



**slma xuLk AayuKt ka kayaRly,
nvIn slma xuLk wvn, nya ka.Dla I**

**OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)**
Phone No: 02836-271468/469, Fax No. : 02836-271467.

A	File No.	S/10-20/ADJ-COMMR/DENOVO/15-16
B	Order-in-Original No.	KDL/COMM/R/PVRR/ 14/2015-16
C	Passed by	SHRI P.V.R. REDDY PRINCIPAL COMMISSIONER OF CUSTOMS, KANDLA.
D	Date of order	20.10.2015
E	Date of issue	02.11.2015
F	SCN No. & Date	S/43-29/2011-12/SIIB dated 01.03.2012. Remand proceedings as per CESTAT, Ahmedabad Order No. A/10356 to 10361/WZB/AHD/2013 dated 01.01.2013/12.03.2013
G	Noticee	M/s Anita Exports, Plot No.35/36, Sector-II, KASEZ, Gandhidham.

1. This Order - 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 & Service Tax Appellate Tribunal, West Zonal Bench,
O-20, Meghaninagar, New Mental Hospital Compound, Ahmedabad-380 016."**
3. Appeal shall be filed within three months from the date of communication of this order.

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 Court Fees 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.

BRIEF FACTS OF THE CASE:

On the basis of information that M/s Anita Exports, Plot No.35/36, Sector-II, KASEZ, Gandhidham have grossly mis-declared and undervalued the consignments of Old and Used/ Worn Clothing (CTH 63090000) imported by them and that the imports were not meant for the purposes as laid down in the Letter of Approval (LOA) / Letter of Permission (LOP) granted to them, Kandla Customs initiated investigations into such imports. In all, twenty-five (25) containers (24 containers imported from 'Korea' and 01 from Germany) of goods declared as 'Old & Used Worn Clothing' were examined. In the Bill of Entry for Home Consumption filed by the Importer, it was declared as "Old & Used Worn Clothing completely fumigated RITC 63090000-Raw materials". The findings of the examination were as under:

1.2 In the Bills of Entry imported goods were declared as "Old and Used Worn Clothing completely fumigated" (CTH 63090000) raw materials. No grades, quality or type of goods imported were declared in the import documents. According to Chapter Note 3 to Chapter 63, for being classified under Tariff Heading 63090000 of CTA, 1975, imported goods must show signs of appreciable wear and tear. It was also observed that Old and Worn Clothing were packed in bales of 80 or 100 kgs and goods in all consignments were completely sorted and segregated. On enquiry from the importer it was gathered that each container actually had a detailed Packing List in the form of a 'Load Port Report' which clearly indicated the type of goods contained in each bale and goods were found to be completely tallying with the Load Port Reports which contain the details of the actual description of items in each bale, a Code number identifying each item, number of bales and quantity of each item and were completely segregated and sorted and did not require any further processing. These Packing Lists were not presented/declared with any of the Bills of Entry. All the 24 load port reports (Korean origin) out of 25 containers examined and their corresponding examination reports were annexed to the show cause notice.

2. The imported consignments had been declared as "Old and Used Worn Clothing completely fumigated", in the Bills of Entry classifiable under Tariff Heading 63090000. However, on examination goods such as **used soft toys, assorted/mixed bags, purses, leather jackets and carpets** falling under Customs Chapter headings 42 & 57 had been detected in bulk quantities in separate sorted and segregated bales. The container-wise break-up of the non-declared goods found was as under:

Sr. No.	BE No.	Date	Container No.	Description of non-declared goods found	Qty. KGS
1	8787	01.8.11	TCKU9466393	USED SOFT TOYS	730

2	8768	01.8.11	BSIU9036845	ASSORTED BAGS & LEATHER JACKETS	1840
3	8783	01.8.11	FCIU8094388	USED BAGS	1600
4	8098	14.07.11	BMOU4066461	MIXED BAGS LEATHER JAKETS	960
5	5845	24.05.11	HDMU6559240	USED BAGS USED LEATHER JACKETS	400
6	8101	14.7.11	FCIU8898112	MIXED BAGS LEATHER JACKETS	1840
7	5844	24.05.11	IRNU9013722	USED BAGS USED LEATHER JACKETS	880
8	6029	30.05.11	HDMU6676205	USED BAGS USED LEATHER JACKETS & SOFT TOYS	700
9	7362	28.06.11	HDMU6648224	USED BAGS USED LEATHER JACKETS	1000
10	7036	22.06.11	GESU5964724	Leather Jackets & Bags	1760
11	7363	28.06.11	DFSU6743590	Leather Jackets & Bags	1120
12	10460	09.09.11	YMLU8291797	Leather Jackets	160
13	7209	25.06.11	TCLU5722410	Leather Jackets	160
14	7210	25.06.11	FSCU9813525	Leather Jackets	160
15	7361	28.06.11	PRSU9604567	carpets	320
16	6179	02.06.11	FCIU9097838	Leather Jackets	160
17	7489	30.06.11	CAIU8418581	Bags & Leather Jacket	640
18	10459	09.09.11	YMLU 8311189	Leather Jackets	160

19	6180	02.06.11	TRLU 5521652	Leather Jackets	160
20	7491	30.06.11	UETU 5014312	Bags & Leather Jacket	720
Total Quantity					15470

3. During examination of the total 25 containers, segregated and sorted old clothes in good condition which were found to be predominantly JACKETS (1843 Bales & 161644 Kg), Winterwear (409 Bales & 38583 Kg). These bales were in the form of finished goods and required no further processing and were ready for sale. It was further noticed that none of these imported goods were in the nature of 'Mix clothing' or raw material as declared but were actually fully sorted into categories like Adult jeans, ladies jeans, children winter wear, children jackets etc. Thus, there appeared to be no requirement of any manufacturing activity or processing to be performed by the importer in the case of subject goods.

4. The Importer had been granted permission for setting up of a manufacturing unit in the SEZ vide Letter of Approval dated 1996 as amended from time to time. As per the Rule 19 of the SEZ Rules, 2006:

i. The Development Commissioner shall issue a Letter of Approval (LOA) for setting up of the Unit. The LOA shall also include limitations and any other terms and conditions, if any stipulated by the Board or Approval Committee.

ii. **The LOA shall specify the items of manufacture or particulars of service activity, projected annual export and Net Foreign Exchange Earning.**

iii. The LOA shall be construed as a license for all purposes related to authorized operations.

5. The importer M/s Anita Exports operating under LOP No. KASEZ/IA/1628/96/1198 dtd.15.5.96 was originally granted to M/s Varsha Exports for manufacturing of plastic bags from plastic waste scrap. Broad banding was allowed in March 2004. The LOAs were renewed periodically and as of today in terms of revised LOA dated 21.5.2008 as amended by letter dtd.18.1.2011, the manufacturing activity allowed to the unit is:

"woolen / synthetic / hosiery / mixed clothing / used worn clothing uncut for mutilation; synthetic fibre waste / yarns / tows / thread waste, hard waste, soft waste, dyed waste and waste from job stock lot; reconditioning of clothes selected from old, used worn clothings / rags; waste yarns for making carpet yearns (for export of carpet)."

"Items of trading activity :

All items except restricted, prohibited, canalized items and plastic waste and scrap, second hand clothings, Rags, Polyester Yarn, Polyester Fabric, Metal scrap, hazardous items such as Battery scrap etc. as per HBOP Vol.I as amended from time to time”

5.1 LOA had condition therein that Import / Local purchase will be permitted of all items except those listed in prohibited list for import/export. However, there is no explicit mention in the LOA as regards to the goods permitted for domestic or DTA clearance. On examination of various instructions issued from time to time and more recently in the minutes of the 46th meeting of Approval committee of KASEZ held on 11/7/2011 under the chairmanship of the Development Commissioner, it was stated as under:

“As per the policy (Imports under Foreign Trade Policy), worn clothing was under restricted category (for imports under CTH 63090000) and worn cloth could not be cleared to DTA as such, as per FTP. The non-export worthy goods had to be mutilated to make it as wipers, etc. before being allowed for DTA sale”.

5.2 The term ‘wiper’ refers to ‘Rags’ (classifiable under CTH 6310) obtained after mutilation of clothes which are not export-worthy. In brief, no activity of ‘Trading of clothes or other articles by the Importer was permitted in the premises.

5.3 The import of ‘Worn clothing and other Worn articles’ is **restricted** under ITC (HS) vide DGFT Notification No.7/2004-09 with effect from 27.10.2004. Further, CBEC Circular No.36/2000-Cus dated 8.5.2000 had prescribed that for the goods to be classified as ‘Rags’, they should be totally ‘unserviceable and beyond repair’. For this, criterion was that the imported garment should have three cuts or more, through its entire length. Therefore, used and worn clothing can be imported/ brought into DTA only in the form prescribed by these CBEC instructions. Presently, SEZ units could only clear into DTA mutilated rags classifiable under CTH 6310 i.e. clothes having not less than 3 cuts across the length of the garment.

6. On the basis of examination, it appeared that the Importer had resorted to mis declaration in description and quality of goods and non-declaration of parameters such as brand, grade, specifications which have relevance to value. It was also revealed that the actual grades of the imported Worn Clothing though available with the importer, were not declared in the Bill of Entry. In addition, the Importer had resorted to outright smuggling of goods such as bags and purses, leather jackets & carpets (which were non-declared and concealed). Since these goods were not declared in the Bill of Entry, it appeared that the declared value was liable for rejection under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

7. In view of above, an offence case was booked against M/s. Anita Exports and goods viz. “Old & Used Worn Clothing completely fumigated RITC 63090000-Raw materials”, 595713 Kgs imported in 25 Containers valued at Rs.28360000 was placed

under seizure under reasonable belief that the same are liable for confiscation under the provisions of Customs Act, 1962 as per Panchnama dated 14/23.11.2011.

8. The statement of Mr. Juned Yakub Nathani, Partner of M/s Anita Exports was recorded on 12.9.2011 under Section 108 of the Customs Act, 1962 during the proceedings.

9. During the investigations, few consignments of imports by various KASEZ units from countries such as US, Europe etc (other than Korea and Japan) were also examined. The examination of such goods, including those imported by M/s Anita Exports, revealed that the form of packing in non-Korean goods was big bales of sizes 400kg (approx.) and that of the Korean goods are mainly in 80-100 kg bales. The non-Korean goods were found to be mixed, used and worn clothing showing appreciable wear and requiring further sorting/ segregation whereas the Korean cargo was fully sorted and graded in terms of pants, shirts, jeans, jackets, winter wear etc. It appeared that no further sorting was required against these goods which were ready for sale.

10. The declared value of the Korean and Non-Korean goods imported by this unit M/s Anita Exports was around the same i.e, in the range of USD 0.22 per kg – USD 0.36 per kg.

11. The goods of Korean origin were having non-declared goods, the mode of packing and quality of goods were of superior quality, had grades and specifications marked on the goods and were fully sorted and segregated. Considering these parameters, the goods of Korean origin, being of superior quality cannot be at par with the non-Korean goods with respect to valuation as the same were not comparable. Moreover, the consignments of Korean origin had substantial quantities of non-declared goods like Leather Jackets, Synthetic Bags / Purses, Carpets etc which were not classifiable as 'Old & Used Worn Clothing completely fumigated'. On the basis of the above findings, the truth or accuracy of the declared value was doubted and the Importer was asked to substantiate the declared value with contract from the overseas supplier. Mr. Juned Yakub Nathani, Partner of M/s Anita Exports in his statement stated that they had not made any written agreement / sales contract with their overseas buyers. The Importer failed to provide information/ documents sought by the department and hence failed to substantiate the declared transaction value.

12. Explanation 1(iii) to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 specifies certain reasons for which proper officer shall have powers to raise doubts on truth or accuracy of the declared value. The unit had resorted to outright smuggling of goods such as bags and purses, leather jackets & carpets. Since these goods were not declared in the Bill of Entry, their declared values were liable to be rejected under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and therefore, the value had to be re-determined in terms of the Rules. The value of the imported goods had to be determined by using reasonable means in terms of Rule 9 of CVR, 2007 (Residual method) due to non-

applicability of Rule 4 to 8. This office had employed the services of Govt approved valuer M/s Accurate Appraisal Services who by using reasonable means that were consistent with the principles and general provision of these rules and considering the international prices of similar / identical goods prevailing in international course of trade and on the basis of data available in India decided the value as Rs. 2,83,60,000/- FOB whereas the declared value was Rs. 70,64,917/- CIF for 595.713 MTs.

13. The freight charges for a standard 40 ft container from Korea to Kandla was ascertained from. M/s Seabridge Maritime Agencies Pvt Ltd who vide letter dated 9.1.2012 informed that the Freight rates for 40' container from Korea to Kandla (and Mundra) was around USD 2400 (Approx Rs.115200). The average weight of a 40' container carrying 'Old & Used Worn Clothing completely fumigated' was around 20,000 kg.

13.1 FOB value as ascertained above is converted to CIF using the below mentioned formula.

Assessable Value = FOB value + Freight for 25 containers + insurance (1.125% of FOB) + Landing charges (1% of CIF) = Rs.318,42,650/- (CIF)

14. In the wake of above findings, it appeared that the discrepancies with respect to the imported goods could be broadly categorized as under:

i. Sorted and Segregated bales of the goods declared as 'old and used clothes' were found to be of very good quality. These goods had already been sorted, segregated and processed in the country of origin and each bale was appearing with specific marks and numbers. These appeared to be finished goods requiring no further sorting, segregation, reconditioning or processing. Thus, these goods were also not eligible for any of the operations envisaged in the LOA namely sorting for the purpose of exports and converting non-export worthy goods into wipers for mutilation. It was also pertinent to note that no 'Trading activity by the importer' had been authorized by the SEZ authorities.

ii. non-declared goods such as bags / purses, leather jackets, carpets which were not covered under the CTH 6309 and not covered under the definition of old and worn clothing appeared to have been imported in violation of the LOA.

iii. On the basis of above and for the reasons discussed therein, it appeared that the Imported goods cannot be allowed to be admitted into SEZ in terms of section 33 of the SEZ Act, 2006, as no authorized operations could be carried out on these goods in the importer's premises.

iv. Since it appeared that the subject goods were not allowed to be admitted into SEZ as discussed above and the import of 'Worn clothing and other Worn articles' is **restricted** under ITC (HS) vide DGFT Notification No.7/2004-09 with effect from 27.10.2004 and would require a specific licence / authorisation issued by DGFT for the purpose. Thus, the imported consignment of old and worn clothing was prohibited for

import under the provisions of Section 11 of Custom Act, 1962 read with Section 5 of Foreign Trade (Development and Regulation) Act, 1992 unless backed with above-mentioned license, permission from the Licensing authority.

15. Based on the above, the imported goods appeared to be liable for confiscation under provisions of section 111(d) of the Custom Act, 1962. For the mis- declaration of goods, value etc and non-declaration / concealment of goods, the goods were liable for confiscation under provisions of section 111(m) of the Custom Act. Thus, for the deliberate and organized acts of duty evasion and importing 'Old and Used Clothes and other used non-declared goods' (restricted goods) unauthorizedly, the importer was liable for penalty under section 112(a) of the Custom Act, 1962.

16. Therefore, M/s. Anita Exports and Shri Juned Yakub Nathani, Partner of M/s Anita Exports were called upon to show cause to the Commissioner of Customs, Kandla, vide Show Cause Notice No. S/43-29/2011-12/SIIB dated 01.03.2012, as to why:-

- (a) the declared value of Rs. 70,64,917/- for the goods imported in 25 containers and detailed in the annexure should not be rejected under Rule 12 and the value should not be re-determined in terms of the Custom Valuation Rules, 2007 .
- (b) the total assessable value of goods (595.713 MT) of Worn clothing imported in 25 containers corresponding to 25 BEs should not be re-determined as Rs.318,42,650/- (Rupees Three Crores Eighteen Lacs Forty Two Thousand and Six Hundred Fifty Only).
- (c) the goods having a re-determined value of Rs.318,42,650/- should not be confiscated under section 111(m) and section 111(d) of the Custom Act, 1962.
- (d) why penalty should not be imposed on the importer M/s Anita Exports under section 112 (a) of the Customs Act, 1962;
- (e) why penalty should not be imposed on Shri Juned Yakub Nathani, Partner of M/s Anita Exports under section 112 (a) of the Customs Act, 1962;

17. The above said SCN was adjudicated by the adjudicating authority and passed following order vide **OIO No. KDL/COMMR/33/2012-13 dated 17.10.2012**

- (i) *The declared value of Rs.70,64,917/- for the 25 containers are rejected under Rule 12 and the value is re-determined in terms of the Custom Valuation Rules, 2007.*
- (ii) *The total assessable value of goods (595.713 MTs) of Worn clothing imported in 25 containers corresponding to 25 BEs are re-determined as 3,18,42,650/- (Rupees Three crores eighteen lakhs forty two thousand six hundred fifty only) in terms of the Rule 9 of Customs Valuation Rules, 2007.*
- (iii) *Ordered confiscation of the imported 'clothes and other mixed goods' declared as 'Old and Used clothes' valued at Rs. Rs.70,64,917/- (Rupees*

- Seventy Lakhs Sixty four Thousand & nine hundred seventeen only) under section 111 (d) and (m) of the Custom Act, 1962. and given an option to the Importer to redeem the goods on payment of fine of Rs.30,00,000/- (Rupees Thirty lakhs only) under Section 125(1) of the Custom Act, 1962.*
- (iv) *Imposed a penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) under Section 112(a) of the Custom Act, 1962 on M/s.Anita Exports.*
- (v) *Also imposed a penalty of Rs 2,50,000/- (Rupees Two lakhs fifty thousand only) under Section 112(a) of the Customs Act, 1962 on Shri Juned Yakub Nathani, Partner of M/s Anita Exports.*

Since, M/s Anita Exports had already deposited Rs.25,00,000/- vide GAR7 Challan No.1 dated 29.10.2011, the same is appropriated against part payment of the above imposed redemption fine / penalties.

The above is in addition to any other action that may be taken against the importer under the Customs Act or the SEZ Act.

18. The importer, against the above cited order viz:- OIO No. KDL/COMMR/33/2012-13 dated 17.10.2012 had preferred an appeal in Hon'ble CESTAT Ahmedabad which vide its order No. A/10356 to 10361/WZB/AHD/2013 dated 01.01.2013/12.03.2013 ordered, inter alia, as under:-

"Para. 13 In view of this, the confiscation ordered by the adjudicating authority of the goods which are as per LOA is incorrect and beyond his powers to do so. Accordingly, the impugned order to that extent is set aside.

Para 14. This takes us now to the goods which were mis-declared or un-declared i.e. the items like leather bags, purses, jackets and carpets found in the container. In our view, these items, undisputedly, are not required and not permitted to be imported in SEZ as per the LOA granted to the appellant. The question arises here is whether the Customs authorities were correct in checking the consignment which were in the containers. In our view, on a specific intelligence, the Customs authorities, on suspicion, could inspect the consignment and on the inspection, if they find any items which are not allowed or entitled to be imported into SEZ, they are within their powers to seize the goods and act in accordance with the law. In this case, since the items like leather bags, purses, jackets and carpets are not included in LOA granted to the appellant for import into the SEZ for authorized operations, are liable to be confiscated and we hold it so. The value of the said goods should be determined in accordance with the law and the redemption fine be imposed in proportion to the value of such goods and imposition of proportionate penalties also needs to be imposed.

Para 15 We were informed that all the containers are stuck up at Kandla and are not allowed to be moved to SEZ due to the impugned order. As we have already set aside the findings of the adjudicating authority as regards the goods which are allowed to be imported in to the SEZ, we direct the lower authorities to release containers in which the goods are found to be as declared and can be used for SEZ operation. We also

direct the lower authorities to seize and pass orders only those goods which are not allowed to be imported for authorized operations in SEZ.

Para 16. In view of the foregoing, we dispose the appeals as indicated hereinabove."

19. Against the above cited Order of Hon'ble CESTAT Ahmedabad order No. A/10356 to 10361/WZB/AHD/2013 dated 01.01.2013/12.03.2013 the Department preferred an appeal in the Hon'ble High Court of Gujarat at Ahmedabad which in C.A.No.431 of 2013 in T.A. NO.692 of 2013, C.A.No.432 of 2013 in T.A. NO.693 of 2013 & C.A.No.433 of 2013 in T.A. NO.6934 of 2013 vide order dated 23.12.2014 ordered as under:-

"Inter alia, on the basis of such observation and other material on record, the Tribunal was pleased to allow the appeal of the importers. Having heard learned counsel for the parties, observations and declaration of law made by the Tribunal in the above noted portion is stayed. It is however, clarified that there is no stay against the final direction of the Tribunal reversing the judgment of the Commissioner of Customs, Kandla. Resultantly, the respondent would get the benefit of release of goods as per the final order of the Tribunal. Nevertheless, the declaration of legal position propounded by the Tribunal in the impugned order and noted above shall stand stayed.

Civil Applications stand disposed of in the above terms."

REMAND PROCEEDINGS

DEFENCE REPLY & PERSONAL HEARING.

20. Personal hearing was given to the Noticee on 08.10.2015 and postponed to 15.10.2015 and again to 16.10.2015 on request of the Noticee. On 16.10.2015 Mr. Paresh M Dave, advocate appeared for personal hearing and submitted that they are relinquishing the title to the goods; that the goods which are not in accordance with the LOA are very small in quantity of 2.60%; that they never ordered these goods and it could be sheer mistake on the part of supplier as they are all in the nature of waste only; that in that view requested for leniency. The Noticee vide their letter dated 12.10.2015 have filed defence reply under which it is, inter alia, mentioned that in percentage terms, the value of such goods which are not as per LOA works out to 2.60% of the total quantity which is negligible and insignificant compared to the goods imported by them for their SEZ operations; that they have ordered for worn clothings only from the foreign supplier; that the price agreed between the parties was also for the above types of materials which are allowed to procure for SEZ operations; that Invoices and other documents like packing lists, bills of lading etc. also bear out that the goods supplied to them were in the nature of the above materials, namely, worn clothing. However, by error and inadvertence of the supplier, a very small and insignificant quantity of other goods have also been delivered, which is nothing but an accidental slip on part of the suppliers.

20.1 Relinquishment of title:

They would like to relinquish their title to the goods which are not found as per the LOA issued in their favour because Section 23(2) of the Customs Act allows owner of any imported goods to relinquish his title to the goods any time before an order for clearance of the goods for home consumption under Section 47 or an order permitting the deposit of the goods in a warehouse under Section 60 has been made; that they are the owner of all the goods including the small quantity of goods not as per LOA and therefore they have a right to relinquish their title to such goods which are not as per LOA. The Bills of Entry filed for the entire quantity of goods are still under consideration and no order for home consumption under Section 47 of the said Act is made for the goods in question and therefore, they could relinquish their title to the goods not as per LOA at this stage; that the owner of any imported goods may not be allowed to relinquish his title to such goods regarding which an offence appear to have been committed under the Customs Act or any other law for the time being in force; but in this case no offence of whatsoever nature is committed by us or anyone else. Therefore, they relinquish their title to the goods like Leather bags, Purses, Jackets and Carpets etc. which are not as per LOA and request to take into consideration that they no longer claim any ownership or title or any right whatsoever as regards such goods. Consequently, no punitive action like confiscation or penalty would lie against them and therefore the proceedings may be formally terminated. No duty liability for such goods would also arise in this case in view of the relinquishment of title to these goods.

21. It is further contended that Section 112(a) provides for penalty on any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets doing or omission of such act. This part of Section 112 is pressed in service by the Revenue in this case against them, but however, they have not done anything or omitted to do anything which would render the goods in question liable for confiscation. When Section 111 of the Act is not attracted the whole basis for proposing penalty against both of them would vanish.

21.1 Even otherwise, there is no violation of any nature committed by them in this case; that they have filed all the import documents purchase invoices, certificates of country of origin, packing lists, bills of lading and all such documents alongwith the bills of entry for the goods in question and also furnished all relevant information to the Custom officers for enabling them to assess duties on imported goods that the facts of the case do not justify any penalty on the firm or the partner and thus, proposal of imposing penalty under Sections 112(a) of the said Act on both of them is bad and illegal and hence, it deserves to be withdrawn at once in the interest of justice.

21.2 That the matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the land mark case of Messrs Hindustan Steel Limited reported in **1978 ELT (J159)** wherein the Hon'ble Supreme Court has held that penalty

should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the person was guilty of conduct contumacious or dishonest and the error committed by the person was not bonafide but was with a knowledge that he was required to act otherwise, penalty might be imposed. It is held by the Hon'ble Supreme Court that in other cases where there were only irregularities or contravention flowing from a bonafide belief, even a token penalty would not be justified.

22. That the proposal to impose penalty on Shri Juned Yakub Nathani, the Partner of our firm, is without jurisdiction because a personal penalty on the partner cannot be imposed when penalty was proposed on the partnership firm. It is held by the Hon'ble Gujarat High Court in cases like Jaiprakash Motwani **2010 (258) ELT 204 (Guj.)**, and also those reported in **2010 (259) ELT 179 (Guj)** and **2010 (260) ELT 51 (Guj)** and also a judgement of the Hon'ble Bombay High Court in case of Jupiter Exports – **2007 (213) ELT 641 (Bom.)** that personal penalty on a Partner was not permissible under the Customs and Central Excise law and therefore, the proposal to impose penalty on Shri Juned Yakub Nathani under Section 112(a) of the said Act deserves to be vacated in the interest of justice.

23. In the above premises, they requested to treat this matter as closed, as they have relinquished their title to the goods which are not as per LOA, and thereupon no

liability rest on them for such goods; that even otherwise, the facts of the present case do not justify imposition of even token penalty on them because they are not guilty of any omission and/or commission, and therefore also, the present proceedings may be treated as closed and concluded without any order adverse to them; that they have requested to formally order closure of this case at this stage.

DISCUSSION AND FINDINGS :

24. I have carefully gone through the case records pertaining to the issue. I find that earlier OIO No. KDL/COMMR/33/2012-13 dated 17.10.2012 passed by my predecessor has been partially set aside by the Hon'ble CESTAT vide Order No. A/10356 to 10361/WZB/AHD/2013 dated 01.01.2013/12.03.2013. Regarding the portion of the earlier Adjudication order upheld by the Tribunal, I find that the noticee has not preferred any appeal and obtained stay on the operation of the said portion of the adjudication order upheld by the Hon'ble CESTAT. I therefore proceed to implement the order of the CESTAT.

25. I find that as per above order of Hon'ble CESTAT, the confiscation ordered by the adjudicating authority of the goods which are as per LOA is incorrect and the impugned order to that extent was set aside and accordingly, lift seizure of the said goods. I therefore find that the said goods are required to be released and permitted to enter into SEZ for the specified operations in accordance with the law.

26. Regarding the balance quantity of 15470 kgs of such items viz:- used soft toys, assorted/mixed bags, purses, leather jackets and carpets not required and not permitted to be imported as per LOA granted to the Noticee, I find that the CESTAT has upheld order of the earlier adjudicating authority confiscating the same.

27. I therefore find that in view of the above order of Hon'ble CESTAT, the issue to be decided, now in this case, is that the items like used soft toys, assorted/mixed bags, purses, leather jackets and carpets, which are not included in LOA granted to the importer, for import into the SEZ for authorized operations, are to be confiscated. The value of the said goods should be determined in accordance with the law and the redemption fine in proportion to the value of such goods should be imposed and imposition of proportionate penalties.

28. I find that the items which are not included in the LOA are listed in brief facts at para No 2 and accordingly there are 15470 kgs of such items viz:- used soft toys, assorted/mixed bags, purses, leather jackets and carpets. These goods were not declared in the Bill of Entry. The imported consignments had been declared as "Old and Used Worn Clothing completely fumigated", in the Bills of Entry and its corresponding value. Therefore, the declared values is not applicable to these non-declared items and were liable to be rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and the value has to be re-determined in terms of the Valuation Rules. The value of the imported goods had to be determined by using

reasonable means in terms of Rule 9 of CVR, 2007 (Residual method) due to non-applicability of Rule 4 to 8 as explained, in detail, in the SCN. The value of the same was determined, as per the findings which was recorded by my predecessor in the earlier OIO, and thus, the value will be the value as ascertained by the Government approved valuer M/s Accurate Appraisal Services by using reasonable means that were consistent with the principles and general provision of Valuation Rules, 2007 and considering the international prices of similar / identical goods prevailing in international course of trade and on the basis of data available in India. Accordingly the value of these non-declared cargo come to Rs.17,28,483/-, calculation of which is explained in Annexure enclosed with this order.

29. I find that the importer by not declaring the items such as used soft toys, assorted/mixed bags, purses, leather jackets and carpets, as mentioned above, which are not permitted by LOA, had unauthorisedly imported these goods and contravened the provisions of Section 111(d) & 111(m) of Customs Act, 1962. During enquiry the importer has admitted that each container had a detailed Packing List in the form of a 'Load Port Report' which accurately indicate the type of goods contained in each bale and on examination, goods were found to be completely tallying with the Load Port Reports, which contain the details of the actual description of items in each bale, a Code number identifying each item, number of bales and quantity of each item, as explained in para 2 of brief facts above. These Packing Lists were not presented/declared with any of the Bills of Entry. All the 24 load port reports (Korean origin) out of 25 containers examined and their corresponding examination reports were annexed to the show cause notice.

29.1 The above mentioned non-declared goods such as used soft toys, assorted/mixed bags, purses, leather jackets and carpets which were not covered under the CTH 6309 under the definition of old and worn clothing were thus, imported in violation of the LOA. As per Section 15(9) of the SEZ Act, 2005, a LOA was issued to a unit to undertake such operations which the Development Commissioner may authorize and mentioned in the LOA. In this case, the LOA was issued for import of 'old and used clothes' and for the purpose of sorting and export of good quality clothes while the non-export quality clothes were to be mutilated into 'wipers'. The non-declared goods were, therefore, not allowed to be imported without payment of duty since no authorized operations had been permitted with these goods in terms of section 27(1) of the SEZ Act, 2005. Thus, these imported goods cannot be allowed to be admitted into SEZ in terms of section 33 of the SEZ Act, 2005, as no authorized operations could be carried out using these goods.

29.2 Further, these goods were not allowed to be admitted into SEZ without a specific licence / authorisation issued by DGFT for the purpose. The imported consignment was prohibited for import under the provisions of Section 11 of Custom Act, 1962 read with Section 5 of Foreign Trade (Development and Regulation) Act,

1992 unless backed with above-mentioned license, permission from the Licensing authority. The importer possessed no such license/ authorization and therefore, the importer is appeared to have devised an ingenious way of importing the same in the name of unit of SEZ for diversion of the same into DTA.

29.3 In view of the above discussion, the imported goods are liable for confiscation under provisions of Section 111(d) of the Custom Act, 1962. For the mis- declaration of goods, value and concealment and non declaration of goods, the goods were liable for confiscation under provisions of Section 111(m) of the Custom Act 1962. Thus, for the deliberate and organized acts of duty evasion and importing non-declared goods' (restricted goods) unauthorizedly, the importer is liable for penalty under Section 112(a) of the Custom Act, 1962.

29.4 The Noticee in his defence reply has submitted that Section 23(2) of the Customs Act, 1962 allows owner of any imported goods to relinquish his title to the goods any time before an order for clearance of the goods for home consumption under Section 47 or an order permitting the deposit of the goods in a warehouse under Section 60 has been made, provided that no offence appear to have been committed under the Customs Act, 1962 or any other law for the time being in force and in this case they have not committed any offence. In this regard I find that the officers of Customs, on the basis of information that the importer have grossly mis-declared and undervalued the imported consignment and on examination only it was found to have contained items such as used soft toys, assorted/mixed bags, purses, leather jackets and carpets in the consignment which are not allowed under LOA/LOI issued to them by Development Commissioner and same are also not declared in the Bill of Entry filed by them. Such un-declared items were prohibited for import under the provisions of Section 11 of Custom Act, 1962 read with Section 5 of Foreign Trade (Development and Regulation) Act, 1992 unless backed with above-mentioned license, permission from the Licensing authority. These undeclared goods do not have any such licence /permission for import and thereby the same are liable for confiscation as provided under Section 111 of C.A. 1962. Even, Hon'ble CESTAT under its above cited order has affirmed that the goods which are not included in LOA/LOI are required to be confiscated and adjudged to proportionate fine and penalty. In view of above discussion on law position and direction of CESTAT as well as intention of the noticee to relinquish the title expressed during the course of this proceedings, I find that the subject goods are required to be confiscated absolutely and accordingly I ordered so.

30. The Noticee's contention that penalty under Section 112(a) is not impossible I find that the imported goods contain goods which are not allowed under LOA, are not declared by the Noticee while filing B/E. Also they have mis- declared description and value of these goods as that of worn clothing. The Noticee was well aware that the imported goods contain undeclared goods from the Load Port Report which was with them from the beginning but not submitted with the B/E and shown only at the time of

investigation. Thus the act or omission on part of the importer render them liable for penal action in terms of Section 112(a) of C.A. 1962.

30.1 Mr. Juned Yakub Nathani, partner of the importer, stated in his statement that he looks after the matters related to export, import and DTA sale of M/s Anita Exports. He stated that they did not have written agreements / contracts with their foreign suppliers/buyers and the rate is finalized through personal meetings; that they had filed TP for such import but they **had not submitted load port report at that time**. He had been shown the list of examined cargo alongwith the Accurate Appraisal Services' valuation report, he did not agree with the same. **The valuation report also contain the value of used soft toys, assorted/mixed bags, purses, leather jackets and carpets, with which he was in agreement** and also stated that he was not allowed to import such goods as per LOA. He further, stated that their company, M/s. Anita Export, was issued a LOA, in which used soft toys, assorted/mixed bags, purses, leather jackets and carpets are not permitted for import and also stated that they were ready to pay any fine or penalty imposed on them for import of such goods. Mr. Juned Yakub Nathani was well aware that no 'Trading activity' has been authorized for them, the imports of non-declared goods were in-eligible for imports by the importer in terms of LOA.

30.2 As admitted above, Mr. Juned Yakub Nathani, the partner of the importer was well aware that the imported cargo, inter alia, contain used soft toys, assorted/mixed bags, purses, leather jackets and carpets from the beginning **from the Load Port Report** itself, which was with him but not submitted with the Bills of Entry while filing them with the Department and submitted only during the inquiry, the value of which is bound to be higher than that of the old and worn clothing imported by them, goes to show that the importer, represented by Mr. Juned Yakub Nathwani have mis-declared the goods with the full knowledge that these cargo contain other non-declared goods also, with an intention to evade payment of duty. Mr. Juned Yakub Nathwani was at the centre of the events and knows the imported cargo, inter alia, contain used soft toys, assorted/mixed bags, purses, leather jackets and carpets from the beginning and his acts or omission would render such cargo liable for confiscation under Section 111(d) & (m) of the Customs Act, 1962 and therefore, liable for penalty under Section 112(a) of the Customs Act, 1962. The argument of the Noticee that penalty cannot be imposed simultaneously on firm and its partner and placed reliance on some citations which are out of place as there are a number cases under which it is held that penalty can very well be imposed, both on firm and its partner, where if specific role is attributed to the partner. I would like to rely on decision of Hon'ble CESTAT, Principal Bench, New Delhi [Court II] in case of Prince International Vs. Commissioner of Central Excise, Noida. [2014 (310) ELT 545 (Tri-Del)] [Final Order Nos. C/A/53645-53647/2014-CU(DB), dated 18-9-2014 in Appeal Nos. C/665-666/2009-CU(DB) and C/29/2010-CU(DB)] under which CESTAT refused to interfere with the imposition of penalty of Rs. 10 lakh on M/s.

Prince International and penalty of Rs. 2.5 lakh imposed on its partner Shri Gyan Chand.

In another such case Hon'ble High Court of Madras in case of C. Eswaran Vs. Commissioner of Customs, Coimbatore [2014 (306) ELT 264 (Mad)][final Order C.M.A. Nos. 811 & 812 of 2012 and M.P. Nos. 1 of 2012 (2 Nos.), decided on 19-7-2012] held that the Appellant in his capacity as partner abetted the firm to commit the offence - Statutory authority fully justified in imposing fine on firm as well as partner. Thus the argument put forth by the Noticee do not hold any water and I propose to impose penalty on both firm and its active partner who has played the vital role.

31. The argument of the Noticee citing the principles as laid down by the Hon'ble Supreme Court in the land mark case of Messrs Hindustan Steel Limited reported in **1978 ELT (J159)** I find that the above case is not applicable in the case on hand in as much as the Court has held that no penalty should be imposed for technical or venial breach of legal provision or where the breach flows from the bona fide belief that offender is not liable to act in the manner prescribed by the statute. The present case is clearly a case of mis-declaration as far as description is concerned and mis-declaration of value with the full knowledge that the imported goods contain undeclared goods. Therefore, reliance placed on the above citation is misplaced.

In view of the aforementioned discussions, I hereby pass the following order.

::O R D E R::

- (i) The declared value of Rs. 1,83,468/- for 15470 Kgs of non-declared goods viz:- used soft toys, assorted/mixed bags, purses, leather jackets and carpets, contained in 20 containers is hereby rejected under Rule 12 and the value is re-determined in terms of the Customs Valuation Rules, 2007.
- (ii) The total assessable value of 15470 Kgs non-declared goods i.e. used soft toys, assorted/mixed bags, purses, leather jackets and carpets imported in 20 containers corresponding to 20 BEs is re-determined as Rs.17,28, 483/- (Rupees Seventeen lakhs Twenty eight thousand four hundred eighty three only) in terms of the Rule 9 of Customs Valuation Rules, 2007.
- (iii) I order absolute confiscation of the imported 'used soft toys, assorted/mixed bags, purses, leather jackets and carpets which were mis-declared as 'Old and Used clothes' valued at Rs.17,28, 483/- (Rupees Seventeen lakhs Twenty eight thousand four hundred eighty three only) under Section 111 (d) and (m) of the Custom Act, 1962 in as much they have relinquished the title to the goods in terms of Section 23 of the Custom Act, 1962.

- (iv) I impose a penalty of Rs.2,00,000/- (Rupees Two Lakhs only) under Section 112(a) of the Custom Act, 1962 on M/s. Anita Exports.
- (v) I also impose a penalty of Rs.75,000/- (Rupees Seventy Five Thousand only) under Section 112(a) of the Customs Act, 1962 on Shri Juned Yakub Nathani, Partner of M/s Anita Exports.
- (vi) I order appropriation of above imposed penalties of Rs.2,75,000/- from the already deposited amount of Rs.25,00,000/- vide GAR7 Challan No.1 dated 29.10.2011, by the importer.

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

Encl: As above

(P.V.R.REDDY)
PRINCIPAL COMMISSIONER

By Registered Post AD / Hand Delivery :

F.No. S/10-20/ADJ-COMMR/DENOVO/15-16

Date: 20.10 .2015

To,

1. M/s Anita Exports,
Plot No.35/36, Sector-II, KASEZ,
Gandhidham.
2. Shri Juned Yakub Nathani,
Partner of M/s Anita Exports
Plot No.35/36, Sector-II, KASEZ,
Gandhidham.

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone.
2. The Development Commissioner, KASEZ, Gandhidham.
3. The Assistant Commissioner, (SIIB /Recovery Section), Customs House, Kandla.
4. Guard File