

DIN-20240771ML000000C911

		<p align="center">OFFICE OF THE COMMISSIONER</p> <p align="center">CUSTOM HOUSE, KANDLA</p> <p align="center">NEAR BALAJI TEMPLE, NEW KANDLA</p> <p align="center">Phone : 02836-271468/469 Fax: 02836-271467</p>
DIN- 20240771ML000000C911		
A	File No.	GEN/ADJ/ADC/1288/2024-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KDL/ADC/DPB/12/2024-25
C	Passed by	Dev Prakash Bamanavat, Additional Commissioner, CH, Kandla
D	Date of Order	23.07.2024
E	Date of Issue	23.07.2024
F	SCN No. & Date	Waiver of SCN
G	Noticee / Party / Importer / Exporter	M/s Metacast International, Shree Kunj, Bhalupali Chowk, Bohidarnuapali, PO: Sankwrma, Sambalpur, Odisha-768006

1. यह मूल आदेश संबंधित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस मूल आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128A के अंतर्गत प्रपत्र सीए-1 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

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“ सीमाशुल्कआयुक्त (अपील),

4 वीं मंजिल, हुडको बिल्डिंग ईश्वर भुवन रोड, नवरंगपुरा , अहमदाबाद 380 009”

The Commissioner of Customs (Appeals)
4th Floor, Hudco Building, Ishwar Bhuvan Road,
Navrangpura, Ahmedabad, Gujarat 380009

3. उक्तअपीलयहआदेशभेजनेकीदिनांकसे60 दिनकेभीतरदाखिलकीजानीचाहिए।

Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्तअपीलकेपरन्यायालयशुल्कअधिनियमकेतहत 5/-

रुपएकाटिकटलगाहोनाचाहिएऔरइसकेसाथनिम्नलिखितअवश्यसंलग्नकियाजाए-

Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्तअपीलकीएकप्रतिऔर

A copy of the appeal, and

(ii) इसआदेशकीयहप्रतिअथवाकोईअन्यप्रतिजिसपरअनुसूची-1 केअनुसारन्यायालयशुल्कअधिनियम-1870

केमदसं-6 मेंनिर्धारित 5/- रुपयेकान्यायालयशुल्कटिकटअवश्यलगाहोनाचाहिए।

This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs.

5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपीलज्ञापनकेसाथड्यूटि/ ब्याज/ दण्ड/ जुर्मानाआदिकेभुगतानकाप्रमाणसंलग्नकियाजानाचाहिये।

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

6. अपीलप्रस्तुतकरतेसमय, सीमाशुल्क (अपील) नियम, 1982 औरसीमाशुल्कअधिनियम, 1962 केअन्यसभीप्रावधानोंकेतहतसभीमामलोंकापालनकियाजानाचाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7.

इसआदेशकेविरुद्धअपीलहेतुजहांशुल्कयाशुल्कऔरजुर्मानाविवादमेंहो, अथवादण्डमें, जहांकेवलजुर्मानाविवादमेंहो, Commissioner (A) केसमक्षमांगशुल्कका 7.5% भुगतानकरनाहोगा।

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BRIEF FACTS OF THE CASE:-

M/s Metacast International, Shree Kunj, Bhalupali Chowk, Bohidarnuapali, PO: Sankwrma, Sambalpur, Odisha, 768006 (hereinafter referred to as the importer) has filed Bill of Entry No. 2575584 dated 14-03-2024 through their CHA M/s Rudra Shipping for import of goods declared as "Anode Butts" under CTH: 38019000.

2. The examination of the cargo was conducted by the officers from the DE section of Custom House, Kandla and samples were drawn which were sent to CRCL, Kandla. The CRCL Kandla vide test reports dated 15-05-2024 **(RUD-1)** has reported as follows:-

The sample as received is in form of blackish white lumps of irregular shape and sizes; Composition: It is composed of carbonaceous matter having following constants:

Total Moisture= 0.72% weight;

Inherent Moisture (ADB) = 0.72% by weight;

Ash Content(ADB)= 39.2% by weight;

Volatile Matter (ADB) = 0.17% by weight;

Fixed Carbon (ADB) = 59.87% by weight;

Whether it is used as anode butt or otherwise could not be ascertained;

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3. Subsequently, the matter was transferred by DE section, Custom House, Kandla to SIIB section vide their letter bearing F. No. CUS/SHED/MISC/383/2024-Docks Examn dated 05-05-2024.

4. In this regard, Statement of Shri Jemin D. Parikh, G Card holder and Authorized representative of M/s Metacast International was recorded under Section 108 of the Customs Act, 1962 before the Superintendent of Customs on 13-06-2024(**RUD-2**), wherein he inter-alia statedthat:

- *The “Anode Butts” being imported by M/s Metacast International are the remaining part of Anodes. These Anodes are carbon rich blocks made out of Calcined Petroleum Coke & Coal Tar Pitch and are used in aluminium industry for electrolysis of calcined alumina. After using these anodes in electrolysis process of calcined alumina, what remains afterwards is known as Anode Butts. Since it is the remaining part of an anode, it is known as “Anode Butt”.*
- *M/s Metacast International had imported these anode butts vide Bill of Entry No. 2575584 dated 14-03-2024 which are intended to be used for manufacture Electrode Carbon Paste (E.C.P.) which will further be used in Steel Industry.*

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- *“Anode Butts” imported by M/s Metacast International vide Bill of Entry No. 2575584 dated 14-03-2024 are “Restricted” as per Para 2.31 of the Foreign Trade Policy 2023 and that an authorization from DGFT is required for the import of these goods.*
- *at the time of filing Bill of Entry No. 2575584 dated 14-03-2024, M/s Metacast International did not possess the requisite authorization from DGFT.*
- *the importer applied for the authorization for import of “Anode Butt/Carbon Block/Waste Anode Butt/Scrap Anode/Used Anode Butt” to DGFT vide their application dated 07-04-2024, in response to which, they were issued authorization bearing No. 0111015172 dated 09-04-2024 for import of Used Anode Butt (B2090).*
- *the test report mentions that “whether the goods can be used as Anode Butt or otherwise could not be ascertained”. In this regard, I state that the goods being imported are the remaining part of anodes, and that is why it is known as “Anode Butts”. “Anode Butts” are a waste product generated after using anodes in electrolysis of the calcined alumina (in aluminium industry) and they themselves do not have any use as such.*

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- *The anode butts are first chipped to remove any ash content in them and subsequently crushed to 20-100 mm size. Subsequently, the crushed Anode Butts (50%) are mixed with calcined petroleum coke (25%) and Coal Tar Pitch (25%) in heated condition in a sigma mixer at 200 degree Celsius to get the finished product i.e., electrode carbon paste (ECP).*
- *The main requirement for manufacture of electrode carbon paste (E.C.P.) is the presence of carbon. Carbon is a major component of anodes used in aluminium industry. However, due to repeated use in electrolysis process of the calcined alumina, some portion of carbon present in these anodes is consumed. Depending upon usage and the extent of the carbon exhausted during the electrolysis process, the carbon percentage remaining in the anode butts varies. Further, the Anode Butts even after being used in aluminium industry have fair/good percentage of carbon left in them which can be utilized to make ECP. Any shortage in the percentage of carbon in the anode blocks is fulfilled by adding calcined petroleum coke and coal tar pitch.*
- *A carbon content of 59.87% in the anode butts present in the goods imported by M/s Metacast International vide Bill of Entry No. 2575584 dated 14-03-2024 as reported by CRCL Kandla in their test report bearing Lab report No. 28/01042024 dated 18-*

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04-2024 is sufficient to manufacture Electrode Carbon Paste (E.C.P.).

- the importer M/s Metacast International holds permission to import Anode Butt (B2090) issued by Ministry of Environment, Forest and Climate Change and consent order No. 99 dated 19-01-2023 for discharge of sewage and trade effluent under Section 25/26 of Water (PCP) Act, 1974 and for existing/new operation of the plant under Section of Air (PCP) Act, 1981. We have uploaded all these documents in e-sanchit portal while filing Bill of Entry No. 2575584 dated 14-03-2024.*

5. In view of the statement tendered by Shri Jemin Parekh as authorized representative of the importer, it is observed that the “Anode Butts” imported by the importer vide Bill of Entry No. 2575584 dated 14-03-2024 are the remaining parts of anodes that are used in aluminium industry for electrolysis of calcined alumina.

6. Therefore, it appeared that these goods are second hand in nature and fall under the category of Second hand goods other than capital goods. The relevant extract of Para 2.31 of the Foreign Trade Policy, 2023 is reproduced hereunder for reference:-

Para 2.31 Second Hand Goods

Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
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<i>II</i>	<i>Second Hand goods other than capital goods</i>	<i>Restricted</i>	<i>Importable against Authorisation</i>
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7. Further, in his statement Shri Jemin D. Parekh stated that at the time of filing Bill of Entry No. 2575584 dated 14-03-2024, the importer did not hold the requisite authorization from DGFT but were later granted authorization bearing No. 0111015172 dated 09-04-2024 **(RUD-3)** by DGFT for the import of “Used Anode Butt (B2090)” in response to their application dated 07-04-2024.
8. Therefore, in view of the above, it appeared that the importer was required to apply for an authorization to DGFT seeking permission for the import of restricted goods they intended to import viz. Anode Butts.
9. On perusal of the documents uploaded in the e-sanchit portal by M/s Metacast International while filing the Bill of Entry No. 2575584 dated 14-03-2024 and as confirmed by Shri Jemin D. Parikh in his statement dated 13-06-2024, it appeared that the importer held no such authorization issued by the DGFT, required to import such restricted items as imported by them vide Bill of Entry No. 2575584 dated 14-03-2024 at the relevant time.
10. In view of the above, it appeared that by importing restricted goods i.e., Anode Butts without any authorization from DGFT, the importer

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violated the conditions prescribed under Para 2.31 (Second Hand Goods) of the Foreign Trade Policy 2023.

11. In view of the above, the goods i.e., 226.915MT of anode butts imported by the importer vide Bill of Entry No. 2575584 dated 14-03-2024 valued at Rs. 60,53,647/- (Rupees Sixty lacs fifty three thousand six hundred and forty seven only) declared as Anode Butts appeared to be liable for confiscation under the provisions of Section 111(d) of the Customs Act, 1962. Accordingly, the subject goods i.e., 226.915MT of anode butts imported by the importer vide Bill of Entry No. 2575584 dated 14-03-2024 valued at Rs. 60,53,647/- (Rupees Sixty lacs fifty three thousand six hundred and forty seven only) were placed under seizure under the provisions of Section 110(1) of the Customs Act, 1962 vide seizure Memo bearing F.No. CUS/SIIB/MISC/2024-SIIB dated 20-06-2024 (RUD-4).

12. Therefore, for the acts of omission of commission committed by the importer, they are liable for penalty under Section 112(a)(i) of the Customs Act, 1962.

WAIVER OF SHOW CAUSE NOTICE:-

13. The importer has submitted an undertaking exercising his right to waiver of a Show Cause Notice and agreed to pay all the Customs duty, fine and penalty in the matter.

14. As per first proviso to Section 124 of the Customs Act, 1962 the show cause notice and personal hearing may be considered oral at the request of

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the person concerned. Therefore, in light of the said provision, the importer is allowed waiver of Show cause notice and personal hearing.

DISCUSSION AND FINDINGS:-

- 15.** I find that the importer has filed Bill of Entry No. 2575584 dated 14-03-2024 through their CHA M/s. Rudra Shipping for import of goods declared as “Anode Butts” under CTH: 38019000.
- 16.** The CRCL Kandla vide test reports dated 15-05-2024 (**RUD-1**) has reported as follows:-

The sample as received is in form of blackish white lumps of irregular shape and sizes; Composition: It is composed of carbonaceous matter having following constants:

Total Moisture= 0.72% weight;

Inherent Moisture (ADB) = 0.72% by weight;

Ash Content(ADB)= 39.2% by weight;

Volatile Matter (ADB) = 0.17% by weight;

Fixed Carbon (ADB) = 59.87% by weight;

- 17.** I find that Shri Jemin D. Parikh, G Card holder and Authorized representative of M/s Metacast International in his statement dated 13.06.2024 has admitted that the subject goods attempted to be imported

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were used Anode Butts and were restricted in nature as per Para 2.31 of the Foreign Trade Policy 2023 and an authorization from DGFT is required for the import of these goods.

18. I find that he has further submitted that the “Anode Butts” being imported by M/s Metacast International are the remaining part of Anodes. These Anodes are carbon rich blocks made out of Calcined Petroleum Coke & Coal Tar Pitch and are used in aluminium industry for electrolysis of calcined alumina. After using these anodes in electrolysis process of calcined alumina, what remains afterwards is known as Anode Butts. Since it is the remaining part of an anode, it is known as “Anode Butt”. M/s Metacast International had imported these anode butts vide Bill of Entry No. 2575584 dated 14-03-2024 which are intended to be used for manufacture Electrode Carbon Paste (E.C.P.) which will further be used in Steel Industry.

19. Clearly, it is observed that these goods are second hand in nature and fall under the category of Second hand goods other than capital goods. The relevant extract of Para 2.31 of the Foreign Trade Policy, 2023 is reproduced hereunder for reference:-

Para 2.31 Second Hand Goods

Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
<i>II</i>	<i>Second Hand goods other than capital goods</i>	<i>Restricted</i>	<i>Importable against Authorisation</i>

20. Therefore, the importer while importing the subject restricted goods did not have a valid authorization issued by the DGFT in the instant case

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rendering the goods liable for confiscation under Section 111(d) of the Customs Act, 1962 as the restriction is a kind of prohibition as held by the Apex court in Om Prakash Bhatia case reported at 2003 (155) ELT 423 (SC).

21. WHETHER GOODS CAN BE RELEASED ON PAYMENT OF REDEMPTION FINE?

21.1 In this regard, it is pertinent to note that the Central Government has the authority to issue notifications under Section 11 of the Customs Act, 1962, declaring the export or import of any items as forbidden. The prohibition can be conditional or unconditional. A notification under Section 11 can be issued for a variety of reasons, including maintaining India's security, preventing a shortage of goods in the country, conservation of foreign exchange, safeguarding balance of payments etc.

21.2 In order to understand the meaning of the terms 'Restriction' and 'Prohibition', it becomes essential on my part to first try and understand the literal meanings of the same. The Cambridge Dictionary, defines prohibition as "law or rule that officially stops something from being done, or the fact of not being allowed by official rules or laws" similarly, it defines restriction as "an official limit set by law on something". Understandably, the peripheral understanding after reading the above definitions shows that the definition for the prohibition is strongly worded with no scope for an exception. In contrast, the definition for restriction is not strongly worded compared to prohibition and carries a scope for the exception.

21.3 Similarly, under the Customs Act, 1962, the definition for "prohibited goods" is strongly drafted with no scope of exception and carries a

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penalty in the form of confiscation of goods as per sections 111, 113, 112 & 124 of the act. However, on the other hand, sections 3 to 5 of the Foreign Trade (Development and Regulation) Act, 1992 are not so strongly worded and carry the scope of an exception in issuing a license for import and export of the restricted commodity. For example, the export of human skeletons is prohibited as per section 2 (33). In contrast, export of cattle which is restricted suitable as per the 'ITC-HC' list, is allowed against an export licence obtained under schedule II ITC(HS) Classification of Export and Import Items, 2018.

21.4 Moreover, the restriction and prohibition of goods are not just limited to the Customs act, 1962 and Notifications of DGFT. Import and export of some specified goods will also be restricted/prohibited under other laws such as Environment Protection Act, Wild Life Act, Indian Trade and Merchandise Marks Act, Arms Act, etc. The prohibition under these acts will also apply to the penal provisions of the Customs Act, rendering such goods liable for confiscation under section 111(d) of the Customs Act (for import) and 113 (d) of the Customs Act (for export)¹¹.

21.5 The relief for the distinction and differentiation in treating restricted and prohibited goods lies in lieu of section 125 of the Customs Act, 1962. *Section 125 of the act makes a clear distinction between prohibited goods and other goods and obligates the release of other goods on payment of redemption of a fee. Similarly Section 112 makes a clear distinction between prohibited and dutiable goods.*

21.6 In this regard, I rely on the following judgements:-

(i) *Shaik Md. Omer v. Collector of Customs AIR 1967 Cal*

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It is the most highlighted case, which elaborates the meaning and the scope of the word 'prohibition' as per section 2(33) of the act. In this case, the Hon'ble High Court of Calcutta observed that prohibition means every prohibition: and restriction is also a type of prohibition. The Court further explained that whenever there is a condition attached with the import or export of the good, then such goods are labelled as 'restricted goods' and import or export of such goods can be permitted on account of the fulfilment of the necessary condition. *Shaik Md. Omer*

(ii) Commissioner of Customs v. Atul Automation (P.) Ltd

The Hon'ble Supreme Court, in this case, has underscored the difference between what is prohibited and what is restricted. **The goods imported or exported without authorisation were found to be restricted goods. Restricted goods have the option of being redeemed and do not deserve the treatment of absolute confiscation, which could be applied only to prohibited goods.**

(iii) Horizon Ferro Alloys (P.) Ltd. v. Union of India

In this case, the difference between prohibited and restricted goods was made considering the tainted characteristics they hold.¹⁵ It was observed that goods like fake currency, pornographic material, dead animal skin or body etc., are prohibited goods as per section 2 (33) of the act. *Moreover, in this case, it was also observed that merely exceeding the quantity restriction over restricted goods will not make them fall under the*

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category of prohibited goods. The Adjudication Authority can use its discretion according to section 125 to declare such goods as restricted goods.

21.7 In this regard, I also rely on the judgement of Hon'ble Supreme Court of India in the matter of M/s. Raj Grow Impex LLP & others [CIVIL APPEAL NO(s). 2217-2218 of 2021] wherein the Apex court vide order dated 17.06.2021 has referred the judgement in the matter of Commissioner of Customs v. Atul Automation (P.) Ltd and clearly distinguished between the restricted goods and prohibited goods and laid down the principle of redemption of restricted goods.

67.4. Learned counsel for the importers have strongly relied upon a 3-Judge Bench decision of this Court in Atul Automations (supra) to submit that therein, the goods imported without authorisation were held to be 'restricted' goods; and the same principle applies to the subject goods when they have been imported without import licence and hence, they cannot be taken as prohibited goods. The submissions have been countered by the ASG that the said decision related to the matter under the FTDR Act and different facts and different regulations concerning the goods were involved therein.

*67.4.1. **In the case of Atul Automations (supra), the goods imported without authorisation were found to be not 'prohibited' but 'restricted' items for import and the orders for their release with payment of fine in lieu of confiscation were approved.** However, a close look at the factual aspects puts it beyond the pale of doubt that therein, this Court has neither laid down the law that in every case of*

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import without authorisation, the goods are to be treated as restricted and not prohibited nor that the goods so imported without authorisation are always to be released on payment of redemption fine.

67.4.2. *The factual aspect of Atul Automations (supra) makes it clear that the imported Multi-Function Devices, Photocopiers and Printers (MFDs) involved in that case were restricted items, importable against authorisation under Clause 2.31 of the Foreign Trade Policy. Thus, the MFDs were found to be restricted items for import and not prohibited items. **That had not been the case where import was restricted in terms of quantity in the manner that the goods were importable only up to a particular extent of quantity and that too against a licence.** It was also found therein that the Central Government had permitted the import of used MFDs having utility for at least five years, keeping in mind that they were not being manufactured in the country.*

67.4.3. ***The present case is of an entirely different restriction where import of the referred peas/pulses has been restricted to a particular quantity and could be made only against a licence. The letter and spirit of this restriction, as expounded by this Court earlier, is that, any import beyond the specified quantity is clearly impermissible and is prohibited.** This Court has highlighted the adverse impact of excessive quantity of imports of these commodities on the agricultural market economy in the case of Agricas (supra) whereas, it had not been the case in Atul Automations (supra) that the import was otherwise likely to affect the domestic market economy. In contrast to the case of Atul Automations, where the goods were permitted*

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to be imported (albeit with authorisation) for the reason that they were not manufactured in the country, in the present case, the underlying feature for restricting the imports by quantum has been the availability of excessive stocks and adverse impact on the price obtainable by the farmers of the country. The decision in Atul Automations (supra), by no stretch of imagination, could be considered having any application to the present case.”

21.8 In view of the above discussion and findings and case laws referred, I find that the subject goods were attempted to be imported without a valid authorisation and therefore, the judgement of Apex court in the matter of Atul Automations, referred supra is squarely applicable and the goods can be released on payment of redemption fine as the goods are not liable for ‘absolute prohibition’. The subject goods are restricted in nature as the goods have been imported without a valid authorisation from DGFT. Thus I find it apt to release the goods on payment of redemption fine.

22. I further find that the importer has been granted authorization bearing No. 0111015172 dated 09-04-2024 by DGFT for the import of “Used Anode Butt (B2090)” in response to their application dated 07-04-2024. Therefore, a lenient view is to be taken while imposing redemption fine and penalty.

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

- a. I order to confiscate 226.915MT Anode Butts imported vide Bill of Entry No. 2575584 dated 14-03-2024 valued at Rs. 60,53,647/- (Rupees Sixty lacs fifty three thousand six hundred and forty seven

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only), under Section 111(d) of the Customs Act, 1962. However, I give them an option to pay fine of Rs.6,55,000/-(Rupees Six lakhs Fifty five thousand only) in lieu of confiscation under Section 125 of the Customs Act, 1962 as discussed above.

b. I impose penalty of Rs.2,50,000/-(Rupees Two Lakhs Fifty Thousand only) under Section 112(a) of the Customs Act, 1962.

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

(Dev Prakash Bamanavat)

Additional Commissioner

To,

M/s Metacast International, Shree Kunj,

Bhalupali Chowk, Bohidarnuapali,

PO: Sankwrma, Sambalpur, Odisha-768006

Copy to-

1. The Assistant Commissioner Review/EDI/TRC/SIIB, Customs House, Kandla for necessary action.
2. Guard File.