*
>
> *Provided that no such letter of approval shall be cancelled unless the entrepreneur has been afforded a reasonable opportunity of being heard.*
>
> *(2) Where the letter of approval has been cancelled under subsection (1), the Unit shall not, from the date of such cancellation, be entitled to any exemption, concession, benefit or deduction available to it, being a Unit, under this Act.*
>
> *(3) Without prejudice to the provisions of this Act, the entrepreneur whose letter of approval has been cancelled under sub-section (1), shall remit, the exemption, concession, drawback and any other benefit availed by him in respect of the capital goods, finished goods lying in stock and unutilised raw materials relatable to his Unit, in such manner as may be prescribed."*
>
> *A proposed unit submits application for a SEZ LOP under Section 15(1) of the SEZ Act. The said application after due consideration by the Approval Committee alongwith the DC is either rejected or processed under Section 15(3) of the SEZ Act. Once the Unit's application is accepted and the LOP is issued, the Unit attains a SEZ Unit status and is thereafter entitled to all the exemptions provided under Section 26 of the SEZ Act including but not limited to the exemption from payment of duties of customs.*
>
> *Subsequently, if the Approval Committee has reasons to believe that an SEZ Unit has persistently violated any provisions of the SEZ Act, then after giving due*

opportunity of being heard can cancel the SEZ registration of the said Unit under Section 16(1) of SEZ Act. On such cancellation, the following two consequences arise:

(i) The exemptions under Section 26 of the SEZ Act stand withdrawn. However, such withdrawal of exemption is from the date of cancellation of registration and does not relate back to the date on which the license was granted.

(ii) The Unit has to remit the exemption, concession, drawback and any other benefit availed by him in respect of the capital goods, finished goods lying in stock and unutilised raw materials relatable to his Unit.

40 In facts of the present case, petitioner's SEZ license has not been cancelled under Section 16(1) till date, let alone during the impugned period. Accordingly, petitioner has rightly and legally continued to avail of the customs duty exemption under Section 26 of the SEZ at all points in time. Further, and in any event, even if the SEZ registration of petitioner is cancelled, then petitioner is only liable to remit the duty concessions which have been availed with respect to capital goods and unused raw material / unsold finished stock only. Even at the highest, there is no question whatsoever of going back 5 years and demanding Customs Duty on all imports made in the past."

A10 Thus, a clear view emerges out of the decision of the Hon'ble Bombay High Court that even in the case of import by SEZ unit from outside India, Customs has no jurisdiction to demand of duty under Section 28 of the Customs Act, for any contravention of SEZ Act until and unless, the LOA of the unit is cancelled. Thus, as logical corollary to the above decision of Hon'ble Bombay High Court, demand of customs duty under Section 28 of Customs Act in respect of goods sold by SEZ unit into DTA without jurisdiction and without authority of law. In view of the above submissions and decisions of Hon'ble Gujarat High Court and Hon'ble Bombay High Court, the impugned SCN demanding differential duty under Section 28(4) of the Act is without jurisdiction and, merits to be dropped forthwith being illegal and untenable.

A11 Further, it may seen that Commissioner of Customs has grossly erred in law by invoking Section 30 of the SEZ Act read with Section 28(4) of the Customs Act. Without prejudice to the above submission, it is submitted that Commissioner of Customs does not have any jurisdiction to demand duty under Section 30 of the SEZ Act. No notification or order whatsoever, has been issued under SEZ Act authorizing Commissioner of Customs or Customs Officer to exercise power under SEZ Act. Demand under Section 30 of the SEZ Act, if any, can be made only by the Development Commissioner or Specified Officer or Authorized Officer of SEZ.

A12 Furtherance, it is submitted that impugned Show Cause Notice and proceedings initiated thereby by the Commissioner of Customs, Kandla Customs House is otherwise also devoid of jurisdiction having no jurisdiction to reassess and redetermine the declared classification and value. It is submitted that Deputy Commissioner of Customs, New Custom House, Kandla does not have the jurisdiction to reassess the Bills of Entry under question.

A13 It submitted that as per SEZ Act, Bills of Entry for import of goods from outside India and in respect of sale of goods into DTA are filed in the SEZ and assessed by the Authorised Officers posted at SEZ. The relevant extract of the SEZ Rules is reproduced below:

"**Procedure for import:**

"*29. (1) Direct delivery shall be permitted at the place of import for clearance of goods imported by Units and Developer from ports or airports or land customs stations or inland container depots as is being done in the case of import of perishable or lifesaving drugs.*

(2) The Unit or Developer, hereinafter referred to as the Special Economic Zone Importer, shall follow the following procedure for imports, namely: -

(a) the Special Economic Zone Importer shall file Bill of Entry for home consumption in quintuplicate giving therein, description with specially stamped endorsement as "Special Economic Zone Cargo" along with Bill of Lading or Airway Bill and invoice and packing list with the Authorized Officer who shall register and assign a running annual serial number and assess the Bill of Entry, on the basis of transaction value, which shall not require any counter signature of the Specified Officer:

Provided that where the Bill of Entry is not assessed on the date of filing itself, the goods shall be allowed to be transferred to Special Economic Zone Importer on the basis of the registered Bill of Entry, if an endorsement to this effect has been made by the Authorized Officer:

Provided further that where the goods including Capital Goods are supplied free of cost or on loan or lease basis, the Bill of Entry shall be filed jointly in the name of the Special Economic Zone importer, and the supplier:

Provided also that where the goods including Capital Goods are supplied on loan or lease basis by a domestic supplier, the Bill of Entry shall be filed jointly in the name of the Special Economic Zone importer and domestic supplier;

(b) the registered or assessed Bill of Entry shall be submitted to the Customs Officer at the place of import and the same shall be treated as permission for transfer of goods to the Special Economic Zone Importer;

---"

"48. ***Procedure for Sale in Domestic Tariff Area****. -*

(1) Domestic Tariff Area buyer shall file Bill of Entry for home consumption giving therein complete description of the goods and/or services namely, make and model number and serial number and specification along with invoice and packing list with the Authorised Officers:

Provided that the Bill of Entry for home consumption may also be filed by a Unit on the basis of authorization from a Domestic Tariff Area buyer.

(2) Valuation of the goods and/or services cleared into Domestic Tariff Area shall be determined in accordance with provisions of Customs Act and rules made thereunder as applicable to goods when imported into India:

---"

A14 Thus, it may be relevant to note Bills of Entry in respect of domestic sale of goods filed by the DTA buyer or the SEZ unit (on the basis of authorization given by the DTA unit) is assessed by the Authorised Officers posted in the SEZ. "Authorised Officer" is defined in the Section 2(c) of SEZ Rules, 2006 as ""Authorised Officer" means an Inspector or Preventive Officer or Appraiser or Superintendent of Customs posted in the Special Economic Zone and authorized by the Specified Officer to discharge any of his functions under these rules;"

A15 In the present case, the Bills of Entry in respect of import by the ZIP ZAP and Bills of Entry for DTA sale of goods have been filed at the Kandla Special Economic Zone and the Bills of Entry has been assessed by the Authorized Officers of the Kandla Special Economic Zone. Hence, the Deputy Commissioner of Customs, Kandla Custom House does not have any jurisdiction to issue SCN under Section 28 of the Customs Act. The SCN ought to have been issued by the Authorized Officer of the SEZ who has assessed the Bills of Entry or his successors.

A16 Hon'ble Supreme Court in the case of Canon India Pvt Ltd vs Commissioner of Customs reported in the ELT under citation no 2021(376) ELT 3 (SC) held that where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. The Hon'ble Apex Court has further held that when a statute directs that the things be done in a certain way, it must be done in that way alone. Relevant paragraph of the aforesaid judgment is reproduced as under:

> *"**9.** The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e., under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another v. Coffee Board, Bangalore [(1980) 3 SCC 358] has held :-*
>
> *"14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."*
>
> *In Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. [(2001) 3 SCC 609] has held: -*
>
> *"9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."*
>
> ***10.** There are only two articles 'a (or an)' and 'the'. 'A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word 'any'.*
>
> ***11.** Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which*

includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962.

12. *The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e., the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.*

13. *Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.*

14. *It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake reassessment [which is involved in Section 28(4)]."*

In view of ratio laid down by the Hon'ble Supreme Court, since, the Bills of Entry has been assessed by the Authorized Officers of the Kandla Special Economic Zone, the authority to re-assess the same lies only with the authorized officer of the Kandla SEZ.

A17 It is submitted that Hon'ble High Court of Gujarat in the case of CMR Chiho Industries Pvt Ltd vs UOI in the case of SPECIAL CIVIL APPLICATION NO. 10521 of 2020, followed the judgment of the Hon'ble supreme Court in Canon India (supra) and held as below:

> "*"36. It can be noticed that from the disclosure made by the petitioner that it had claimed the classification and exemption by bringing to the notice of the department all relevant details and therefore, to term this as a misdeclaration and to arrive at a subjective satisfaction for not allowing the benefit of Notification on the ground of existence of the Copper in the scrap motors, by the DRI Officer surely in wake of the decision of Canon India Pvt. Ltd (supra) shall need to be interfered with. The assessment once when is done by the concerned*

officer of the Custom Department, the reassessment by the DRI Officer, who invoked the powers, not being the proper officer as per the decision of Canon India Pvt. Ltd. (supra) would warrant indulgence. And, hence, his reasonable belief would also have no bearing when otherwise the authority concerned had allowed the import on the basis of the material which had been already made available by the petitioner. Thus, on the count of the DRI officer not being a proper officer under the law as the action on the part of the officer of DRI is not to be sustained. Again, assuming that he would have powers to reassess the very fact that entire material was with the assessing officer, it was for him to assess otherwise. Besides, vide notification issued by the Central Board of Excise & Customs, that is, notification no. 40/2012 – Customs (NT) dated 2.5.2012 and more particularly, item no.6 whereby, the Intelligence Officer in the Director General of Revenue Intelligence and Directorate General of Central Excise Intelligence, have been assigned the powers of various sections including the powers under subsection (1) and (2) of section 110 of the Act, which notification has been considered by the Apex Court with reference to assigning the powers of section 28 of the Act and has been held to be invalid. The learned counsel for the Union, could not dispute the said proposition as well as the applicability of the judgment to the facts of the present case, therefore, applying the principles enunciated in the case of Canon India Private Ltd (supra) the petition deserves to be allowed"

A18 The Judgement of Hon'ble Gujarat High Court in case of CMR Chiho and Canon India (supra) has been further followed by this Hon'ble Gujarat High Court in case of Messrs Aztec Fluids and Machinery Pvt. Ltd. Vs. Union of India (Special Civil Application No. 5562 of 2021) vide Judgment dated 01.04.2022 even considering pendency of review petition before the Supreme Court in Canon India Case.

A19 In the present case, the Bills of Entry have been filed at the Kandla Special Economic Zone and the Bills of Entry have been assessed by the Authorised Officers of the Kandla Special Economic Zone. Hence, the Commissioner of Customs, Kandla, Custom House does not have any jurisdiction to reassess the Bills of Entry and re-determine the classification or declared value and issue SCN under Section 28 of the Customs Act in view of the ratio laid down by the Hon'ble Apex Court in Cannon India (supra) and followed by this Hon'ble Court in CMR Chiho case (supra) and M/S Aztech Fluids and Machinery Pvt. Ltd. (Supra). In view of the above submissions, the impugned SCN proposing reclassification of the polyester knitted fabrics and reassessment of value of goods merits to be dropped forthwith as the SCN is without jurisdiction.

B. It is submitted that the issue of jurisdiction goes to the root of matter, therefore, the whole proceeding initiated by Respondents by detention and seizure of goods imported by the Petitioners and proceeding consequent thereto, is vitiated. In this regard Petitioner places reliance on Deepak Agro Foods Vs. State of Rajasthan [2008 (228) ELT 510 (SC)], wherein, the Hon'ble Apex Court has held that where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, *non est* and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties.

B1 The Hon'ble Supreme Court, in *Kiran Singh And Others Vs Chaman Paswan And Others [AIR 1954 SC 340]*, held in para 6, "*It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities.*"

B2 The Noticee also relies on the decision of the Hon'ble Apex Court in the case of Jagmittar Sain Bhagat And Others Vs. Director, Health Services, Haryana [2013 (10) SCC 136]. The Apex Court held as below:

> *"9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality the doctrine of waiver also does not apply. (Vide United Commercial Bank Ltd. v. Workmen [AIR 1951 SC 230], Nai Bahu v. Lala Ramnarayan [(1978) 1 SCC 58: AIR 1978 SC 22], Natraj Studios (P) Ltd. v. Navrang Studios [(1981) 1 SCC 523] and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [(1999) 3 SCC 722] .)"*
>
> *"10. In Sushil Kumar Mehta v. Gobind Ram Bohra [(1990) 1 SCC 193] this Court, after placing reliance on a large number of its earlier judgments particularly in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [(1976) 1 SCC 496 : 1976 SCC (L&S) 70] , Kiran Singh v. Chaman Paswan [AIR 1954 SC 340] and Chandrika Misir v.Bhaiya Lal [(1973) 2 SCC 474 : AIR 1973 SC 2391] held, that a decree without jurisdiction is a nullity. It is a coram non judice; when a special statute gives a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the common law court has no jurisdiction; where an Act creates an obligation and enforces the performance in specified manner, "performance cannot be forced in any other manner"*

B3 In view of the above submissions and by application of the ratio of the decisions of the Apex Court, it is submitted that the impugned SCN being without jurisdiction and hence, merits to be dropped.

C. In the SCN it has been alleged that ZIP ZAP has cleared into DTA "Polyester Knitted Fabric" under 23 Bills of Entry by misclassifying under CTH 60053200 by availing benefit of concessional duty i.e., 8%,2%,1% under Notification 72/2005-Customs. However, Vide Finance Act 2016, the tariff items 60053100 to 60053400 and the entries relating to thereto was substituted by tariff items 60053500 to 60053900. It has been alleged that goods cleared into

DTA should have been classified under CTH 60053700 which attracted 16% BCD in terms of Notification 82/2017 read with 72/2005-Customs (Sl No 181)

C1 In this regard, it is submitted that, the all the 23 Bills of Entry referred to in the impugned SCN were filed online. Without admitting even if it is assumed for the sake of argument that goods have been mis -classified, the Commissioner of Customs failed to appreciate that the SEZ unit filed the Bills of Entry online and the system was not updated. Had the system been updated it would not have accepted the classification number which is no more in existent. Further, the system provided pre-amended duty under Notification 72/2005-Customs (Sl.No 181).

C2 It is not the case that the DTA units or the SEZ unit has manipulated the classification and rate of duty. The Unit did not submit any forged or fabricated document as alleged in the impugned SCN. The SEZ unit fed the data to the system and system assessed the Bills of Entry under question. The system ought to have displayed the correct rate of duty and classification. Further, it may not be out of place to mention here that before allowing clearance, the Authorised officer of the SEZ scrutinize the Bills of Entry. Sample copy of Bills of Entry is attached and marked as **Annexure- D1**

C3 It is submitted that neither system not the concerned Authorized Officers who assessed the Bills of Entry could detect the wrong classification or incorrect duty. It is not the case that in the Bills of Entry, the description of the goods has been mis declared. In the Bills of Entry description of the goods were same both in the period prior to amendment of the Tariff vide Finance Act 2016 and post amendment of the Tariff'. This would be evident from the Bill of Entry at RUD-4 where CTH stated to have been correctly declared and any of the Bill of Entry at Annexure-A to the SCN, where the goods under question stated to have been wrongly classified under CTH 60053200. The Noticee was not aware of the amendment in the Tariff or exemption Notification no 72/2005-Customs. ZIP -ZAP or DTA units can not be faulted for the fault of the system or departmental officer who assessed the Bills of Entry.

C4 In view of the above submissions, the Noticee can not be alleged of misclassifying the goods and availing wrong exemption deliberately. The allegations merits to be dropped on this ground alone.

D. It has been stated in the impugned SCN that 03(three) new Bills of Entry was not part of the SCN dated 08.09.2021 issued by Kandla Customs on the basis of investigation conducted by DRI. Considering that DRI investigation stated to have revealed gross undervaluation, it was felt necessary to re-examine the issue of short levy of the Customs duty arising due to gross undervaluation of these new three Bills of Entry. In Annexure-A to the SCN, the differential duty in respect of three new bills of entry is stated to have been computed taking into account certified details of the subject clearances submitted by the SEZ unit, data received from SEZ Online system administered by NSDL and findings of the investigation carried out by DRI AZU

D1 In this regard it is submitted that Commissioner of Customs has acted in arbitrary manner and rejected the value declared in the said three Bills of Entry arbitrarily without following the procedures laid down for rejection and determination of value under the **Customs Valuation (Determination of Price of imported Goods) Rules, 2007(CVR2007).**

D2 It would be pertinent to note that the declared value has to be first rejected under Rule 12 of the CVR2007. The value of imported goods is transaction value. In terms of Rule 3(4) of CVR 2007, if value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9 of CVR 2007. The Rules are applied sequentially for determination of value.

D3 But in the impugned SCN neither the declared value has been rejected under CVR 2007 nor any attempt has been made to re-determine value in accordance with the CVR 2007. In the instant case value has been redetermined only taking into account certified details of the subject clearances submitted by the SEZ unit, data received from SEZ Online system administered by NSDL and findings of the investigation carried out by DRI. The method adopted for determination of value is contrary to the CVR 2007 and hence, the SCN demanding differential duty on account of undervaluation merits to be dropped being illegal, unjust and contrary to the CVR 2007.

D4 Without prejudice to the above submissions, it is submitted that in the impugned SCN, there is no proposition to redetermine the value in respect of the 03 (three) Bills of Entry mentioned at Sl No 27 to 29 of Annexure-A to the SCN. However, in the SCN, confiscation has been proposed in respect of goods cleared from SEZ to DTA totally valued at Rs 8,75,95,506/- which includes the value of 03 Bills of Entry where value alleged to have been mis-declared. Thus, the Noticee being without put to Notice can not expected to defend any allegation. The SCN merits to be dropped ab-initio having been issued against the principle of natural justice.

E. It is submitted that Demand in the instant case has been raised by invoking extended period of limitation under Section 28(4) of the Customs Act, 1962 which is not sustainable. It is pertinent to mention that that the Bills of Entry under consideration in the instant case were filed for import by ZZEPL and filed by ZZEPL on behalf of the DTA buyers were during the period October 2017 to November 2017, however, the SCN has been issued on 25.10,2022. In this regard, it is submitted that in given factual matrix of the case, extended period of limitation is not invokable. As it would be evident from Para 2 of the SCN that Officers of DRI initiated investigation against SEZ unit and DTA buyers and on the basis of the said investigation, Kandla Customs has issued SCN dated 08.09.2021. The Bills of Entry which had already been investigated by DRI has now again taken up by the Department for demand duty on ground of mis-classification [Ref para 3 of the SCN]. Further, DRI had already investigated the issue relating to undervaluation and issued Show Cause Notice dated 08.09.2021. Therefore, the demand of differential duty by the Department under the impugned SCN is time barred. The impugned SCN has been issued for demand of duty under Section 28(4) of the Act. Section 28(4) of the Act reads as under:

> *"(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"*

E1 Further, in the impugned SCN, differential duty for alleged mis-classification has been computed on the value proposed to be determined SCN dated 08.09.2021. It is beyond comprehension of any one as to what prevented the department to investigate the issue of alleged mis classification before issuance of the earlier SCN dated 08.09.2021. Department was aware of the fact that the SEZ unit selling goods into DTA and DRI investigated the issue relating to undervaluation in

respect of all the Bills of Entry which are subject matter of the impugned SCN. The same of Bills of Entry has been once proposed to be re-assessed for the purpose of valuation and in the impugned SCN proposed to be re-assessed for the purpose of classification. It is trite that the deficiencies in the investigation in the first show cause notice cannot be made good in the second show cause notice and subsequent show cause notice alleging suppression of facts again is blatantly unreasonable and not tenable.

E2 Furthermore, in the impugned SCN, differential duty for alleged mis-classification has been computed on the value proposed to be determined SCN dated 08.09.2021. It is beyond comprehension as to what prevented the department to investigate the issue of alleged mis classification before issuance of the earlier SCN dated 08.09.2021. Department was aware of the fact that the SEZ unit selling goods into DTA and DRI investigated the issue relating to undervaluation in respect of all the Bills of Entry which are subject matter of the impugned SCN. The same of Bills of Entry has been once proposed to be re-assessed for the purpose of valuation and in the impugned SCN proposed to be re-assessed for the purpose of classification. It is trite that the deficiencies in the investigation in the first show cause notice cannot be made good in the second show cause notice and subsequent show cause notice alleging suppression of facts again is blatantly unreasonable and not tenable.

E3 Further. in the impugned SCN, undervaluation has been alleged in respect of three Bills of Entry (Sl No 27-29 of Annexure-A to the SCN), relying on the investigation by DRI. The issue of undervaluation has already been dealt in the SCN dated 08.09.2021 and differential duty has been demanded. Therefore, the Department has grossly erred in law by demanding differential duty by invoking extended period of limitation again on the same ground. Since the issue was already in the Notice of the Department, issuance of the impugned SCN invoking extended period alleging suppression is not sustainable.

E4 From the above facts, it is clear that the impugned SCN has been issued in continuation of SCN dated 08.09.2021. It is settled legal position that in a case where a show cause notice has been issued for the earlier period on certain set of facts, then on the same or similar set of facts another show cause notice, invoking the extended period of limitation, cannot be issued as the facts were already within the knowledge of the department. The Noticee relies on the following decisions in this regard.

(i) In the case of Nizam Sugar Factory vs. CCE 2006 (197) ELT 465 (SC), the Hon'ble Supreme Court has held that:

> "9. *Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."*

In the aforesaid case, the Apex Court followed its earlier decision in the case of *P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise 2003 (153) E.L.T. 14 (S.C.)*, wherein it was held that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. The SC also noted that the

judgment in the case of P & B Pharmaceuticals (P) Ltd. was followed by the Supreme Court in the case of *ECE Industries Limited v. Commissioner of Central Excise, New Delhi 2004 (164) E.L.T. 236 (S.C.)*, wherein it was held that:

> *"4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."*

(ii) In the case of Simplex Infrastructure Ltd vs Commissioner of Service Tax [2015 (39) STR 938 (Cal), Hon'ble High Court at Calcutta held:

> **"14.** *In my opinion, it is difficult to think that the subject matter of the three earlier show cause notices and the impugned show cause notice are totally different. Both relate to Service Tax. One tax appears to be payable at a later stage than the other. There can be no argument that the issue whether the writ petitioner as a works contractor availed of free materials from the service recipients and failed to include them in their assessment of Service Tax, is a relevant factor in the computation of Service Tax on Commercial or Industrial construction services and to determine the issue whether they have improperly availed of abatement of Rs. 268,78,48,460/- under the subject notification.*
>
> ***15.*** *If one applies the ratio of the Supreme Court case, it is for the department to investigate whether the issue of a works contractor not including the value of the materials supplied to them to the service recipients is related to the subject matter of the impugned show cause notice. The two issues may not be identical but are related to each other. But this question of fact as to the extent to which the subject matter of the earlier three show cause notices was a factor in the issuance of the impugned show cause notice, with all data and necessary details have to be gone into by the Commissioner and not by this court. If it is found by him that the facts, data and factors, which were the basis of the earlier show cause notices were relevant in issuing the impugned show cause notice, then the show cause notice would be clearly hit by the above judgment of the Hon'ble Supreme Court. In other words, the show cause notice would be barred by the laws of Limitation, because the department had knowledge of the ingredients of the impugned show cause notice. The petitioner could not be charged with suppression to invoke the longer period of limitation."*

(iii) In the case of *Shreeji Colourchem Industries [2013(294) ELT 615 (Tri-Ahd)*, the CESTAT held :

> **"*19.*** *In any case, I find that M/s. NRL was issued show cause notice on 26-7-1994 also in respect of the same very goods covering the same gate passes and same period. I find that the law on the issue stand settled by various decisions of the Tribunal that when the first show cause notice is issued raising demand on a ground, issuance of second show cause notice on the same very issue and for the same period, even though after gathering additional information/material, cannot be upheld. Reference in this regard is made to Tribunal's decision in case of CCE, Indore v. Sidhartha Tubes Ltd., as also various decisions discussed by learned Member (Technical) in his proposed order. The distinctions drawn by my learned brother, for not applying the ratio of the decisions to*

the facts of the present case, are not being agreed to by me. Admittedly, the facts in each and every case would be different and it is ratio of the law declared, which is required to be adopted in similar circumstances and the facts. The fact that the second show cause notice stand issued after making detailed investigations, will not make the same as valid in the eyes of law. The adjudication cannot be allowed to take place in a piecemeal manner. Theoretically and hypothetically, if the Revenue, in the course of further investigations, find same more material and evidence against the appellant, the department cannot be allowed to issue a third show cause notice in respect of the same allegations and for the same period, on the ground that further investigations have revealed more evidences against the appellant. In my view, the ratio of all the decisions, as relied upon by the appellant and as discussed by Member (Technical) are fully applicable to the facts of the present case and second show cause notice and resultant order are required to be set aside on this ground itself."

E5 Without prejudice to the above submissions, it is submitted that in terms of Section 28(4), show cause notice for demand of duty can be issued, where duty has not been levied, paid, short-levied or short-paid by reason of collusion or any wilful mis-statement or suppression of facts. In the SCN no attempt has been made to substantiate the said allegations, and no evidence whatsoever has been sought to be adduced or referred to in support of these allegations. In this regard, it is submitted that mere unsubstantiated allegations of willful mis-statement and intention to evade duty are not sufficient for establishing a case for demand of duty under Section 28(4) of the Act. The said allegations have to be supported and based on material and cogent evidence. In the instant case, no evidence whatsoever has been referred to in support of these allegations against the Noticee. The SCN only refers to investigation conducted by DRI which culminated in issuance of SCN dated 08.09.2021. It is a settled position in law that the burden to prove the allegations regarding willful mis-statement and intention to evade duty lies upon the Department. In the impugned SCN, the Department has not discharged the burden cast upon it by the law.

E6 In the SCN no attempt has been made to substantiate the allegations of mis-classification or undervaluation, and no evidence whatsoever has been sought to be adduced or referred to in support of these allegations. It is submitted that correct description of the goods has been mentioned by the Noticee but the system selected non- existent Tariff Heading and Notification. Further, as regard to allegation of undervaluation, the SCN has referred to the investigation conducted by DRI and SCN dated 08.09.2021. In the case of SCN 08.09.2021, the Department had relied upon only on the statements and has not considered value of contemporaneous import of fabric In this regard, it is submitted that mere unsubstantiated allegations of willful mis-statement and intention to evade duty are not sufficient for establishing a case for demand of duty under Section 28(4) of the Act. In this regard, the Noticee cites and relies upon the Supreme Court's judgment in the case of Uniworth Ltd. vs. CCE, Raipur 2013 (288) E.L.T. 161 (S.C.). In that case, the Apex Court rejected the finding of the Appellate Tribunal which placed the onus of providing evidence in support of bona fide conduct on the appellant. The Supreme Court held that it is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. The relevant extract from the said decision is as follows:

"24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the

burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India Vs. Ashok Kumar (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

E7 In the case of Aban Lyod Chiles Off-shore Ltd vs. Commissioner of Cus, Maharashtra [2006 (200) E.L.T. 370 (S.C.)], the Hon'ble Supreme Court has held that the words 'mis-statement or suppression of facts' in the proviso to Section 28(1) [which is the earlier provision for duty demand corresponding to the present Section 28(4)] are qualified by the word 'willful', and that the word 'willful' preceding the word mis-statement clearly spells out that there has to be an intention on the part of the assessee to evade duty. The relevant extract from the decision is reproduced below:

"20. *The proviso to Section 28 can be invoked where the payment of duty has escaped by reason of collusion or any willful mis-statement or suppression of facts. So far as 'mis-statement or suppression of facts' are concerned, they are qualified by the word "willful". The word "willful" preceding the words "mis-statement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty.'*

E8 The judgment in Aban Lyod Chiles Off-shore (supra) was relied and followed by the Supreme Court, in the case of Uniworth Textiles Ltd. cited above. The Supreme Court held that for operation of the proviso clause of Section 28(1) [which corresponds to the present Section 28(4)], the intention to deliberately default is a mandatory prerequisite. It was also held that the use of the word "willful" introduces a mental element, and hence requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. The relevant extract from the judgment is as follows:

"19. *Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.*

20. *This Court in Aban Loyd Chiles Offshore Limited and Ors. v. Commissioner of Customs, Maharashtra (2006) 6 SCC 482 observed:-*

> *"The proviso to Section 28(1) can be invoked where the payment of duty has escaped by reason of collusion or any willful misstatement or suppression of facts. So far as "misstatement or suppression of facts" are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty."*

21. *The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim:*

> *"The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus., dated 3-6-1997"*
>
> ***22.*** *We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. Black's Law Dictionary, Sixth Edition (pp 1599) defines "willful" in the following manner: -*
>
> > *"Willful. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…*
>
> *An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done…" (emphasis added)"*

E9 From a bare perusal of the impugned SCN, it is clear that the department has not discharged the burden of establishing the allegations of willful mis-statement and intention to evade payment of duty on the part of the Noticee. It is clear from the SCN, that the demand of duty is based on the conjecture / surmise that there was intent to evade duty. The said conjecture / surmise is not sought to be supported by leading or referring to any evidence or proof whatsoever, and the Department has jumped to the presumption regarding intention to evade duty merely from the fact that the Noticee had incorrectly availed the duty exemption, mis-classified the goods and resorted to undervaluation.

E10 It is submitted that in the impugned SCN, no evidence has been adduced regarding any positive act of volition on the part of the Noticee which establishes willfull mis-statement or intent to evade duty. At Para 12 of its judgment in Uniworth Textiles (supra), the Supreme Court held the conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is untenable. The Hon'ble Court held that:

> ***"12.*** *We have heard both sides, Mr. R.P. Bhatt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso." (emphasis added)*

At Para 17 of the judgment, the Supreme Court further held that the proviso to Section 28(1) of the Act contemplates a positive action which betrays a negative intention of willful default. In view of the above submissions and judicial precedents, the demand of duty under

Section 28(4) by alleging deliberate intention to evade duty and wilful mis-statement, is without basis in facts or law. The SCN merits to be dropped on this ground alone.

E11 The Hon'ble Supreme Court in case of Sarabhai M. Chemicals Vs. Commissioner of Central Excise, Vadodara reported in 2005 (179) ELT 0003 SC clearly held that although on merits, the department succeeds, the appeals need to be allowed if the show cause notice is time barred. The Hon'ble Allahabad High Court in case of Commissioner of Customs, Central Excise & Service Tax Vs. Monsanto Manufacturers Pvt. Ltd. reported in 2014 (35) STR 177(All.) held in para 22 that once the demand is hit by limitation, nothing further should be seen. Even if for a moment if it is assumed that category under which demand was raised by the department is correct (though not agreed), then also, the demand raised by the department is hit by limitation and thereby, demand raised invoking extended period of limitation is not sustainable.

E12 In view of the above submissions and decisions of the Hon'ble Apex Court, High Court, the impugned SCN issued invoking extended period of limitation is ab initio void and merits to be dropped. Since, the SCN is itself is not sustainable, proposal of confiscation and demand of penalty under the SCN is also ab initio not sustainable.

F. Without prejudice to the above submissions, it is submitted that in the impugned SCN, the differential duty in respect of 23 Bills of Entry alleged to have been misclassified has been worked out on the basis of value proposed to be redetermined in the SCN dated 08.09.2021. In this regard, it is submitted that the SCN dated 08.09.2021 has not yet been adjudicated and duty and interest payable has not yet been determined under Section 28(8) of the Customs Act.

F1 It is submitted that Commissioner of Customs failed to appreciate that fact of one show cause notice can not be taken to adjudicate another show cause notice. It is a settled position in law that each show cause notice must be limited to the case that is made out therein. The Noticee, in this regard relies upon the decision of Hon'ble Supreme Court in the case GTC Industries Limited vs Commissioner of Central Excise New Delhi [1997 (94) ELT 9(SC)]. In this case, the Hon'ble Apex Court held as under:

> *15. The Tribunal found no legal difficulty in holding that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication of the first and second show cause notices. We find great difficulty in upholding the Tribunal's view. As we see it, <u>each show cause notice must be limited to the case that is made out therein by the Revenue</u>. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function."*
>
> *[Emphasis supplied]*

F2 The Commissioner of Customs has grossly erred in law by taking the value, proposed to be redetermined in another Show Cause Notice which has not yet been determined by the Adjudicating Authority, for computing differential duty in the impugned SCN. The SCN merits to be dropped alone on this ground.

G. It is submitted that goods are not liable for confiscation under Section 111 (d), 111(m) & 111(o) as proposed in the impugned SCN. It may be noted that Section 111 of the Customs Act provides for confiscation of improperly imported goods. As in foregoing paragraphs, it has been submitted that goods cleared from SEZ to DTA is not import under Section 2(23) nor such transaction qualifies as import under SEZ Act, Section 111 is not applicable in the present case.

G1 Without prejudice to the above submission , it is submitted that in the impugned SCN, confiscation has been proposed under Section 111 (d), 111(m) and 111(o) of the Act. Clauses(d), (o) and (m) of Section 111 read as under:

"(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer";

G2 Since the goods i.e., 'Polyester Knitted Fabrics' are not prohibited nor there is any such assertion in the impugned SCN, section 111(o) is otherwise not applicable. Further, the Notice alleges that the Noticee has availed incorrect exemption under Notification 72/2005. It may be noted that there is no allegation in the SCN relating to non-observation of any condition of the Notification. Thus, Section 111 (o) is also not applicable in the present case.

G3 As regard to the proposition to confiscate the goods under Section 111(m) of the Customs Act, it is submitted that in terms of Section 111(m) goods are liable for confiscation if they do not correspond in respect of value or "in any other particular" with the Bill of Entry filed by the importer. In the instant case, correct description of the goods were declared. It is a well settled position laid down in a number of judicial precedents, that merely because an incorrect classification or exemption is claimed in the B/E, it does not mean that the goods do not correspond "in any other particular" so as to make them liable for confiscation. Therefore, merely mentioning wrong CTH in the B/E cannot be equated with mis-declaration. In the present case, the Noticee declared the non-existent CTH and correct Exemption Notification. It is System which computed the duty. Noticee can not be fastened with the liability for deliberate mis-declaration.

G4 It is a well settled position laid down in a catena of decisions, that goods are not liable for confiscation under Section 111(m) merely due to the fact the importer has claimed an incorrect classification or benefit of an exemption notification in the B/E. It has been held that where goods are correctly described by the importer in the B/E, mere incorrect claim of classification and benefit of an exemption notification in the B/E, does not render the goods liable for confiscation by reason of the goods not corresponding "in any other particular" within the meaning of Section 111(m).

G5 In the case of Northern Plastics Ltd vs. Collector of Customs & C. Ex 1998 (101) E.L.T. 549 (S.C.), the Hon'ble Supreme Court held as under:

"19. *The appellant had not described the rolls as jumbo rolls but had given the length and width of each roll. The word "jumbo" is only indicative of size of the goods and the appellant having specifically stated the size of each roll it was not necessary, as there was no such requirement of law, for him to have described the goods which were in the form of rolls as jumbo rolls. It was also not necessary for him to describe them as the `jumbo colour film' as there was no separate heading or sub-heading for jumbo colour film in Chapter 37. Merely because the appellant claimed that it was entitled to*

exemptions in respect of customs duty under exemption Notification No. 52/86 as amended by 157/88 and because there was a separate exemption notification in respect of colour jumbo films, it cannot be said that the declaration made in the Bill of Entry did not correspond with "any other particular" of the imported goods. Whether the appellant was entitled to the benefit of exemption under the said notification or not was a matter of belief of the appellant and not a matter of `any other particular' with respect to the goods. It is also relevant to note that the appellant's earlier consignment bearing the same description, same classification and identical claim for exemptions was cleared by the Delhi Customs House in the previous year. The Collector and CEGAT were, therefore, clearly in error in holding that by claiming benefit of exemptions under notifications which really did not apply to the imported goods, the appellant had intentionally tried to evade proper payment of customs duty.

22. *..... As regards the claim for exemption in payment of countervailing duty the appellant had stated that it was entitled to the benefit under Notification No. 50/88-C.E. The declaration made by the appellant has been found to be wrong by the Collector and CEGAT on the ground that there was a separate exemption notification in respect of jumbo rolls for Cinematographic Films. While dealing with such a claim in respect of payment of customs duty we have already observed that the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty." [Emphasis supplied]*

G6 The Noticee further relies upon the following decisions:

(i) *Prince Marine Transport Services Pvt. Ltd. vs. CC (Imports), Mumbai 2015 (327) ELT 283 (Tri-Mum).* The relevant extract from the said decision is reproduced below:

'5.4 *As regards the confiscation and imposition of penalty, we do not find any reason for the same. The vessel was examined by the Customs Officers along with a Chartered Engineer before its clearance was allowed. When the appellant claims a classification under CTH 8901, it is based on its understanding of the subject matter and the same cannot be treated as a misdeclaration as held by the Hon'ble Apex Court in the case of Northern Plastic Ltd. v. Collector of Customs & Central Excise - 1998 (101) E.L.T. 549 (S.C.)."*

(ii) *Komal Trading Company vs Commissioner of Customs (Import) Mumbai 2014 (301) ELT 506 (Tri- Mum).* In this case it has been held that:

"4.*10* …… *The Hon'ble Apex Court in the case of Northern Plastics Ltd. [1998 (101) E.L.T. 549] held that laying claim to some exemption, whether admissible or not, is a matter of belief of the assessee and does not amount to misdeclaration and consequently confiscation under Section 111 of the Customs Act and imposition of penalty are not warranted. A similar view was held by the Hon'ble Bombay High Court in the case of Gaurav Enterprises [2006 (193) E.L.T. 532] wherein it was held that an untenable claim for exemption of duty is not a misdeclaration…. ".*

G7 It is submitted that by giving the correct description of the goods, the Noticee had discharged the obligation of making a correct declaration in the Bill of Entry. In this regard, the Noticee cites and

places reliance on the recent decision of CESTAT, Mumbai in the case of Sirthai Superware India Ltd vs Commr. of Customs Nhava Sheva-III 2020 (371) E.L.T. 324 (Tri. – Mumbai), In the said case, the importer had imported certain goods during the period 07.09.2012 to 17.6.2015 (i.e. after self-assessment in Customs had been introduced), and availed the benefit of duty exemption under a notification. Subsequently, the Deptt. found that classification of the goods declared by the importer was incorrect and benefit of duty exemption claimed by the importer was not admissible. The Commissioner confirmed demand of differential duty under Section 28(4), holding that after introduction of self-assessment in Customs, the onus to declare correctly and truthfully rested on the importer. In appeal, CESTAT held that:

> ***"5.5*** *When Commissioner has himself in the para 33 of his order for holding the classification under the Heading 392410, referred to description made in the Bill of Entries/invoices he cannot be justified in holding the charge of misdeclaration against appellants. For that reason we are of the view that by giving the correct description on the documents relating to import clearance appellants have discharge the burden of making correct declaration on the Bill of Entry. Hence any error in classification or the exemption claimed on Bill of Entry cannot be misdeclaration with the intention to evade payment of duty for the purpose of invoking extended period of limitation. Hence demand made by invoking extended period of limitation needs to be set aside*

G8 In view of the settled position in law as decided by the Hon'ble Supreme Court, Bombay and the Tribunal, it cannot be said that the Noticee has mis-declared the goods. Hence, the goods cannot be held liable for confiscation under Section 111(m) of the Act.

G9 Further, without prejudice to the above submission, it is submitted that SEZ Act and Rules made thereunder is a complete code in itself as far as the activities within the SEZ, penalty for contravention of any of the provision of SEZ Act and Rules are concerned. In the SEZ Act. In the SEZ Rules, 2006, action against SEZ unit/ Developers is envisaged under Rule 25 of the SEZ Rule. The Rule 25 reads as under:

> *"25. Where an entrepreneur or Developer does not utilize the goods or services on which exemptions, drawbacks, cess and concessions have been availed for the authorized operations or unable to duly account for the same, the entrepreneur or the Developer, as the case may be, shall refund an amount equal to the benefits of exemptions, drawback, cess and concessions availed without prejudice to any other action under the relevant provisions of the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Excise Tariff Act, 1985, the Central Goods and Services Tax Act, 2017 (12 of 2017), Integrated Goods and Services Tax Act, 2017 (13 of 2017), State Goods and Services Tax Acts, Union Territory Goods and Services Tax Act, 2017 (14 of 2017) and the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) and the enactments specified in the First Schedule to the Act, as the case may be:*
>
> *Provided that if there is a failure to achieve positive net foreign exchange earning, by a Unit, **[**or stipulated Value addition, such entrepreneur shall also be liable**]** for penal action under the provisions of Foreign Trade (Development and Regulation) Act, 1992 and the rules made there under."*

G10 From plain reading of Rule 25 it becomes clear that provisions of Customs Act can be pressed only when the unit or developer fails to utilize the goods or services for authorised operation. In

the impugned SCN there is no such allegation that ZZEPL has failed to utilise the goods for authorized operation. Nor the Development Commissioner of the SEZ has issued any SCN to the Noticee in this regard. In view of this, the proposal to confiscate goods under Section 111 of the Act is not tenable.

G11 Further, without prejudice to the above submissions, it is further submitted that the goods which are not available for confiscation cannot be confiscated. It has been held in a catena of cases that goods cannot be confiscated when they are not physically available for confiscation. Further, redemption fine or fine in lieu of confiscation cannot be imposed in such cases. The Noticee relies on the following case law:

(i) *CC vs. Raja Impex (P) Ltd. 2008 (229) ELT 185 (P&H):* The relevant portion of the judgment is extracted below**:**

"12. It may also be noticed here that in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), the goods were released to the assessee on an application made by it and on the execution of a bond by the assessee and in those circumstances, the Hon'ble Apex Court held that the mere fact that the goods were released on the bond being executed would not take away the power of custom authority to levy redemption fine. A reading of the judgment/order of the Hon'ble Apex Court in M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), would show that the Apex Court has taken the view that redemption fine can be imposed even in the absence of the goods as the goods were released to the appellant on an application made by it and on the appellant executing a bond. Since the goods were released on a bond the position is as if the goods were available. The ratio of the above decision cannot be understood that in all cases the goods were permitted to be cleared initially and later proceedings were taken for under-valuation or other irregularity, even then redemption fine could be imposed. We are, therefore, not inclined to accept the contention raised by the appellant on this issue and set aside the redemption fine.

13. The reliance of learned counsel for the revenue upon the provisions of Section 125 of the Act is also misconceived. Section 125 of the Act is applicable only in those cases which have been cleared by the concerned authorities subject to furnishing undertaking/bond etc. However, in the present case, admittedly, the goods were cleared by the respondent-authorities without execution of any bond/undertaking by the assessee. Thus, in view of the fact and circumstances of the case, we find no error in the impugned orders. No substantial question of law arises for our determination in the present appeal and the same is hereby dismissed."

(ii) Commissioner of Customs (Import), Mumbai vs. Finesse Creation Inc. 2009 (248) E.L.T. 122 (Bom.): In this case, the Bombay High Court has held that:

"5. In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter.

6. In these circumstances, in our opinion, the tribunal was right in holding that in the absence of the goods being available no fine in lieu of confiscation could have been imposed. The goods in fact had been cleared earlier. The judgment in Weston (supra) is clearly distinguishable. In our opinion, therefore, there is no merit in the questions as framed. Consequently, appeal stands dismissed."

The SLP filed by the revenue against the said judgment has been dismissed by the Supreme Court, as reported at *2010 (255) E.L.T. A120 (S.C.)*.

(iii) In the case of *Shiv Kripa Ispat Pvt. Ltd. vs. CCE, Nasik, 2009 (235) ELT 623 (Tri. -LB)*, the issue referred to the Larger Bench of CESTAT was whether goods can be confiscated and redemption fine imposed even if they are not available for confiscation, when such goods have not been initially seized. The Larger Bench decided the issue against the revenue, relying on the decision of P&H High Court in the case of *Raja Impex (supra)*. The Larger Bench also observed that in the case of *Chinku Exports vs. CC 1999 (112) ELT 400 (Tri.)*, the Appellate Tribunal had held this issue against the revenue, and that the department's Civil Appeal was dismissed by the Apex Court (as reported at 2005 (184) E.L.T. A36 (S.C.).

In view of the above submissions and decisions, since the goods which have been cleared for home consumption and are not physically available, cannot be confiscated and redemption fine or fine in lieu of confiscation cannot be imposed. Hence, the proposal of confiscation is *ab initio* not tenable and merits to be dropped.

H. The impugned SCN proposes to impose penalty under Section 112 / 114A of the Customs Act.

H1 As submitted at length in the preceding paragraphs, the goods in question are not liable for confiscation under Section 111. Hence, there is no question of levying any penalty under Section 112 on the Noticee. It is further submitted that the Noticee has not done any act or omission which would make the imported goods liable for confiscation under Section 111 of the Act.

H2 Without prejudice to the above, it is submitted that in the SCN penalty has been demanded under Section 112 of the Act. It may be seen that under Section 112 there are two clauses, namely (a) and (b). Further, it may be seen that quantum of penalty leviable under Section 112 is specified under sub- clauses (i) to (v) of Section 112 of the Customs Act. The SCN does not reveal the exact clause/ clauses of Section 112 under which the penalty is leviable. In the SCN essential ingredients have not been specifically set out with reference to the clauses. Thus, the SCN is ambiguous and merits to be dropped,

H3 The need for a penalty order having to specifically indicate the precise provision under which the penalty is being imposed was emphasized by the Supreme Court in Amrit Foods v. Commissioner of Central Excise, U.P[2005(190) ELT 433 (SC). It was observed that in the absence of any indication as to which particular clause of Rule 173Q had been contravened, the penalty could not have been imposed. The relevant extract of the decision of the Hon'ble Supreme Court is reproduced below:

"5. *The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show cause notice nor the order of the Commissioner specified which particular clause*

of Rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of the 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs."

H4 In this regard, the Noticee also, refers to the decision of Madras High Court in the case of B Lakshmichand vs Government of India [1983 (12) ELT) 322 (Mad). The Hon'ble High Court held that such proceedings being irrational and ambiguous, merits to be set aside. The relevant extract the of decision is extracted below:

"***"3.*** *I have been taken through the show cause notice and as well as the orders passed by the authorities under the Act in the present case. There is only the bare quoting of S. 112 of the Act and there is no reference to either to clause (a) or (b) or both of S. 112 of the Act. The essential ingredients have not been specifically set out with reference to either of the clauses. Hence, it has got to be held that there was no making up of mind either at the earlier stage or at the subsequent stage of the prosecution of the proceedings and the passing of the orders thereon as to which of the clauses would be attracted in the instant case. The whole matter has been dealt with in a sphere of ambiguity. The present case is not a case where a wrong provision has been quoted, so that it can be stated that it was due to a bona fide error, which did not vitiate the jurisdiction of the Authority. As stated above, this is a case where there had been a failure to apply the mind as to which of the clauses is relevant and would be attracted. The power and the discretion given to the Authority functioning under S. 112 of the Act are judicial in character and are open to judicial review, and if they are found to have been exercised on irrational and ambiguous basis, the court will strike down the orders.*

4. *A similar infirmity in a show cause notice under S. 112 of the Act came up for scrutiny before a Division Bench of the Calcutta High Court in Charandas v. Assistant Collector of Customs, A.I.R. 1968 Cal. 28, and there, it has been countenanced that the notice should contain the relevant allegations that the person concerned did or omitted to do anything which he was required to do under the law or he had any knowledge that the contraband seized has been smuggled into the country. On the facts of the case, the Bench held that the person concerned had been asked to show cause why he should not be penalised in accordance with the provisions of S. 112 of the Act, without charging him with the ingredients of the offence which would expose him to a penalty, and therefore, he can neither give a proper answer nor adequately defend himself. If the above propositions are kept in view, I find that the orders passed by the authorities under the Act in the instant case cannot be sustained. There is lack of clarity and the whole matter has been dealt with in a sphere of ambiguity. Definitely, the petitioner must be deemed to have been put to prejudice by such proceedings and the orders passed thereon. This obliges me to interfere in writ*

proceedings. Accordingly the writ petition is allowed. There will be no order as to costs.""

H5 In view of the above settled position in law, enunciated by Hon'ble Supreme Court/ High Courts that SCN should indicate precise provision of law under which penalty is proposed to be imposed, the SCN merits to be dropped forthwith on this ground alone.

H6 Furthermore, as submitted at length in the preceding paragraphs that the goods in question are not liable for confiscation under Section 111. Hence, there is no question of levying any penalty under Section 112(a) and Section 112(b) on the Noticee. It is further submitted that the Noticee has not done any act or omission which would make the imported goods liable for confiscation under Section 111 of the Act.

H7 In this regard, the Noticee relies upon the decision of the Mumbai bench of CESTAT in the case of Maersk India Limited Vs. CC., Sheva 2001 (129) ELT 444. The relevant extract from the said decision is reproduced below:

"The impugned order shows that the penalty was imposed under Section 112(a) of the Act. The pre-condition of such penalty is that the person being penalised must have done or omitted to do action rendering such goods liable to confiscation. The penalty under Section 112 is the direct result of the confiscation of the goods under Section 111 of the Act. Prima facie where there is no action of confiscation, the question of penalty does not arise."

H8 Further reliance is placed on the decision of Delhi Bench of CESTAT in the case S.S. Gupta Vs. CC, New Delhi 2001 (132) E.L.T. 441 (Tri. - Del.). In this case, CESTAT held:

"4. --------The provisions of Section 112 are very specific as the penalty is imposable only when the goods are liable for confiscation under Section 111 of the Customs Act. As the goods are not liable for confiscation under Section 111 in the present matters, penalty cannot be imposed under Section 112. This was the view held by the Tribunal in the case of Maersk India Ltd., supra. Accordingly, we set aside the penalty imposed on all the Appellants under Section 112 of the Act…"

H9 Without prejudice to the above submissions, it is further submitted that penalty can be imposed only when an assessee has acted deliberately in defiance of law or is guilty of conduct which is contumacious or dishonest or has acted in conscious disregard of his obligations. In the present case, the SCN has been issued on basis of allegation of mis-classification under valuation. It may be seen from the preceding paragraph of the submissions, that there was no under mis-classification or valuation of goods imported by the Noticee. Penalty cannot be imposed when the assessee is acting under a *bona fide* belief. It has been held in judicial pronouncements by various Courts and the Tribunal that the law requires that an intention to evade payment of tax must be shown before penalty can be imposed under Section 112. Something more than a mere failure to pay tax must be shown, i.e., the assessee must be aware that the duty was leviable and must have avoided payment.

H10 In the case of Hindustan Steel Ltd. vs. State of Orissa 1978 (2) ELT (J159) SC], the Hon'ble Supreme Court held as under:

> ***"7.*** *Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."*

H11 In the case of Akbar Badrudin Jiwani vs. Collector of Customs 1990 (47) ELT (161 (SC), the Hon'ble Supreme Court has held as under:

> **"59.** *We refer in this connection to the decision in Merck Spares v. Collector of Central Excise & Customs, New Delhi - 1983 E.L.T. 1261, Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay - 1984 (18) E.L.T. 533 and Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay - 1987 (29) E.L.T. 904 wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in Hindustan Steel Ltd. v. State of Orissa - 1978 (2) E.L.T. (J 159) (S.C.) = 1970 (1) SCR 753 - by this Court that: -*
>
> *The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."*

H12 In the light of the above submissions and case-law, the proposal to impose penalty under Section 112 is unsustainable, and merits to be dropped forthwith.

H13 The SCN also proposes to impose penalty under Section 114A of the Customs Act. In this regard it is submitted that Commissioner of Customs has grossly erred in law by imposing penalty under Section 114A of the Customs Act. The Commissioner of Customs failed to appreciate that penalty under Section 114A is imposable on any person who is liable to pay duty as determined under Section 28(8) (presently 28(4) of the Customs Act. In the instant case no duty has been demanded from Noticee. Section 114A of the Customs Act reads as under: -

"***SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases.*** *- Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has xxx been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:*

Provided *that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:*

Provided further *that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :*

Provided also *that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account :*

Provided also *that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :*

Provided also *that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.*

Explanation*. - For the removal of doubts, it is hereby declared that -*

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

H14 Thus, on plain reading of Section 114A makes it expressly clear that penalty under the Section is imposable only in the case where the duty or interest is determined under Section 28 of the

Customs Act. The Hon'ble Supreme Courts, High Court and Tribunals have consistently held that penalty under Section 114A is not imposable where demand has not been determined under Section 28 of the Customs Act. There is catena of case law holding that where duty is not determined under Section 28 of the Customs Act, penalty under Section 114A is not imposable. Some the decisions are discussed in the subsequent paragraphs

H15 The Apex Court in the case of Commissioner of Customs, Mumbai Vs M.M.K.Jewellers reported in 2008(225) ELT.3(SC) has held as under:

> "*42. Penalty under Section 114A is imposable only when the demand is confirmed under the proviso to Section 28(1) of the Act. In view of the clear findings of the Commissioner that the respondent-assessees are not guilty of suppression of facts or are guilty of collusion or misstatement and, therefore, duty cannot be imposed by invoking the extended period of limitation. When the duty itself cannot be imposed, no order of imposing the penalty under Section 114A of the Customs Act can be sustained".*

H16 The Principal Bench of Hon'ble Delhi CESTAT in the case of J.Mitra & Bors Vs Commissioner of Customs, New Delhi [2013 (288) ELT 305(Tri-Del)] held as under:-

> *"19. We find that there was no demand under Section 28(8) of the Customs Act, for duty short-levied and hence no penalty could have been imposed under this section. So the penalty imposed on M/s. Care Foundation under Section 114A is not legally sustainable. There might have been a case for imposing penalty under Section 112 on Care Foundation also. Since such penalty is not imposed by the adjudicating authority, we refrain from imposing such penalty."*

H17 The department filed an appeal before the Delhi High Court against the above stated decision of the CESTAT. Hon'ble Delhi High Court in the said case reported in the ELT under the title CC(I&G) vs Care Foundation [2014(302) ELT 181(Del)] while affirming the order of CESTAT held as under:

> *".In the opinion of this Court, no exception can be taken to the finding that since there was no demand under Section 28(8) of the Customs Act for duty, no penalty could have been imposed under that provision and consequently the penalty under Section 114A was not sustainable"*

H18 Hon'ble Tribunal in the case of Escorts Heart Institutes & Research Centre vs CC (Import & General) [2016(336) ELT 185 (Tri-Del) held as under:

> ***"8.*** *It is evident from the foregoing analysis that the show cause notice did not raise the demand in terms of Section 28 ibid. The wording of Section 114A ibid makes it expressly clear that penalty under that Section is attracted when liability to pay duty or interest is determined under Section 28 ibid. Indeed, in the case CC (I&G) v. Care Foundation (supra), involving similar facts and circumstances, Delhi High Court held as under :-*
>
> > *6. In the opinion of this Court, no exception can be taken to the finding that since there was no demand under Section 28(8) of the Customs Act for duty, no penalty could have been imposed under that provision and consequently the penalty under Section 114A was not sustainable. The further reasoning that there could have been penalty under Section 112 but since that provision was not invoked, the direction to pay penalty at Rs. 2.34 crores was not*

warranted in the circumstances, does not appear to be in error of law. For these reasons the Court is of the opinion that the question of law framed has to be answered against the revenue and in favour of the assessee."

Thus, in the facts and circumstances of the present case, penalty under the Section 114A ibid is simply not attracted. The above quoted para of the Delhi High Court judgment also deals with Revenue's contention regarding penalty under Section 112 ibid which we (have to) respectfully follow"

H19 The above discussed decisions of the Apex Court, High Court and Tribunals squarely apply in the present case. The unambiguous provisions of Section114A of the Customs Act read with the above stated judicial pronouncements, make it clear beyond any doubt that penalty under Section 114A is not imposable where duty has not been determined under Section 28 of the Customs Act. Since, in the present case, there is no demand of duty, penalty under Section 114A is not imposable.

I. The SCN proposes to impose penalty under Section 114AA is not imposable. Section 114AA reads as under:

"SECTION 114AA. Penalty for use of false and incorrect material. - *If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods".*

I1 The Noticee vehemently denies to have made any false declaration. Even in the SCN also there is no such allegation to justify penalty under Section 114AA. It submitted that the Noticee imported goods and declared correct description of the goods. Further, the notice declared the correct value of the goods this would evident from the value of contemporaneous imports of the similar goods at various port. Hence, penalty under Section 114AA is not imposable. In view of this, penalty under Section 114AA is not imposable.

I2 Without prejudice to above, it is further submitted that provisions of Section 114AA would be applicable only to those cases where export benefits are claimed without exporting the goods and presenting forged documents knowingly or intentionally. It would not be out of place to discuss the intention of the legislature behind inserting Section 114AA. In the Twenty Seventh Report of the Standing Committee of Finance, the legislative intention behind insertion of Section 114AA was discussed at paragraph 62. For the ease of perusal, the entire discussion is reproduced below: -

'Clause 24 (Insertion of new Section 114AA)

62. Clause 24 of the Bill reads as follows:

After Section 114A of the Customs Act, the following Section shall be inserted, namely:--

"114AA. Penalty for use of false and incorrect material.—if a person knowingly or internationally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

63. The information furnished by the Ministry states as follows on the proposed provision:

"Section 114 provides for penalty for improper exportation of goods. ***However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported.*** *The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to 5 times the value of goods. A new Section 114 AA is proposed to be inserted after Section 114A."*

64. It was inter-alia expressed before the Committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a 'false statement' etc. Questioned on these concerns, the Ministry in their reply stated as under."

"The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under Section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because person summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under;

"The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian boarder*. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."*

66. The Committee observes that owing to the increased instances of willful fraudulent usage of export promotion schemes the provisions for levying of penalty upto five times the value of goods has been proposed. ***The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty****. The committee, however, advice the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment."*

(Emphasis supplied)

I3 The aforesaid extract from the report of the standing committee explains without any ambiguity the purpose for which Section 114AA has been inserted in the Customs Act. The purpose is to punish those people who avail export benefits without exporting anything. It is thus, submitted that section 114AA has been introduced to counter serious frauds not every kind of violations under Customs Act. The perusal of the aforesaid extract makes it clear that Section 114AA was inserted to penalize in circumstances where export benefits are availed without exporting any

goods which is not the case here. According to the legislatures, Section 114 of the Customs Act provides penalty for improper exportation of goods and it was not covering situations where goods were not exported at all. Such serious manipulators could have escaped penal action even when no goods were actually exported. In the light of aforesaid discussion, it is submitted that in the present case Section 114AA is not invocable against the Noticee.

I4 It is submitted that the Hon'ble Supreme Court in case of Loka Shikshana Trust v. CIT reported in AIR 1976 SC 10, Indian Chamber of Commerce v. Commissioner of Income Tax reported in AIR 1976 SC 348, Additional Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers' Association reported in AIR 1980 SC 387 Novartis AGv. Union of India (2013) 6 SCC 1 relied upon the speeches made by the finance minister for the purpose of ascertaining what was the reason for introducing a particular clause. In view of recent Constitution Bench Judgment of the Hon'ble Supreme Court, in case of Kalpana Mehta Vs. Union of India & Ors. (W.P. (C) 558 of 2012), Parliamentary Committee Report is to be considered to see the purpose for which a statutory provision has been brought in. Thus, in view of parliamentary standing committee report on introduction of Section 114AA, penalty cannot be imposed on the Noticee under Section 114AA.

J. In the impugned SCN, it has been proposed to enforce the Bond-cum- Legal Undertaking furnished by the Noticee in format H. In this regard, it is submitted that an SEZ unit is required to execute Bond-cum- Legal Undertaking in terms of Rule 22 (1) (i) of the SEZ Rules. The relevant extract of Rule 22 is reproduced below:

> ***"22. Terms and conditions for availing exemptions, drawbacks and concessions to every Developer and entrepreneur for authorized operations.-***
>
> *(1) Grant of permission to operate including availing exemption, drawbacks and concession to the entrepreneur or Developer shall be subject to the following conditions, namely: -*
>
> *(i) the Unit shall execute a Bond-cum-Legal Undertaking in Form H, with regard to its obligations regarding proper utilization and accountal of goods, including capital goods, spares, raw materials, components and consumables including fuels, imported or procured duty free and regarding achievement of positive net foreign exchange earning;*
>
> *(ii) the Developer and Co-Developer shall execute the Bond-cum-Legal Undertaking in Form D with regard to their obligations regarding proper utilization and accountal of goods, including goods procured or imported by a contractor including the sub-contractor duly authorized by the Developer or Co-Developer as the case may be;*
>
> *(iii) the Bond-cum-Legal Undertaking shall be jointly accepted by Development Commissioner and by the Specified Officer:*
>
> *Provided that the Bond-cum-Legal Undertaking executed by the Unit or the Developer including Co-Developer shall cover one or more of the following activities, namely: -*
>
> *(a) the movement of goods between port of import or export and the Special Economic Zone;*
>
> *(b) the authorized operations, as applicable to Unit or Developer;*
>
> *(c) temporary removal of goods or goods manufactured in Unit for the purposes of repairs or testing or calibration or display or processing or sub-contracting of production process or production or other temporary removals into Domestic Tariff Area without payment of duty;*
>
> *(d) re-import of exported goods.*
>
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--------"

J1 Thus, it may be seen that the Bond-cum-Legal Undertaking is jointly accepted by Development Commissioner and by the Specified Officer of the SEZ. The Bond-cum-Legal Undertaking is not furnished before the Commissioner of Customs and hence, the Commissioner of Customs cannot enforce the Bond-cum-Legal Undertaking towards the liability arising out of the subject goods from SEZ unit to DTA.

K. Without prejudice to the above, as submitted in the foregoing submissions that SEZ Act and Rules made thereunder is a complete code in itself as far as the activities within the SEZ. The Rule 25 of the SEZ Act provides only penal provisions for contravention of any of the provision of SEZ Act and Rules are concerned. From plain reading of Rule 25 it becomes amply clear that provisions of Customs Act can be pressed only when the unit or developer fails to utilize the goods or services for authorised operation. In the impugned SCN there is no such allegation that ZZEPL has failed to utilise the goods for authorized operation. Nor the Development Commissioner of the SEZ has issued any SCN to the Noticee in this regard. In view of this, the proposal to impose penalty under Section 112/114A/ 114AA of the Act is not tenable and the proposal merits to be dropped.

DISCUSSION AND FINDINGS-

16. I have carefully gone through the show cause notice dated 25.10.2022, defence submissions placed on record and all the material evidences available on record.

17. Before going into the merit of the case in respect of demand of duties of customs, it is pertinent to examine and discuss the submission of the noticees made in respect of jurisdiction of the show cause notice.

18. The noticees in their submission, from A1 to A10, have argued that the provisions of Customs Act are inapplicable and the Commissioner of Customs has no jurisdiction to make assessment or re-assessment under the Customs Act. Section 30 of the SEZ Act, 2005 provides rates of Customs duty which would be leviable when goods are cleared from SEZ into DTA but the duty would be charged under Section 12 of the Customs Act and the same is chargeable only in case of goods imported into and exported out of India. Therefore, Section 12 has no application in the case where goods cleared from SEZ to DTA as removal of goods from SEZ cannot be considered as import. In this regard, they have relied upon the judgement of the Hon'ble Gujarat High Court in the case of Adani Power Ltd vs UOI [2015(330) ELT 883(Guj). The Hon'ble High Court in the case of Adani Power Ltd held thus:

> *"34. Section 30 of the SEZ Act is divided into two parts. First part creates liability only on removal of goods from SEZ to DTA. Section 30 does not provide for levy of duty on goods removed from SEZ processing area into non-processing areas. To the extent of Section 30 provides for levy of duty on goods removed from SEZ into DTA for the purposes for levy of duty on goods removed from SEZ into DTA for the purposes of quantification by reference, the duty is to be calculated with reference to the provisions of the said Act and CTA for determining the rate of duty classification and valuation. This is referred to as incorporation of reference but Section 30 of the SEZ Act is independent from Section 12 of the said Act. Section 30 of the SEZ Act is distinct and different from Section 12 of the said Act and the two operate in different fields. Section 30 of the SEZ Act does not refer to the word "import". Section 30 of the SEZ Act does not provide for levy of goods imported into SEZ as per the word "import" defined in SEZ Act. For goods imported into SEZ, customs duty is levied under Section 12 of the said Act, but on account of Section 26 of the SEZ Act, there is an exemption from payment of such customs duty. The provisions of Section 12 of the said Act are applicable to SEZ only insofar as and limited to import of goods into SEZ from a place outside India. The provisions of the said Act are not applicable at any stage thereafter insofar as SEZ*

Act is concerned. At the point of entry of the goods into the territorial waters of India from a place outside India where the provisions of the Customs Act are applicable insofar as SEZ is concerned, no customs duty is payable by virtue of the exemption under Section 26 thereof. The provisions of the Customs Act are thereafter exhausted and have no further role to play. Consequently, when goods are removed from SEZ into DTA, it is the provision of Section 30 of the SEZ Act which shall prevail. This is also provided for in Section 51 of the SEZ Act which contains the overriding provision. Section 51 of the SEZ Act provides that notwithstanding anything contained in any other law for the time being, the provisions of SEZ Act shall prevail. Therefore, the Parliament cannot make any law providing for levy of customs duty on removing the goods from SEZ into DTA, and any such law being so made shall be ultra vires Entry 83 of List I of Schedule VII to the Constitution of India read with Section 12 of the said Act. Thus, impugned notification cannot provide for levy on goods removed from SEZ into DTA or non-processing areas which is a field covered and occupied by Section 30 of the SEZ Act. The impugned notification is also ultra vires Section 30 of the SEZ Act which has an overriding effect and shall prevail."

"43. Section 30 of the SEZ Act, 2005 is the charging section whereby duty is imposed in respect of goods removed from SEZ to DTA. Section 30(a) provides that any goods removed from SEZ to DTA shall be chargeable to customs duties, etc. as leviable on such goods when imported. Section 30(b) provides that the rate of duty applicable shall be the rate on the date of removal. The said section, therefore, incorporates by reference rates of customs duties as applicable when goods are imported into India from outside India for goods removed from SEZ to DTA and that the levy of duty is not under the Customs Act. Section 51 of the SEZ Act gives overriding to the provisions of SEZ Act and that being so, the same will prevail over any other law including the Customs Act. Thus, when no customs duty is payable on goods imported in India, no duty would be payable on similar goods transferred from SEZ to DTA in view of Section 30 read with Section 51 of the SEZ Act".

19. They have further submitted that the Hon'ble Supreme Court dismissed the Petition for Special Leave to Appeal (C) No. 30868 of 2015 filed by Union of India &Ors. against the above Judgment of the Hon'ble Gujarat High Court. Thus, the decision of the Hon'ble Gujarat High Court has been approved by the Hon'ble Supreme Court [Union of India v. Adani Power Limited - 2016 (331) E.L.T. A129 (S.C.)].

20. They have also relied upon the judgement of Hon'ble Bombay High Court in the matter of M/s. Renaissance Global Limited Vs. UoI [2022 (11) TMI 1015].

21. In this regard, it is essential to note that on removal of goods from SEZ to DTA, Section 30 of the SEZ Act, 2005 is the charging section for duties of Customs, which is reproduced below:-

"30. Domestic clearance by Units:-

Subject to the conditions specified in the rules made by the Central Government in this behalf: -

(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and

(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty."

22. Section 30(a) of the SEZ Act provides that if any goods are removed from SEZ to DTA, such goods will be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 as leviable on such goods when imported. It simply means that if any goods are removed from the SEZ to DTA, then the present customs duty will be leviable treating the goods to be

imported from outside India. Had the goods been imported at a sea port, then charging section would have been Section 12 of the Customs Act, 1962 and recovery of such duties of customs would have been done under Section 28 of the Customs Act, 1962. Since the goods have been cleared from Special Economic Zone to the DTA by the SEZ unit the charging section is Section 30 of the SEZ Act as provided in Section 30(a) of the SEZ Act, 2005 read with Section 12 of the Customs Act, 1962 as the words "shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported" indicate. Clearly Section 30 of the SEZ Act, 2005 borrows levying provision of customs duties from Section 12 of the Customs Act, 1962 and Customs Tariff Act, 1975. Therefore, the argument of the noticees that Section 12 is not attracted in the instant matter has no substance. Further, the judgement referred by the notice is very clear on the levy of duties of Customs under Section 12 of the Customs Act, 1962 read with Section 30 of the SEZ Act, 2005. Further, the issue before Hon'ble High Court of Gujarat to decide was whether the government could levy duty for removal of electrical energy from SEZ to DTA vide Notification No. 25/2010-Cus dated 27.02.2010 issued under Section 25(1) of the Customs Act, 1962. The relevant extracts of the judgement is as given below:-

> "*53. However, from the above statutory provisions, it can be seen that by virtue of Section 30 of the SEZ Act, a SEZ unit on its clearance of goods to any DTA invites duty of customs where applicable as leviable on such goods when imported. Such DTA clearance by a SEZ unit would, thus, be treated as imports for computation of customs duty. Section 30 of the SEZ Act only imposes conditions for a SEZ unit to clear the goods to a DTA. Such condition is payment of authorized duties, as applicable and leviable on such goods when imported. By reference, therefore, the charging Section 12 of the Customs Act, 1962 would be leviable as if the goods cleared by SEZ unit to the DTA are in the nature of imports. If, therefore, by virtue of an exemption notification, the whole of customs duty payable is exempted, then no customs duty would be payable on import of such goods. Even otherwise, Section 51 of the SEZ Act gives overriding effect to the provisions of the Act.*
>
> *54.* ***Section 30(a) of the SEZ Act provides that if any goods are removed from SEZ to DTA, such goods will be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 as leviable on such goods when imported. Meaning thereby, that if any goods are removed from the SEZ to DTA, then the present customs duty will be leviable treating the goods to be imported from outside India****. If the same meaning is applied to the Government Notification No. 25/2010-Cus., dated 27-2-2010, Annexure A to this writ petition, it provides that the Central Government if it is satisfied can grant exemption in public interest to the goods falling under the Tariff Item No. 2716 00 00 of the First Schedule to Customs Tariff Act, 1975 from whole of the duties which are specified in the First Schedule. Meaning thereby, with regard to Tariff Item No. 2716 00 00 if the goods are imported in India, then those goods will be exempted from payment of customs duty. If we apply the same analogy to Section 25(1) of the Customs Act, 1962 which provides for exemption from payment of customs duty and in view of Section 30(a) of the SEZ Act, since the goods are being brought from SEZ to DTA, then it has to be treated as imported goods which has come from outside India and, therefore, Item No. 2716 00 00 which is the goods known as electrical energy removed from the SEZ to DTA would be exempted as it will be treated to be imported from outside India and 16% ad valorem cannot be charged by the respondents because Section 25(1) of the Customs Act, 1962 is not charging Section, but it is the Section which grants exemption from payment of customs duty. It is not disputed by the respondents that proviso to Government Notification No. 25/2010-Cus., dated 27-2-2010 exempted electrical energy which is imported into India from the whole of payment of customs duty. Therefore, proviso to Government Notification No. 25/2010-Cus., dated 27-2-2010 is violative of provisions of Section 25(1) of the Customs Act, 1962 and arbitrarily impose customs duty treating electrical energy falling under Tariff Item No. 2017 00 00 removed from SEZ to DTA chargeable to Customs duty. Therefore, entire proviso to Government Notification No. 25/2010-Cus., dated 27-2-2010 is violative of Section 25(1) of the Customs Act, 1962 read with Section 30(a) of the SEZ Act, arbitrary and liable to be quashed. In view of the above, the said Notification No. 25/2010-Cus., dated 27-2-2010 as well as Notification No. 21/2002-Cus. as amended by Clause 60 of the Finance Bill, 2010 (Second Schedule*

thereto) are ultra vires Entry 83 of List I of Seventh Schedule to the Constitution of India, Section 12 of Customs Act, 1962 and Section 30 to SEZ Act, 2005 as well as Articles 14 and 265 of the Constitution of India and consequently deserves to be quashed and set aside."

23. I find that the judgement of Hon'ble High Court of Gujarat has clearly held that Section 12 is attracted when goods are removed from SEZ to DTA in pursuance of Section 30 of the SEZ Act, 2005. The judgement has also held that such removal would be treated as imports for the levy of duties of Customs.

24. They have also relied upon the judgement of Hon'ble Bombay High Court in the matter of M/s. Renaissance Global Limited Vs. UoI [2022 (11) TMI 1015]. However, the facts of the said case are entirely different from the instant case as in that case the issue was whether demand of duty under Section 28 was legal while importing goods into SEZ when exemptions from such duties are allowed as per Section 26 of the SEZ Act, 2005. However, in the instant case, the demand of duty under Section 28 of the Customs Act, 1962 is on clearance/removal of goods from SEZ to DTA as per the provisions of Section 30(a) of the SEZ Act, 2005 read with Section 12 of the Customs Act, 1962.

25. The legal authority for issuance of show cause notice and adjudication thereof is provided under Rule 47(5) of the SEZ Rules, 2006, [consequent to Notification No 772(E) dated 05.08.2016] which is reproduced below:-

*"Refund, **Demand, Adjudication**, Review and Appeal **with regard to matters relating to authorized operations under Special Economic Zones, Act**, 2005, transactions and goods and services related thereto, **shall be made by the Jurisdictional Customs** and Central Excise **Authorities in accordance with the relevant provisions contained in the Customs Act, 1962**, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made thereunder of the notification issued there under."*

26. Adjudication of such cases are required to be done in accordance with CBEC Circular No. 24/2011-Cus. Dated 31-5-2011 [F.No. 450/11/2009-Cus. IV], which has specified the 'proper officer' for issuance of show cause notice and adjudication of cases, where SCNs are issued under section 28 of the Customs Act, 1962. 76. As per the Circular No. 24/2011-Cus. Dated 31-5-2011 the proper officer to adjudicate the case, under Section 28 of the Customs Act, 1962, where duty involved is more than Rs. 50 Lakhs is Commissioner/Principal Commissioner. In the instant case, the SCN was issued by the Commissioner, Customs House Kandla.

27. I find that they have further argued, at Para A11 to A19 and B to B3, that the Commissioner of Customs, Kandla doesn't have the jurisdiction to re-assess and re-determine the declared value. Since the Bills of Entry has been assessed by the Authorized officers of the KASEZ, the authority to re-assess the same lies only with the authorized officer of the KASEZ. Accordingly, they have argued that the SCN ought to have been issued by the Development Commissioner or Authorized officer of the SEZ (KASEZ) who has assessed the Bills of Entry or his successor. In this regard, they have relied upon the judgement of Hon'ble Supreme Court in the case of Canon India Pvt. Ltd vs Commissioner of Customs 2021 (376)ELT 3(SC) wherein the Apex court has held that where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by any other officer of another department though he is designated to be an officer of the same rank.

28. In this regard, I find that the Central Government vide S.O 319(E) dated 14.03.2006 notified the Kandla Special Economic zone as a 'port' under Section 7 of the Customs Act, 1962.

29. I further find that the Ministry of Commerce and Industry vide Notification S.O 2665(E) issued in exercise of power under Section 21(1), has notified, interalia, the

offences contained in Sections 28, 28AA, 111, 124 of the Customs Act, 1962 as the offences in the SEZ Act, 2005. Further the Ministry of Commerce & Industry vide Notification S.O 2666(E) dated 05.08.2016, as mentioned above, has authorized the Additional Director General, Directorate of Revenue Intelligence for offences under the Customs Act, 1962 (52 of 1962) to be the enforcement officer(s) in respect of any notified offence or offences committed or likely to be committed in a Special Economic Zone. As per the notification, the enforcement officer(s), for the reasons to be recorded in writing, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit. Clearly, the DRI, AZU was well within the jurisdiction to carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit. Further, the legal authority for issuance of show cause notice and adjudication thereof, as discussed above, is provided under *Rule 47(5) of the SEZ Rules, 2006*, which is reproduced below:-

> *"Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorized operations under Special Economic Zones, Act, 2005, transactions and goods and services related thereto, shall be made by the Jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made thereunder of the notification issued there under."*

30. On conjoint reading of the above mentioned Notifications and Rule 47(5), it is evident that the demand and Adjudication of cases with respect to authorized operations under SEZ Act, 2005 are to be carried out by the Jurisdictional Customs Authorities, in accordance with the relevant provisions contained in the Customs Act, 1962 and not by the Specified/Authorised officer of SEZ.

31. I find that they have relied upon the judgement of Hon'ble Supreme court in the case of Canon India Pvt. Ltd vs Commissioner of Customs 2021 (376) ELT 3(SC) wherein the Apex court has held that where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by any other officer of another department though he is designated to be an officer of the same rank. In this regard, it is pertinent to note that the issue before the Apex court was whether officers of DRI were 'proper officer' under Section 2(34) of the Customs Act, 1962 to issue show cause notice under Section 28(4) of the Customs Act, 1962. The noticee is trying to create a wrong analogy by extracting the findings of the Apex court, 'where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by any other officer of another department though he is designated to be an officer of the same rank',as in the instant case, the authority, to issue demand of duty under Section 28 of the Customs Act, 1962 by the jurisdictional Customs authorities, in respect of matters related to authorized operation of Special economic zone, emanates from the provisions of Rule 47(5) of the SEZ Rules, 2006, inserted vide Notification G.S.R No. 772(E) dated 05.08.2016. In this regard, I rely on the judgement of the Hon'ble High Court of Madras in the matter of DLF utilities ltd. vs. UoI, 2020 (373) E.L.T. 300 (Madras) wherein the Hon'ble Court held-

> *"69. Further, Rule 47(5) of the Special Economic Zones Rules, 2006 has been inserted vide GSR 772(E), dated 5-8-2016 with effect from 8-8-2016. As per the above provision, "Refund, Demand, Adjudication, Review and Appeal with Regard to Matters Relating to Authorised Operations under the Special Economic Zones Act, 2005, transactions, and goods and services related thereto, shall be made only by the jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made thereunder or notification issued thereunder".*
>
> *70. The impugned show cause notice is also liable to be declared as without jurisdiction. Even if, it is assumed that the clearance of HSD Oil was without the authority*

of law by the DTA supplier (IOCL). Only the jurisdictional officer concerned under the Central Excise Act, 1944 within whose jurisdiction IOCL is registered is competent to issue a show cause notice to recover the Excise duty under Section 11A of the Central Excise Act, 1944.

71. Therefore, on this count also the impugned show cause notice issued by the 2nd respondent (Development Commissioner) is unsustainable and the demand proposed is liable to be quashed."

32. Therefore, in view of the above discussion and findings, the demand of duty under Section 28 of the Customs Act, 1962 is legal and valid. Now the merits of the case viz. mis-classification and mis-declaration require discussion.

Issue of mis-classification, incorrect availment of Notification and mis-declaration in terms of value in terms of 23 DTA Bills (Sr.No. 01 to 23 of Annexure-A):

33. I find that M/s. Zip Zap Exim Pvt. Ltd and their DTA clients while filing the subject 23 Bills of Entry declared the imported goods as "Polyester Knitted Fabric" by classifying the same under CTH 6005 3200 which covers "Warp Knit Fabrics other than those of Heading 6001 to 6004- Of Synthetic Fibers—Dyed".

34. In this regard, it is seen that by virtue of the Finance Act, 2016, the Tariff items **6005 3100 to 6005 3400** and the entries relating thereto were substituted by the Tariff Items **6005 3500 to 6005 3900**. The earlier Tariff heading entry 60053 200 which covered "Warp Knit Fabrics other than those of Heading 6001 to 6004- Of Synthetic Fibers—Dyed" had been substituted by 60053700 as "Warp Knit Fabrics other than those of heading 60.01 to 60.04- of Synthetic fibres-Dyed". By virtue of coming into effect of the Finance Act, 2016 and substitutions of certain Tariff headings thereof, it is clear that the said goods merited classification under CTH 6005 3700. I find that, by virtue of Notification No. 82/2017-Customs dated 27.10.2017 (Sr.No. 164) read with Notification No. 72/2005-Customs as amended by Notification No. 89/2006-Cus (Sr.No. 181), the subject goods classifiable under CTH 6005 3700 attracted customs duty @16%, 2%, 1% and IGST @5%.

However, the DTA importers have paid Custom duty @ 8%, 2%, 1% & IGST @5% by classifying the subject goods under Tariff Item 6005 3200 by availing benefit of Notification No. 72/2005-Cus, as amended by Notification No. 89/2006-Cus (Sr.No. 181). Therefore, the DTA importers are liable to pay the differential duties of customs on account of change in rate of duty as discussed above.

35. Further, the said SEZ unit in connivance with the DTA buyers had cleared the imported goods vide the said 23 Bills of Entry by resorting to gross undervaluation as extensively discussed and covered in the Show cause notice dated 08.09.2021. The said SCN dated 08.09.2021 has been adjudicated vide OIO No. KND-CUSTM-000-COM-07-2024-25 dated 17.07.2024 (DIN-20240771ML0000555F60).

36. In this regard, the noticees have submitted that, all the 23 Bills of Entry referred to in the impugned SCN were filed online. Without admitting, even if it is assumed for the sake of argument that goods have been mis-classified, the Commissioner of Customs failed to appreciate that the SEZ unit filed the Bills of Entry online and the system was not updated. Had the system been updated it would not have accepted the classification number which is no more in existent. Further, the system provided pre-amended duty under Notification 72/2005-Customs (Sl. No. 181). It is not the case that the DTA units or the SEZ unit has manipulated the classification and rate of duty. The Unit did not submit any forged or fabricated document as alleged in the impugned SCN. The SEZ unit fed the data to the system and system assessed the Bills of Entry under question. The system ought to have displayed the correct rate of duty and classification. Further, it may not be out of place to mention here that before allowing clearance, the Authorised officer of the SEZ scrutinizes the Bills of Entry. They have further argued that neither system nor the

concerned Authorized Officers who assessed the Bills of Entry could detect the wrong classification or incorrect duty. It is not the case that in the Bills of Entry, the description of the goods had been mis declared. In the Bills of Entry description of the goods were same both in the period prior to amendment of the Tariff vide Finance Act 2016 and post amendment of the Tariff'. This is evident from the Bill of Entry at RUD-4 where CTH stated to have been correctly declared and any of the Bill of Entry at Annexure-A to the SCN, where the goods under question stated to have been wrongly classified under CTH 60053200. The Noticee was not aware of the amendment in the Tariff or exemption Notification no 72/2005-Customs. ZIP -ZAP or DTA units can not be faulted for the fault of the system or departmental officer who assessed the Bills of Entry.

37. I find that their argument is that the Bills of Entry were filed online and it was the fault of the system for not being updated and the assessing officers could not identify the correct classification. In this regard, it is important to note that all the inward or outward movement of goods into or from the Zone by the Unit is based on self-declaration and such clearances are not subject to routine examination as per the provisions of Rule 75 of the SEZ Rules, 2006 as given below:-

> ***"Rule 75 of the SEZ Rules, 2006:-***
>
> *Rule 75.Self-Declaration. - Unless otherwise specified in these rules all inward or outward movement of goods into or from the Zone by the Unit or Developer shall be based on self-declaration made and no routine examination of these goods shall be made unless specific orders of the Development Commissioner or the Specified Officer are obtained.*
>
> *[Provided that all the consignments of Special Economic Zone shall be subject to a risk management system]"*

38. Further, it is important to note that the noticees never came forward to declare the correct classification before the KASEZ Custom authorities which establish that they willfully suppressed the material facts in order to evade duties of Customs.

39. In view of the above, it is amply clear that the subject goods were mis-classified and incorrect exemption notification benefit were availed at the time of DTA clearance and same had resulted in evasion/short payment of Customs Duty.

Issue of 03 DTA Bills i.e. (Sr.No. 24 to 26 of Annexure-A) for which goods were cleared subsequently on the basis of 03 new DTA Bills (Sr.No. 27 to 29 of Annexure-A):

40. I find that M/s. Zip Zap Exim Pvt. Ltd and its DTA clients initially filed 03 DTA Bills of Entry viz. 2012435 dated 06.11.2017, 2012514 dated 07.11.2017 and 2012515 dated 07.11.2017 by classifying the goods under CTH 60053200, 60059000 and 600590000 respectively. However, the subject goods were not cleared on the basis of said DTA Bills of Entry. It is seen that the said goods were cleared vide new 3 DTA Bills of Entry viz. 2013044 dated 16.11.2017, 2013037 dated 16.11.2017 and 2013044 dated 16.112017 by correctly classifying the same under CTH 60053700 and it is further seen that they had correctly availed the benefit of Notification No. 82/2017-Cus dated 27.10.2017. However, these 03 new DTA Bills of Entry were not a part of the Show Cause Notice dated 08.09.2021.

41. The SCN dated 08.09.2021 has been adjudicated vide OIO No. KND-CUSTM-000-COM-07-2024-25 dated 17.07.2024 wherein the undersigned held that Directors of M/s. ZZEPL approached various DTA buyers of Polyester Knitted fabrics and Electronic goods and persuaded them to start importing the said goods through their company M/s Zip Zap Exim Pvt Ltd, KASEZ as the cost overhead for unit in SEZ was less as compared to direct import from regular ports. They assured the DTA importers that they could arrange the said imports at undervalued price in the name of M/s

ZZEPL and thereafter clearing the same in DTA to them. Accordingly, they (DTA importer) were required to pay less duty as compared to the duty payable on the goods imported directly from ports. It was decided between them that the goods will be imported in the name of M/s ZZEPL in the SEZ and cleared into DTA to them at undervalued rate. Misc port expenses from the time of arrival at the Indian Port to the delivery of the goods at SEZ gate were to be borne by M/s ZZEPL and they (DTA importers) had to bear the transportation cost for getting goods transported from the SEZ to their godowns. Accordingly, instructions were issued to the overseas suppliers to make two set of invoices, one showing the actual price and another showing the lower price. One with actual price was sent to overseas supplier after signing and one with lower price was sent to M/s. Zip zap for presenting before the Customs authorities. For the said arrangement the DTA importer paid some commission to ZZEPL which also included their profit margin and other sundry expenses. The Customs duty at the time of import from SEZ unit to DTA was to be borne by them (DTA importer) for their consignments. The payment of goods over and above the price declared in the invoices was made through hawala/third party bank accounts. Their modus of evasion of duties of customs had been admitted by Directors of M/s. Zip Zap as well as various DTA buyers in their statements recorded under Section 108 of the Customs Act, 1962. All the statements being voluntary in nature were admissible as evidence and further the statements were corroborated by various other substantial evidences like wechats between DTA buyers and overseas suppliers, audio recordings, bank advices, documents/emails retrieved from mobile devices. The discussion of evidence proved that the SEZ unit and DTA importers and other persons concerned had operated a well designed modus operandi to defraud the revenue. As the department had collected various evidences, supplemented by admission in statements, the value declared by them had been rejected under Rule 12 of the CVR, 2007 and the same had been re-determined in terms of Rule 3 (based on actual transaction value retrieved in case of 7 Bills of Entry for Fabric).

42. I find that the show cause notice dated 08.09.2021 issued on the basis of investigation carried out by DRI, Ahmedabad did not include the said 03 DTA Bills of Entry, therefore, the above findings of the order dated 17.07.2024 in respect of valuation of Polyester Knitted fabric are squarely applicable in the instant 03 DTA Bills of entry as the period is same and ZZEPL and DTA importers adopted the same modus while filing the said 03 DTA Bills of Entry.

Therefore, I hold that they are liable to pay duties of Customs as per Annexure-A to the Show cause notice dated 25.10.2022, on account of mis-declaration of value in respect of the 03 DTA Bills of Entry under the provisions of Section 28 of the Customs Act, 1962.

Confiscation of goods under Section 111 and Redemption fine under Section 125

43. I find that the SEZ Unit and DTA buyers did not disclose the material facts relating to the actual specification, characteristics, nature and description of the subject products cleared into DTA. The above discussed facts revealed that while clearing the subject goods i.e. “Polyester Knitted Fabrics” to DTA, the said SEZ Unit had mis-classified and mis-declared the subject goods, totally valued at Rs. 8,75,95,506/- by deliberately suppressing the material facts relating to specifications and particulars of the same. They mis-classified and mis-declared the subject goods in terms of value and wrongly availed exemptions, with an intent to evade the payment of appropriate duty on the same during clearance to DTA. For the said act of omission & commission for suppression of material facts, the goods totally valued at Rs. 8,75,95,506/- are liable for confiscation under Section 111(m) of the Customs Act, 1962 since the said

goods did not correspond in respect of value and classification with the entry filed before the Customs.

44. A letter of Approval dated 12.01.2017 (RUD-1) had been granted to the said SEZ Unit by the Development Commissioner, KASEZ under Section 15(9) of the SEZ Act, 2005 read with Rule 18 of the SEZ Rules, 2006 to operate as an SEZ unit and carry out authorized operations of Trading activity of goods declared as "Polyester Knitted Fabric" covered under Tariff item 6005 3200. For the said act of suppression of material facts, the goods mentioned in Annexure-A, totally valued at Rs. 8,75,95,506/- are liable for confiscation under Section 111(d) of the Customs Act, 1962, since the said Tariff head does not fall under the category of authorized operation approved by the Development Commissioner as per LOA granted to the said SEZ Unit.

45. Further for the said act of suppression, the goods valued at Rs. 8,75,95,506/- are liable for confiscation under section 111(o) of the Customs Act, 1962 since the SEZ unit along with DTA clients deliberately paid lesser customs duty by availing incorrect notification benefits with a malafide intention to evade payment of Customs duty.

In this regard, I rely on the judgement of CC Mumbai Vs Multimetal Ltd-2002(Tri-Mumbai) wherein the Hon'ble Tribunal held that when mis-declaration is established, goods are liable for confiscation irrespective of whether there was malafide or not-. This judgement of Hon'ble Tribunal has been upheld in Apex court in 2003 (ELT A309 (SC).

Penalty under Section 114A of the Customs Act, 1962.

46. With regard to the penalty under Section 114A of the Customs Act, 1962, on DTA clients, it is already held that they have not paid the Custom duties as mentioned in Annexure-A to the show cause notice by way of wilfull suppression of facts, therefore, they are liable for penalty under section 114A of the Finance Act, 1962.

47. Further, I find that the Board vide Circular no. 61/2002-Cus dated 20.09.2002 clarified that while imposing penalty under Section 114A the quantum of penalty must be the amount of duty and interest. The contents of the board Circular no. 61/2002-Cus dated 20.09.2002, is as under:-

> "It has been reported that a number of show cause notices were issued proposing the demand of not only duty, but also interest payable in terms of provisions of para 128 of the Hand Book of Procedures (1st April, 1993 - 31st March, 1997). While the Show Cause Notices have quantified/specified the amount of duty, the interest to be demanded has not been specified, although demands have been raised. It has been reported that in all such cases, penalty under section 114A is being imposed equivalent to the amount of duty which stands determined on the date of adjudication order. The Board has been requested to clarify as to whether mandatory penalty imposed under section 114A of the Customs Act, 1962 would be equal to the amount of duty or it would be equal to duty plus interest. Section 114A provides for levy of penalty equal to the duty or interest payable by a person in cases involving collusion or any willful mis-

statement, or suppression of facts by the said person. Conjunction "or" in section 114A seems to be creating confusion at the field level.

2. The matter has been examined in consultation with the Ministry of Law. The Ministry of Law, has stated that Maxwell's Interpretation of Statutes (p-229) while dealing with conjunctions "or" and "and" provides that - "To carry out the intention of the legislature, it is occasionally found necessary to read conjunctions "or" and "and" one for the other." The Hon'ble Supreme Court in a case reported AIR 1957 SC p.699 State of Bombay vs. R.M.D.Chamarbougwala also read the word "or" as "and" to give effect to the clear intention of the legislature. In view of this, the Ministry of Law is of the view that to carry out the intentions of the legislature, it is occasionally found necessary to read the conjunction "or" and "and" one for the other. A Constitutional Bench of the Hon'ble Supreme Court in a case reported in AIR 1963 SC p.1638 T.S.GovindlaljiMaharaj vs. State of Rajasthan has also observed that sometimes "or" must mean "and" as has been mentioned vide para 39 of the said judgment. A copy of the Ministry of Law's opinion is enclosed.

3. In view of the above, **it is clarified that penalty under section 114A of the Customs Act, 1962 should be equivalent to duty and interest**….."

48. In view of the same, I hold that the DTA clients are liable to pay penalty under Section 114A of the Customs Act equal to the duty plus interest. However, in terms of fifth proviso to Section 114A of the Customs Act, 1962, penalty under Section 112 and Section 114A are mutually exclusive, which reads as follows:-

"114A.....

.....

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114....."

Therefore, I find that once the penalty is imposed under section 114A, no penalty is imposable under Section 112 of the Customs Act, 1962 on DTA clients.

49. With regard to penalty under Section 114A/112 of the Customs on SEZ unit, I find that there is no duty liability on SEZ unit as the duty liability arises on DTA clients in terms of Section 30 of the SEZ Act, 2005, therefore penalty under Section 114A on SEZ unit M/s. Zip Zap does not arise. However, with regard to the penalty under Section 112 of the Customs Act, 1962, I find that as the goods were imported by M/s. Zip Zap and further cleared into DTA by way of mis-classification, mis-declaration and incorrect availment of Notification, in violation of LOA granted to them, the provisions of penalty under section 112(a) & 112(b) of the Customs Act, 1962 are attracted.

50. With regard to penalty under Section 114AA of the Customs Act, 1962, I find that M/s. Zip Zap in connivance with its DTA lients has made a false statement and document while presenting the Bill of Entry by mis-declaring the goods in terms of

classification, value and incorrect availment of Notification, rendering themselves liable for penalty under Section 114AA of the Customs Act, 1962.

51. In view of the above discussion and findings, I hereby pass the following order:-

A. IN RESPECT OF M/S. ZIP ZAP EXIM PVT. LTD

(a) I reject the classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing at Sr.No. 01 to 23 in Annexure-A to the notice, and order to re-classify the same under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) I order to confiscate the goods mentioned in Annexure-A to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 8,75,95,506/- (Rupees Eight Crore Seventy Five Lakh Ninety Five Thousand Five Hundred and Six only) under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962.

As regards the above goods not physically available for confiscation, I impose redemption fine of Rs. 87,59,550/- (Rupees Eighty Seven Lakhs Fifty Nine Lakhs Five Hundred and fifty only) under Section 125 of the Customs Act, 1962 in lieu of confiscation.

(c) I impose penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) under Section 112(a) of the Customs Act, 1962;

(d) I impose penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) under Section 112(b) of the Customs Act, 1962;

(e) I impose penalty of Rs. 8,75,95,506/- (Rupees Eight Crore Seventy Five Lakh Ninety Five Thousand Five Hundred and Six only) under Section 114AA of the Customs Act, 1962;

(f) I order to enforce the Bond-cum-legal Undertaking in Form-H furnished by the said SEZ Unit towards the liabilities arising out of subject goods removed from said SEZ Unit to DTA as detailed in Annexure-A.

B. IN RESPECT OF M/S. BHURIA OVERSEAS-

(a) I reject the classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-1 to the notice, and order to re-classify the same under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) I order to confiscate the goods, mentioned in Annexure-1 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 2,72,10,992/- (Rupees Two Crore Seventy Two Lakh Ten Thousand Nine Hundred and Ninety Two only) under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962.

As regards the above goods not physically available for confiscation, I impose redemption fine of Rs. 27,21,099/- (Rupees Twenty Seven Lakhs Twenty One Thousand and ninety nine only) in lieu of confiscation under Section 125 of the Customs Act, 1962.

(c) I confirm differential Customs Duty of Rs. 34,98,968/- (Rupees Thirty Four Lakh Ninety Eight Thousand Nine Hundred and Sixty Eight Only) as mentioned in Annexure-1 and order to recover from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962.

(d) I order to recover applicable interest, on the amount confirmed at (c) above, under Section 28AA of the Customs Act, 1962 for the subject goods.

(e) I impose penalty equal to the duty plus interest under Section 114A of the Customs Act, 1962;

(f) I impose penalty of Rs. 2,72,10,992/- (Rupees Two Crore Seventy Two Lakh Ten Thousand Nine Hundred and Ninety Two only) under Section 114AA of the Customs Act, 1962.

C. IN RESPECT OF M/s. MILESTONE EXIMP-

(a) I reject the classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-2 to the notice, and order to re-classify the same under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) I order to confiscate the goods mentioned in Annexure-2 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 1,67,03,816/- (Rupees One Crore Sixty Seventy Lakh Three Thousand Eight Hundred and Sixteen only) under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962, though the same are not physically available.

As regards the above goods not physically available for confiscation, I impose redemption fine of Rs. 16,70,381/- (Rupees Sixteen Lakhs Seventy Thousand Three Hundred and Eighty One only) in lieu of confiscation under Section 125 of the Customs Act, 1962.

(c) I confirm differential Customs Duty of Rs. 17,66,426/- (Rupees Seventeen Lakh Sixty Six Thousand Four Hundred and Twenty Six Only) as mentioned in Annexure-2 and order to recover from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962.

(d) I order to recover applicable interest, on the amount confirmed at (c) above, under Section 28AA of the Customs Act, 1962.

(e) I impose penalty equal to duty plus interest confirmed above under Section 114A of the Customs Act, 1962.

(f) I impose penalty of Rs. 1,67,03,816/- (Rupees One Crore Sixty Seventy Lakh Three Thousand Eight Hundred and Sixteen only) under Section 114AA of the Customs Act, 1962.

D. IN RESPECT OF M/S. RADHA TRADING

(a) I reject the classification of subject goods declared under Customs Tariff Item 60053200 of the Customs Tariff Act, 1975, in the DTA Bills of Entry appearing in Annexure-3 to the notice, and order to re-classify the same under Customs Tariff Item 6005 3700 of the Customs Tariff Act, 1975.

(b) I order to confiscate the goods mentioned in Annexure-3 to the notice, cleared from said SEZ unit to DTA by means of trading, totally valued at Rs. 4,36,80,698/- (Rupees Four Crore Thirty Six Lakh Eighty Thousand Six Hundred and Ninety Eight only) under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962

As regards the above goods not physically available for confiscation, I impose redemption fine of Rs. 43,68,069/-(Rupees Forty Three lakhs Sixty Eight Thousands and Sixty Nine only) in lieu of confiscation under Section 125 of the Customs Act, 1962.

(c) I confirm differential Customs Duty of Rs. 54,28,305/- (Rupees Fifty Four Lakh Twenty Eight Thousand Three Hundred and Five Only) as mentioned in

DIN-20241071ML000000B9A9

Annexure-3 and order to recover the same from them under Section 30 of the SEZ Act, 2005 read with Section 28(4) of the Customs Act, 1962

(d) I order to recover applicable interest under Section 28AA of the Customs Act, 1962.

(e) I impose penalty equal to duty plus interest confirmed above under Section 114A of the Customs Act, 1962.

(f) I impose penalty of Rs. 4,36,80,698/- (Rupees Four Crore Thirty Six Lakh Eighty Thousand Six Hundred and Ninety Eight only) under Section 114AA of the Customs Act, 1962.

52. This order is issued without prejudice to any other action that may be taken against the SEZ unit or any other person under the Customs Act, 1962 or any other law for the time being in force.

Signed by M Ram Mohan Rao
Date: 15-10-2024 16:51:25

(M. Ram Mohan Rao)
Commissioner of Customs,
Custom House, Kandla

To,

1. M/s. Zip Zap Exim Pvt. Ltd, Shed No. 397, AS-IV, Sector-I, KASEZ, Gandhidham, Kutch
2. M/s. Bhuria Overseas (IEC-3314003901), H.No E-144, Alok Apartments, P D Pandya College Road, Paldi, Ahmedabad.
3. M/s. Milestone Eximp Pvt. Ltd (IEC-0398002941/AABCS6202L), Godown No. 5, Ground Floor, Building 26-C, Mouje Dapode (Taluka), Bhiwandi, Thane.
4. M/s. Radha Trading (IEC-0503036358), D14-236, Sector-8, Rohini, New Delhi.

Copy To-

1. The Deputy Commissioner of Customs, Kandla, Special Economic Zone, Gandhidham.
2. The Deputy/Assistant Commissioner of Customs, (TRC/EDI/KASEZ Policy), Kandla Customs House, Kandla.
3. The Chief Commissioner, Customs, Ahmedabad for Review.
4. Guard File.