

OIO No. KDL/ADC/DPB/21/2024-25
DATED 05.09.2024

	OFFICE OF THE COMMISSIONER CUSTOM HOUSE, KANDLA NEAR BALAJI TEMPLE, NEW KANDLA Phone : 02836-271468/469 Fax: 02836-271467	
DIN- 20240671ML0000016534		
A	File No.	GEN/ADJ/ADC/518/2023-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KDL/ADC/DPB/21/2024-25
C	Passed by	Dev Prakash Bamanavat Additional Commissioner of Customs, Custom House, Kandla.
D	Date of Order	05.09.2024
E	Date of Issue	05.09.2024
F	SCN NO. & Date	Waiver of Show Cause notice
G	Noticee / Party / Importer / Exporter	i. M/s Krishna Enterprise, Shed No. 251, CIB type, Sector III, Kandla Special Economic Zone, Gandhidham ii. M/s. Niraj Enterprise, Plot No.435/C, Deepmala Nagar, Ward-6A, NR DPS School, Gandhidham, Kachchh-370230

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 128 A 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:

“ सीमा शुल्क आयुक्त (अपील),
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ़ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”
“THE COMMISSIONER OF CUSTOMS (APPEALS),
Having his office at 7th Floor, Mridul Tower, Behind Times of India,
Ashram Road, Ahmedabad-380009.”

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.
4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं॰-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
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. अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।

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. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE:-

M/s. Krishna Enterprise (hereinafter referred to as 'SEZ unit') are situated at Shed No. 251, CIB type, Sector III, Kandla Special Economic Zone, Gandhidham, Kutch. Letter of Approval (LOA) dated 27.01.2020 was granted to them vide F.No. KASEZ/IA/KE/42/2019-20 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 warehousing and trading services activity. Whereas, the Unit Approval Committee (UAC) after due deliberations has approved the requests of the said SEZ unit for inclusion of additional items in their warehousing service activity and accordingly, amendments in the original LoA were made from time to time.

2. It further appeared that the said SEZ Unit had filed Bills of Entry for the import of goods declared as **“Mix Lot of PVC Coated Fabric”**. The samples of subject goods were drawn and forwarded to CRCL Kandla for ascertaining the correct description and composition of the imported goods. The Test Report from CRCL Kandla indicated that the subject goods had been mis-declared / mis-classified before KASEZ Customs authorities. The details of the goods are mentioned in the Table-I below for reference:-

Table -1

Sr.No	Bill of Entry No and Date	Declared Description	Qty (in Kgs)	Container No
1	1013045 dated 23.08.2022	Mix Lot of PVC Coated Fabric	27800	TRHU8482720

2.1. The said SEZ Unit had filed Bill of Entry No 1013045 dated 23.08.2022 for the import of goods declared as **“Mix Lot of PVC Coated Fabric”** on behalf of the DTA Client, namely M/s. Niraj Enterprise, Plot No.435/C, Deepmala Nagar, Ward-6A, NR DPS School, Gandhidham, Kachchh-370230. The representative samples were drawn and forwarded to CRCL Kandla for ascertaining the correct description, composition of the subject goods vide Test Memo No 682 dated 02.09.2022. The results of the Test Report of CRCL, Kandla are reproduced below for reference:-

“On opening the sample packet three (Green, Yellow and brown colored) cut pieces of sheet were found. Each base knitted fabric (coated on one side) is made of polyester and coating is composed of polyurethane (PU):

Sample Colour	Thickness (as such)	GSM (as such)	% of Polyester (% by wt)	% of Polyurethane (% by wt)
Green	0.55	404.2	28.2	Balance
Yellow	0.55	384.9	34.9	Balance
Brown	0.58	350.8	52.0	Balance

It is other than PVC Coated fabric”

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2.2. The CRCL test report revealed that the subject goods did not conform to the declared description in the Bill of Entry filed before Customs authorities. The goods have been declared as **“Mix Lot of PVC Coated Fabric”** and classified under Tariff Headings 59031090. However the test results indicated that the subject goods were **knitted** fabric and were made up of **polyester and coating was composed of polyurethane (PU)**. It was apparent from the test result that the subject goods were textile fabrics coated with PU. Based on the test report, it appeared that the subject goods merit classification under Tariff Heading 59032090 and should attract Basic Customs Duty @ 20% per Sq meter along with applicable Anti dumping duty @ 0.46 USD per meter in terms of Sr. No. 03 of Table in CBIC Notification No 14/2022-Customs(ADD) dated 22.05.2022 along with applicable IGST.

2.3. Rejection of Declared Value as per the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007) for mis-declared goods

The CRCL test report revealed that the subject goods did not conform to the declared description in the Bill of Entry filed before Customs authorities, therefore the transaction value as declared by the DTA Client appeared to be liable for rejection under Rule 12 of the Customs Valuation Rules, 2007. Since the goods appeared to be mis-declared, the value declared by the DTA Client could not be considered as transaction value as per the provisions of sub-rule (1) of rule 3 of CVR, 2007 read with Rule 12 of the Customs Valuation Rules, 2007. Therefore the value of the goods needed to be re-determined by proceeding sequentially through rule 4 to rule 9 of the CVR, 2007 as given under explanation of Rule 12 of the Customs Valuation Rules, 2007.

2.4 Re-determination of the value of the goods as per CVR, 2007

Whereas, transaction value of the identical goods at identical commercial level, were tried to be ascertained. However, no such import data is found. Therefore, Rule 4 of the CVR, 2007 appeared to be not applicable in the instant case. Subsequently, an attempt was made to re-determine the Value in terms of Rule 5 of CVR 2007 by referring to the contemporary Import data available on NIDB. The Unit value for the subject goods might be considered as **Rs 28.91 per SQM**.

The details of the differential Customs Duty on account of under-valuation and applicability of ADD on the subject goods appeared to be recoverable from the DTA Client/SEZ unit are mentioned in the Annexure-A, given below:-

Annexure-A																				
Sr No	Import BE No./ Date	Declared Description of Goods in Bill of Entry	HSN Code	Container No	Declared Value at the time of Import	Duty Forgone	Correct CTH as per CRCL test Report	Qty in Kgs	Qty in SQM as per revised Invoice	BCD (in %) leviable as per correct CTH	SWS	IGST in % leviable as per Correct CTH	Anti durning duty leviable as per Correct CTH	Qty in Mtr as per revised Invoice	Redetermin ed Value as per Contempora ry Import Data (@ 28.9 USD per SQM)	Customs Duty Leviable as per Correct CTH	SWS	ADD	IGST Leviable as per Correct CTH	Effective Duty In Inr leviable as per correct CTH
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
1	103045 dated 23.08.2022	Mix Lot of PVC Coated Fabric	59031090	TRHU84 82720	918746	336628	59032090	27800	77803	20%	10%	12%	0.46 USD Per Mtr	52302	2249284.7	449857	44986	19,36,743	5,61,704	29,93,290.15

2.5 Status of the goods

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The said goods are presently lying at the premises of the said SEZ unit. Further, the SEZ unit and DTA client vide letter dated 21.02.2023 agreed to pay the differential Customs Duty as applicable as per Customs Act, 1962.

3. Legal Provisions:

The following are the legal provisions, which are in general applicable in the present case. The list given herein is indicative and not exhaustive, as the context of legal provisions may otherwise require reference of other legal provisions, reference of which are also to be invited, as and when required:

3.1. The Customs Act, 1962:

- 3.1.1. Section 46 of the Customs Act, 1962
- 3.1.2. Section 11 of the Customs Act, 1962
- 3.1.3. Section 2(33) of the Customs Act, 1962
- 3.1.4. Section 2(39) of the Customs Act, 1962
- 3.1.5. Section 28 of the Customs Act, 1962.
- 3.1.6. Section 111(m) of the Customs Act, 1962.
- 3.1.7. Section 112 of the Customs Act, 1962
- 3.1.8. Section 114AA of the Customs Act, 1962

3.2. SEZ Act, 2005

- 3.2.1 Rule 15(9) of the SEZ Rules, 2006.
- 3.2.2 Rule 18 of the SEZ Rules, 2006.
- 3.2.3 Rule 27(10) of the SEZ Rules, 2006.
- 3.2.4 Rule 29(1) of the SEZ Rules, 2006.
- 3.2.5 Rule 29(2) of the SEZ Rules, 2006.

4. Whereas, Section 17 of the Customs Act, 1962 provides for self-assessment of duty on imported and export goods by the importer and exporter himself by filing a bill of entry or shipping bill, as the case may be. Under self-assessment the importer or exporter has to ensure correct classification, applicable rate of duty, value and exemption notifications, if any, in respect of imported / export goods while presenting bill of entry or shipping bill. Further, Rule 75 of the SEZ Rules, 2006 also provides that unless and otherwise specified in these rules all inward or outward movements of the goods into or from SEZ by the Unit/Developer shall be based on self-declaration made by the Unit/Developer. While importing subject goods, the said SEZ unit and their DTA client were bound for true and correct declaration and assessment. As the said SEZ unit was engaged in business of providing warehousing services in respect of subject goods, they were fully aware of specifications, characteristics, nature and description of the goods imported and warehoused on behalf of DTA client. From the above, it is evident that the said SEZ unit and the said DTA client deliberately suppressed specifications,

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characteristics, nature and description of the goods and wrongly declared the classification and description of said product/goods.

5. Whereas, as per Section 46(4A) of the Customs Act, 1962, the importer, who is presenting the bill of entry should ensure the accuracy and completeness of the information given therein, the authenticity and validity of any document supporting it; and compliance with the restriction or prohibition, if any, relating to the goods under the Customs Act, 1962 or under any other law for the time being in force. The above discussed facts reveals that while importing the subject goods, the said SEZ unit has mis-classified and mis-declared the subject goods as detailed in Annexure-A by suppressing the material facts relating to the specification and particular of the same. Apparently, it appears the said SEZ unit and said DTA client has violated the provisions of Section 46(4A) by way of mis-declaring the subject goods as detailed in Annexure-A. Such indulgence and endeavor on the part of their part are in violation of the provisions of Section 46 of the Customs Act, 1962, irrespective of the importability of the impugned goods and other aspects involved in the case, which makes the impugned goods liable for confiscation in terms of Section 111(m) of the Customs Act, 1962 and said SEZ unit and their DTA client liable for penalty under Section 112/114A and Section 114AA of the Customs Act, 1962.

6. **Accordingly, an Investigation Report including stating the summary as given below, has been received by this office from the office of KASEZ, Gandhidham.**

- a. The Classification & the Value of the subject goods declared in the Bill of Entry appearing in Annexure-A to this notice, needs to be rejected. The subject goods appear to merit Classification as detailed in Annexure-A to this Notice. Further, there appears to be a need to re-determine the Value of the subject goods as detailed in Annexure –A to the Notice.
- b. The goods mentioned in Annexure-A to this notice, imported by the said SEZ unit appears to be liable for confiscation under section 111(m) of the Customs Act, 1962.
- c. The said DTA Client appears to be liable for Penalty under Section 112/114A/114 AA of the Customs Act, 1962 for the reasons discussed above.
- d. The said SEZ Unit appears to be liable to Penalty under Section 114AA/ 117 of the Customs Act, 1962 for the reasons discussed above.

6.1. Further vide email dated 10.07.2023 and 24.08.2023, the office of KASEZ intimated that as the goods are found to be mis-declared at the time of import and due to which "duty forgone" amounting to Rs. 29,93,290/- has been short levied and the same is required to be levied under Section 28(4) of the Customs Act, 1962.

Waiver of Show cause notice

7. The DTA client/importer as well as the SEZ unit have vide their letters dated 18.04.2023 requested for waiver of SCN and personal hearing in the instant matter.

7.1 The Hon'ble Supreme Court (Three Judge Bench) in their Order dated 04.04.2002 in the case of Commissioner of Customs, Mumbai Vs. Virgo Steels reported in 2002 (141) E.L.T. 598

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(SC) has held that the Show Cause Notice has to be issued to the party before raising demand and that mandatory requirement of issuing a Show Cause Notice can be waived by the Noticee under Section 28 of the Customs Act. As the right of receiving the Show Cause Notice under Sec 28 is being personal to the person concerned, the same can be waived by that person.

Discussion and findings:-

8. I find that the instant matter pertains to mis-declaration and consequently undervaluation of goods by the SEZ unit i.e. M/s. Krishna Enterprises (SEZ Unit) and M/s. Neeraj Enterprises (DTA Client). I have carefully gone through the Investigation report, request letters for waiver of show cause notice and personal hearing and other relied upon documents supplied by the office of KASEZ.

9. In the instant case, the issues to be decided by me are:-

- (i) whether the Classification & the Value of the subject goods declared in the Bill of Entry, needs to be rejected and reclassified/re-evaluated as per the show cause notice;
- (ii) whether the subject goods imported by the said SEZ unit on behalf of DTA client are liable for confiscation under section 111(m) of the Customs Act, 1962;
- (iii) whether the DTA client is liable to pay differential duty of Rs. 29,93,290/- under the provisions of Section 28 of the Customs Act, 1962.
- (iv) whether the DTA Client is liable for Penalty under Section 112/114A/114 AA of the Customs Act, 1962.
- (v) whether the said SEZ Unit is liable for Penalty under Section 114AA/ 117 of the Customs Act, 1962.

10. I find that the said SEZ Unit had filed a Bill of Entry bearing No 1013045 dated 23.08.2022 for the import of goods declared as **“Mix Lot of PVC Coated Fabric”** on behalf of the DTA Client, namely M/s. Niraj Enterprise, Plot No.435/C, Deepmala Nagar, Ward-6A, NR DPS School, Gandhidham, Kachchh-370230. The representative samples were drawn and forwarded to CRCL Kandla for ascertaining the correct description, composition of the subject goods vide Test Memo No 682 dated 02.09.2022. The results of the Test Report of CRCL, Kandla are reproduced below for reference: -

“On opening the sample packet three (Green, Yellow and brown colored) cut pieces of sheet were found. Each base knitted fabric (coated on one side) is made of polyester and coating is composed of polyurethane (PU):

Sample Colour	Thickness (as such)	GSM (as such)	% of Polyester (% by wt)	% of Polyurethane (% by wt)
Green	0.55	404.2	28.2	Balance
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Brown	0.58	350.8	52.0	Balance

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It is other than PVC Coated fabric”

11. I find that the CRCL test report revealed that the subject goods did not conform to the declared description in the Bill of Entry filed before Customs authorities. The goods have been declared as “**Mix Lot of PVC Coated Fabric**” and classified under Tariff Headings 59031090. However the test results indicated that the subject goods were **knitted** fabric and were made up of **polyester and coating was composed of polyurethane (PU)**. It is evident from the test result that the subject goods were textile fabrics coated with PU. Based on the test report, therefore the subject goods merit classification under Tariff Heading 59032090 and should attract Basic Customs Duty @ 20% per Sq meter along with applicable Anti dumping duty @ 0.46 USD per meter in terms of Sr. No. 03 of Table in CBIC Notification No 14/2022-Customs(ADD) dated 22.05.2022 along with applicable IGST. I further find that neither the SEZ unit nor the importer has disputed the test report in the instant matter. I further find that they have agreed to the mis-declaration vide their letter dated 18.04.2023 and are ready to pay their dues.

Valuation and Customs duty:-

12. Rejection of Declared Value as per the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007) for mis-declared goods

The CRCL test report revealed that the subject goods did not conform to the declared description in the Bill of Entry filed before Customs authorities, therefore the transaction value as declared by the DTA Client is liable for rejection under Rule 12 of the Customs Valuation Rules, 2007. Since the goods have been mis-declared, the value declared by the DTA Client could not be considered as transaction value as per the provisions of sub-rule (1) of rule 3 of CVR, 2007 read with Rule 12 of the Customs Valuation Rules, 2007. Therefore the value of the goods is to be re-determined by proceeding sequentially through rule 4 to rule 9 of the CVR, 2007 as given under explanation of Rule 12 of the Customs Valuation Rules, 2007.

12.1 Re-determination of the value of the goods as per CVR, 2007

Transaction value of the identical goods at identical commercial level, were tried to be ascertained. However, no such import data is found. Therefore, Rule 4 of the CVR, 2007 is not applicable in the instant case. Subsequently, an attempt has been made to re-determine the Value in terms of Rule 5 of CVR 2007 by referring to the contemporary Import data available on NIDB. The Unit value for the subject goods is therefore taken as **Rs 28.91 per SQM.**

The details of the differential Customs Duty on account of under-valuation and applicability of ADD on the subject goods is recoverable from the importer i.e. M/s. Niraj Enterprises under Section 28(4) of Customs Act, 1962 are mentioned in the Annexure-A, given below:-

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Annexure-A																				
Sr No	Import BE No./ Date	Declared Description of Goods in Bill of Entry	HSN Code	Contain er No	Declared Value at the time of Import	Duty Forgone	Correct CTH as per CRCL test Report	Qty in Kgs	Qty in SQM as per revised Invoice	BCD (in %) leviable as per correct CTH	SWS	IGST in % leviable as per Correct CTH	Anti dumping duty leviable as per Correct CTH	Qty in Mtr as per revised Invoice	Redetermin ed Value as per Contemporary Import Data (@ 28.9 USD per SQM)	Customs Duty Leviable as per Correct CTH	SWS	ADD	IGST Leviable as per Correct CTH	Effective Duty Inr leviable as per correct CTH
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
1	103045 dated 23.08.2022	Mix Lot of PVC Coated Fabric	59031090	TRHU8482720	918746	336628	59032090	27800	77803	20%	10%	12%	0.46 USD Per Mtr	52302	2249284.7	449857	44986	19,36,743	5,61,704	29,93,290.15

12.2 In view of the above discussion, I find that the importer i.e. M/s. Niraj Enterprises is liable to pay Customs duty amounting to Rs. 29,93,290/- under the provisions of Customs Act, 1962 or Customs Tariff Act, 1975 only when such goods are cleared into DTA, as discussed below.

12.3 It is pertinent to note that the liability of Customs duty including ADD, CVD and Safeguard duty etc. arises only when the goods are cleared into Domestic Tariff Area (DTA) on filing of Bill of Entry for Home consumption. I find that the show cause notice itself states that the goods are lying in the premises of the SEZ unit which implies that the Bill of Entry for Home Consumption has not been filed yet by the DTA client/importer. In this regard, it is important to extract Section 26(1)(a) and Section 30 of the SEZ Act, 2005 below for better appreciation of the facts:-

“26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.—

(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 authorized operations by the Developer or entrepreneur;**

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 (51 of 1975), where applicable, as leviable on such goods when imported;”**

Therefore, it is apparent that the goods are leviable to Customs duty including ADD, CVD and Safeguard duty under the provisions of Customs Act, 1962 and Customs Tariff Act, 1975, when the goods are cleared into DTA for home consumption as per the provisions of Section 30 of SEZ Act, 2005.

12.4 I further find that as per Rule 34 of SEZ Rules, 2006, the goods admitted into a SEZ shall be used by the Unit or the Developer only for carrying out the authorized operations but if

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the goods admitted are utilized for purposes other than for the authorized operations or if the Unit or Developer fails to account for the goods as provided under these rules, duty shall be chargeable on such goods as if these goods have been cleared for home consumption, in case a Unit is unable to utilize the goods imported or procured from DTA, it may export the goods or sell the same to other Unit or to an Export Oriented Unit(EOU) or Electronic Hardware Technology Park(EHTP) Unit or Software Technology Park(STP) Unit or Bio-technology Park(BTP) Unit, without payment of duty, or dispose of the same in the DTA on payment of applicable duties on the basis of an import licence submitted by the DTA buyer, wherever applicable.”

Bare reading of the above rule, I find the following:-

- (i) If the goods admitted into a SEZ by the unit **have been utilized** for purposes other than for the authorized operations, duty shall be chargeable on such goods as if these goods have been cleared for home consumption;
- (ii) If the SEZ unit is unable to utilize the goods imported, it may dispose of the same in the DTA on payment of applicable duties.

It is clear that the subject goods in the matter have not been utilized for the purpose other than for the authorized operations as the instant case is of mis-classification and undervaluation only.

12.5 I also find that as per the provisions of Section 51 of the SEZ Act, 2005 reproduced below states that SEZ Act shall have over riding effect on any other law for the time being in force;

“51. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

12.6 In view of the above, I hold that the importer/DTA client is not liable to pay differential Customs duty amounting to Rs. 29,93,290/- under the provisions of Customs Act, 1962 or Customs Tariff Act, 1975 as the payment of Customs duty arises only when such goods are cleared into DTA.

13. **Confiscation of goods and penalties thereof:-**

I find that the importer i.e. M/s. Niraj Enterprises has mis-declared the goods imported vide Bill of Entry no. 103045 dated 23.08.2022, as discussed in the foregoing paras. In this regard, it is important to note that the mis-declaration of goods has also resulted in mis-declaration of value of goods and therefore the goods are liable to be confiscated under the provisions of Section 111(m) of the Customs Act, 1962, which is reproduced herein below:-

“Section 111(m) in the Customs Act, 1962

(m) 1[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 2[in respect thereof or in the case of goods

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under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54];”

In this regard, I also rely on the judgement of CC Mumbai Vs Multimetal Ltd-2002(Tri-Mumbai), upheld in Apex court in 2003 (ELT A309 (SC), wherein it is held that when mis-declaration is established, goods are liable for confiscation irrespective of whether there was malafide or not. In view of the above, I hold that the goods valued at Rs. 22,49,284/- are liable to confiscation under the provisions of Section 111(m) of the Customs Act, 1962.

14. Penalties on the importer under Section 112, 114A and 114AA of the Customs Act, 1962.

With regard to the penalties under Section 114A and/or 112 of the Customs Act, 1962, I find that both the sections 112 and 114A attract penalties for evasion of duty.

14.1 It is pertinent to note that Section 112(a)(ii) or 112(b)(ii) (applicable in the instant case as the impugned goods are dutiable) mandates that in case of dutiable goods the importer is liable to ***penalty not exceeding ten percent of the duty sought to be evaded*** or five thousand rupees, whichever is higher.

14.2 Further, I find that proviso to Section 112(a)(ii) or Section 112(b)(ii) mandates that if the duty determined under Section 28(8) alongwith interest under Section 28AA is paid within thirty days from the communication of order of the proper officer determining such duty, the amount of penalty shall reduce to twenty five percent of the penalty so determined. Therefore, it is apparent that the penalty under Section 112(a)/112(b), in case of dutiable goods, ***depends upon the amount of duty determined/confirmed*** under the provision of Section 28(8) of the Customs Act, 1962. However, as discussed in the foregoing paras, demand of duty arises only on clearance of imported goods into Domestic Tariff Area (DTA).

14.3 I further find that as per the provisions of Section 51 of the SEZ Act, 2005 states that SEZ Act shall have over riding effect on any other law for the time being in force, as discussed above. It is pertinent to note that though the Section 112 of the Customs Act, 1962 provides for Penalty for improper importation of goods, the SEZ Act, 2005 doesn't have any provisions for levying duty on the goods imported and lying in SEZ unit and imposing penalty on such goods for improper importation of goods into SEZ unit. It is only when goods are cleared into DTA, liability of duty arises which in turn would empower the proper officer of Customs to impose penalty under Section 112 of the Customs Act, 1962 as the penal provisions contained in Section 112 of the Customs Act are directly linked with the evasion of duty. However, the provisions of Section 112(a)(ii) or 112(b)(ii) also provide for Rs. 5,000/- as the penalty in case duty sought to be evaded doesn't arise.

14.4 I further find that Section 114A also attracts penalty for non/short payment of duty by way of collusion/willful mis-statement/fraud. However, as discussed in the foregoing paras, demand of duty arises only on clearance of imported goods into Domestic Tariff Area (DTA).

In view of the above, I hold that the importer is not liable to penal action under Sections 112 and 114A of the Customs Act, 1962.

14.5 With regard to penalty under Section 114AA of the Customs Act, 1962, I find that the importer has made a false statement and document while presenting the Bill of Entry by mis-

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declaring the goods, rendering themselves liable for penalty under Section 114AA of the Customs Act, 1962.

15. Penalties on the SEZ unit under Section 114AA and 117 of the Customs Act, 1962.

15.1 With regard to penalty under Section 114AA of the Customs Act, 1962, I find that the SEZ unit on behalf of the DTA client has made a false statement and document while presenting the Bill of Entry by mis-declaring the goods, rendering themselves liable for penalty under Section 114AA of the Customs Act, 1962. Rule 75 of the SEZ Rules, 2006 mandates that unless and otherwise specified in these rules, all inward or outward movements of the goods into or from SEZ by the Unit shall be based on self-declaration made by the Unit. While importing subject goods, the said SEZ unit and DTA importers were bound for true and correct declaration and assessment. As the said SEZ unit was engaged in business of providing warehousing services in respect of subject goods, they were fully aware of specifications, characteristics, nature and description of the goods imported and warehoused on behalf of DTA client. They have clearly violated the conditions enlisted in LoA granted to them. Therefore, they are liable for penal action under Section 114AA of the Customs Act, 1962.

However, I don't find it apt to impose penalty under Section 117 of the Customs Act, 1962 as the penalty for false statement and declaration is already provided in Section 114AA of the Customs Act, 1962.

16. In view of the same, I hereby pass the following order:-

In respect of DTA client/importer i.e. M/s. Niraj Enterprise

- (i) I reject the classification of the subject goods declared under Customs Tariff heading 59031090 of the Customs Tariff Act, 1975, in the Bills of Entry appearing in Annexure-A above and re-classify the subject goods under Customs Tariff item as detailed in Annexure-A above.
- (ii) I reject the transaction value declared by the importer in the said BoE filed by SEZ on their behalf and re-determine the same in terms of the CVR, 2007 as detailed in Annexure –A above.
- (iii) I hold the subject goods valued at Rs. 22,49,285/- liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962 for the reasons discussed above.

However, I give an option, of redemption fine of Rs. 2,00,000/- in lieu of confiscation, to the importer under Section 125 of the Customs Act, 1962.
- (iv) I impose penalty of Rs.1,50,000/- under Section 114AA of the Customs Act, 1962.
- (v) I impose penalty of Rs. 5,000/- under Section 112 of the Customs Act, 1962.
- (vi) I refrain from imposing penalty under Section 114A of the Customs Act, 1962, for the reasons discussed above.

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In respect of SEZ Unit i.e. M/s. Krishna Enterprise

- (i) I impose penalty of Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962.
- (ii) I refrain from imposing penalty under Section 117 of the Customs Act, 1962.

Additional Commissioner of
Customs
Custom House, Kandla

DIN- 20240671ML0000016534

To,

- (i) M/s Krishna Enterprise, Shed No. 251, CIB type, Sector-III, Kandla Special Economic Zone, Gandhidham.
- (ii) M/s. Niraj Enterprise, Plot No.435/C, Deepmala Nagar, Ward-6A, NR DPS School, Gandhidham, Kachchh-370230.

Copy submitted to:-

1. The Deputy Commissioner, Kandla Special Economic Zone, Gandhidham, Kutch.
2. The Deputy/Assistant Commissioner of Customs, Review, Kandla Customs House, Kandla for the purpose of Review.
3. The Superintendent (EDI/TRC) for necessary action at their end.
4. Guard File.