slma xuLk AayuKt ka kayaRly,
nvln 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/COMMR/PVRR/15/2015-16
C	Passed by	SHRI P.V.R. REDDY PRINCIPAL COMMISSIONER OF CUSTOMS, KANDLA.
D	Date of order	29.10.2015
E	Date of issue	02.11.2015
F	SCN No. & Date	S/43-30/2011-12/SIIB dated 17.02.2012. Remand proceedings as per CESTAT, Ahmedabad Order No. A/10356 to 10361/WZB/AHD/2013 dated 01.012013/12.03.2013
G	Noticee	M/s Safari Fine Clothing P. Ltd., Shed No.280-A, 281-A, Sector-III, 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 Safari Fine Clothing Ltd information was importing grossly mis-declared and undervalued consignments of Old and Used/ Worn Clothing (CTH 63090000) 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 these units, Kandla Customs initiated investigations into such imports. In all, ten (10) containers of goods declared as 'Old & Used Worn Clothing' were examined. Of these nine (9) containers were imported from 'Korea' and one (01) container was imported from 'Chile'. In the Bill of Entry for Home Consumption the imported goods were declared as "Old & Used Mix 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" (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. During examination it was observed that Old and Worn Clothing were packed in bales of 80 or 100kgs 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. It was obtained from the importer for all the consignments which illustrated that imported goods were completely segregated and sorted and did not require any further processing.

1.3 On examination, goods were found to be completely tallying with the Load Port Reports which had 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. These detailed Packing Lists were not presented with any of the Bills of Entry. All the 10 load port reports pertaining to the 10 containers and their corresponding examination reports were annexed to the show cause notice.

1.4. The imported consignments had been declared in the Bills of Entry as "Old & Used Mix Clothing", classifiable under tariff heading **63090000**. However, on examination of these consignments, goods such as **mixed bags , leather jackets, 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 in **6** containers was as under:

S. No.	Bill of Entry	Date of Bill of Entry	Container No.	Description of non-declared goods found	Quantity
1	8580	27.7.2011	DFSU6280622	Carpets	800kg
2	6790	16.6.2011	BMOU4718030	Leather jacket, mix bags,	2000 kg

				carpets	
3	6985	22.6.2011	YMLU8226343	Leather jackets	160kg
4	7920	7.11.2011	DFSU6744234	Mixed Bag, Carpets, Leather jackets	2080kg
5	9751	28.8.2011	DFSU6744338	Leather jackets	160kg
6	7178	24.6.2011	WFHU5095250	Mixed Bags, Leather jackets	1280kg

1.5. During examination of the total 10 containers, segregated and sorted old clothes in good condition which were found predominantly were JACKETS (950 Bales& 91895 Kg), Blankets (160Bales&12640 Kg). These bales were in the form of finished goods and required no further processing and 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.

1.6. It appeared that the subject goods had already been sorted, segregated and processed in Korea / Chile i.e. they had been processed by the recyclers in the country of Origin and hence, they appeared to be finished goods requiring no further sorting, segregation, reconditioning or processing.

2. The Importer had been granted permission for setting up of a manufacturing unit in the SEZ vide Letter of Approval dated 5.10.2001. As per the Rule 19 of the SEZ Rules, 2006 (relevant excerpts reproduced for reference):

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.

2.1 In terms of the LOA dated 5.10.2001 issued to the Importer by the Development Commissioner, KASEZ, the authorized activity (and the item of manufacture) "T-shirt wipers, clothing, towel rags, fleece wipers, color t-shirt wipers". There was a condition to have a projected Export turnover of USD 64,10,040/- and Net Foreign Exchange Earning (NFE) of USD 18,82,140/- in five years. It further had condition therein that Import / Local purchase would be permitted of all items except those listed in prohibited

list for import/export. However, there was 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:

2.2 " 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".

(i) The term 'wiper' refers to 'Rags' (classifiable under CTH 6310) obtained after mutilation of clothes which are not export-worthy. In brief, the permitted activities for the Importer are import of 'worn clothing' of CTH 63090000, segregation of these clothes for the purpose of exports and the remaining clothes are to be mutilated to make them as wipers before being allowed for DTA clearance on payment of appropriate duty of customs in compliance with the CBEC circular No. 36/2000 Customs dated 8.5.2000. The unit has to achieve positive Net Foreign Earnings (NFE) using these processes. Thus, no activity of 'Trading of clothes or other articles' by the Importer is permitted in the premises.

(ii) 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 has 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 could 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.

3. Statement of Mr. Hatim H. Hamdani was recorded on 12.9.2011under Section 108 of the Customs Act, 1962., and the statement of Shri Manmohan Singh, Additional Director of M/s Safari Fine Clothing P. Ltd recorded on 01.03.2012.

4. In view of above, an offence case was booked against M/s. Safari Fine Clothing P.Ltd. and goods declared as "Old & Used Worn Clothing completely fumigated RITC 63090000-Raw materials", 241666 Kgs imported in 10 Containers valued at Rs.1,32,29,302/- 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 14/15.12.2011.

5. 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 during examination that the actual grades of the imported Worn Clothing though

available with the importer, were not declared deliberately in the Bill of entry at the time of import. 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.

6. During the investigations, few consignments of imports by various KASEZ units from countries such as US, Europe etc (other than Korea and Chile) were also examined. The examination of such goods, including those imported by M/s Safari fine clothing P Ltd, 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 80-100kg 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 is required against these goods which are ready for sale. Further all the bales of Korean origin containers had specific marks and numbers/ codes given by the supplier by which the goods in different bales could be identified easily. Thus, there was massive difference in quality, packing and marking of the Korean goods compared to that of Non-Korean goods. The differentiation was all the more important because the authorized activities as per the LOA was 'manufacturing activity' and it appeared that the non-Korean clothes were found to be in the nature of 'mix clothing' which would require the manufacturing activity of sorting and processing whereas the Korean clothes were in nature of sorted, processed and ready for sale which required no further 'manufacturing activity'. In the wake of these facts and that no 'Trading activity' had been authorized for this Importer, the imports of whole of Korean goods, even other than non-declared goods appeared in-eligible for imports by the importer in terms of LOA.

7. The declared value of the Korean and Non-Korean goods imported by this unit M/s Safari fine clothing P Ltd. was around the same i.e, in the range of USD 0.15 per kg – USD 0.20 per kg. Korean goods were found to be in pre-sorted and segregated bales of 80-100 kgs each while those from US/ Europe were unsorted/mixed (clothes) bales with appreciable wear and tear having an average bale size of 350-400 kgs.

(i) The goods of Korean origin, as discussed hereinabove, 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 and used clothes'. 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.Manmohan Singh, Additional Director of M/s Safari Fine Clothing P Ltd vide letter dated 9.1.2012 had stated that their firm had not written contract with any of the suppliers of 'old and used cloth' and as a matter of policy they did not enter into any contracts. The Director of the unit Mr. Hatim H.Hamdani, in his statement recorded on 12.9.2011 stated that imports of worn clothing from Korea were made by his company without his knowledge. Based on his experience and knowledge of international market, he stated that valuation of 'used cloth' exported from korea ranges from USD 0.80 to USD 1.20 per Kg for the grade 'A' which meant that these clothing would not have tear & un-removable stains and it will include name brands, cream products and vintage wear. He further stated that winter wear such as Jackets etc will be in the range of USD 0.60 per kg CNF. Since the import values of Korean goods declared by his unit was in the range of USD 0.17 to USD 0.25 per kg, Mr Hatim was asked if he could provide with the actual invoices from the Korean suppliers, he stated that he would try to produce the actual invoices from the Korean suppliers from whom his company had made imports of Used/worn clothing.

(ii) Mr. Hatim however, failed to provide the actual invoices and was not traceable during the later course of investigations. The Importer failed to provide information/ documents sought by the department and hence failed to substantiate the declared transaction value. Further the transaction value declared was for the 'old and used clothes' and the imports were found to contain substantial non-declared goods as well as segregated and sorted finished goods. Hence, the declared transaction value could not cover the non-declared goods in terms of Rule 12(1) of the Custom Valuation Rules, 2007.

(iii) 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. These include mis-declaration in description and quality of goods and non-declaration of parameters such as brand, grade, specifications which have relevance to value. In the instant cases it was found that there had been mis-declaration in description and quality of imported goods. Further, the actual grade of the imported Worn Clothing, though available with the importer, was not declared at the time of import. For these reasons the value declared by the importer was liable to be rejected under provisions of Rule 12. 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.

8. Since, the declared value of the goods imported from Korea was liable for rejection under Rule 12(1) of the Customs Valuation Rules (CVR), 2007, the value had to be determined by using reasonable means in terms of Rule 9 of CVR, 2007 (Residual

method) because of non-applicability of Rule 4 to 8. This office had employed the services of Govt approved valuers M/s Accurate Appraisal Services who had taken into consideration, the physical condition of the goods, the origin of cargo, quality and various international market prices and re-determined in terms of the Customs Valuation Rules, 2007 as Rs. 1,18,26,000/- FOB whereas the declared value was Rs. 22,65,512/- CIF for 241.666 MT.

9. 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) is around USD 2400 (Approx Rs.115200). The average weight of a 40' container carrying 'old/used and mixed clothes' was around 20,000 kg. Thus, assessable value was arrived at by using the below mentioned formula:-

Assessable Value = FOB value + Freight for 10 containers + insurance (1.125% of FOB) + Landing charges (1% of CIF) = Rs.1,32,29,302/-

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. Even if it was assumed that the goods were imported for the purpose of 100% export (which is a trading activity and not manufacturing activity), it was seen that these goods did not require any further processes to be carried out and therefore, not allowed to be imported without payment of duty since no authorized operations can be carried out with these goods in terms of section 27(1) of the SEZ Act, 2005. It is 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 were not covered under the definition of old and worn clothing which 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 could not 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 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 Licencing authority. The importer possessed no such license/ authorisation.

10. 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 misdeclaration 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.

11. Therefore, M/s. Safari Fine Clothing Pvt Ltd was called upon to show cause as to why:-

(a) the declared value of Rs. 22,65,512/- for the goods imported in 10 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 Customs Valuation Rules, 2007 .

(b) the total assessable value of goods (241.666 MT) of Worn clothing imported in 10 containers corresponding to 10 BEs should not be re-determined as Rs. 1,32,29,302/- (Rupees One Crore Thirty Two Lakhs Twenty Nine Thousand Three Hundred and Two Only).

(c) the goods having a re-determined value of Rs.1,32,29,302/- should not be confiscated under Section 111(m) and section 111(d) of the Customs Act, 1962.

(d) why penalty should not be imposed on the importer M/s Safari Fine Clothing P. Ltd, under Section 112 (a) of the Customs Act, 1962;

(e) why penalty should not be imposed on Shri Manmohan Singh, Additional Director of M/s Safari Fine Clothing P. Ltd under Section 112 (a) of the Customs Act, 1962;

12. The adjudicating authority, after granting personal hearing and considering the defence reply submitted by the importer and based on his own findings passed following order vide **OIO No. KDL/COMMR/34/2012-13 dated 17.10.2012**

::O R D E R::

(i) The declared value of Rs. 22,65,512/- for the 10 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 (241.666 MTs) of Worn clothing imported in 10 containers corresponding to 25 BEs is re-determined as 1,32,29,302/- (Rupees One crore thirty two lakhs twenty nine thousand three hundred two 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.22,65,512/- (Rupees Twenty two lakhs sixty five thousand five hundred twelve 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.14,00,000/- (Rupees Fourteen Lakhs only) under Section 125(1) of the Customs Act, 1962.

(iv) Imposed a penalty of Rs 2,50,000/- (Rupees Two Lakhs fifty thousand only) under Section 112(a) of the Customs Act, 1962 on M/s.Safari Fine Clothing Pvt. Ltd.

(v) Also imposed a penalty of Rs.1,00,000/- (Rupees One Lakh only) under Section 112(a) of the Customs Act, 1962 on Shri Manmohan Singh, Additional Director of M/s Safari Fine Clothing Pvt. Ltd.

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

13. Being aggrieved by the above cited order viz:- OIO No. KDL/COMMR/34/2012-13 dated 17.10.2012 the importer had preferred an appeal in Hon'ble CESTAT Ahmedabad which vide its order No. A/10356 to 10361/WZB/AHD/2013 dated 01.012013/12.03.2013 ordered 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."

14. Against the above cited order of Hon'ble CESTAT Ahmedabad order No. A/10356 to 10361/WZB/AHD/2013 dated 01.012013/12.03.2013 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.6934of 2013 vide order dated 2312.2014 (Flagged as Annexure-B) 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."

DENOVO PROCEEDINGS

DEFENCE REPLY & PERSONAL HEARING

15. 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 2.68%; 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 2.68% 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.

16. 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.

17. 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.

18. 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.

19. 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.

. 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

against him. Hence, the proposal of imposing personal penalty on him under this Section deserves to be vacated in the interest of justice.

21. 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 & FINDINGS

22. I have carefully gone through the case records pertaining to the issue. I find that earlier OIO No. KDL/COMMR/34/2012-13 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 01.012013/12.03.2013. 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 Hon'ble CESTAT.

23. 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.

24. Regarding the balance quantity of 6480 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 Hon'ble CESTAT has upheld order of the earlier adjudicating authority confiscating the same.

25. 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.

26. I notice that the items which are not included in the LOA are listed in brief facts at para No1.4 and accordingly there are 6480 kgs of such items viz:- mixed bags, 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 mixed Clothing", 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 are 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.**3,57,896**/-, calculation of which is explained in Annexure enclosed with this order. The importer had been shown the valuation report in respect of used soft toys, assorted/mixed bags, purses, leather jackets and carpets, prepared by M/s Accurate Appraisal Services' with which he was in agreement.

27. I find that the importer by not declaring the items such as mixed bags, leather jackets and carpets, as mentioned above, which are not permitted by LOA, had unauthorisedly imported these goods and contravened the provisions of Sections 111(d) & 111(m) of the Customs Act, 1962. During enquiry the importer has submitted the 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 1.4 of brief facts above. These Packing Lists were not presented/declared with any of the Bills of Entry. All the 10 load port reports examined and their corresponding examination reports were annexed to the show cause notice.

28. The above mentioned non-declared goods such as mixed bags, 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, 2006, as no authorized operations could be carried out using these goods.

29. 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.

30. 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.

31. The Noticee in his defence reply has submitted that 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, 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.

32. 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

33. Mr. Manmohan Singh, Additional Director of M/s Safari Fine Clothing P Ltd in his statement dated 01.03.2012 had stated that their firm had not written contract with any of the suppliers of 'old and used cloth' and as a matter of policy they did not enter into any contracts. He further stated in his statement that he looks after the matters related to import, exports and DTA sale. He stated that they had filed TP for such import but they **had not submitted load port report at that time** and also stated that he was not allowed to import such goods as per LOA. It was also stated that they had not ordered for these goods, the supplier had sent these goods by mistake. He further stated that their company was issued a LOA, in which mixed bags, leather jackets and carpets are not permitted for import. Mr. Manmohan Singh 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.

34. As admitted above, Mr. Manmohan Singh, Additional Director 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, 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. Manmohan Singh 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. Manmohan Singh was in-charge or responsible for looking after import, export and DTA sale 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 on Shri Manmohan Singh because he acted as an employee of the company citing and relying on the case *of Z.U. Alvi V/s. CCE, Bhopal reported in* **2000 (36) RLT 721***,* wherein Appellate Tribunal has held that when an employee of a company was dealing with the goods in his official capacity as an employee of the manufacturer, it was not a case where such an employee was covered under penal provision and that when a person was not in-charge or responsible for the conduct of business of the manufacturer and was dealing with the goods only in his official capacity as an employee, he could not be considered to be a person liable for penalty. However, I find that Hon'ble CESTAT,

Principal Bench, New Delhi in case of M/s DEWAS FABRICS LTD Vs. COMMISSIONER OF CENTRAL EXCISE, INDORE [Final Order Nos. A/54463-54465/2014-EX(DB), dated 18-11-2014 in Appeal Nos. E/3813-3815/2005-EX(DB)] has categorically stated that "Penalty on director of EOU - Clearance of goods duty free for export but sent to domestic manufacturer - Abatement - Entire illegal operation done with knowledge and connivance of director of EOU - He allowed goods to be cleared on ARE-1s to Surat while under ARE-1s the goods have to be directly sent to port - He has not questioned the documentary evidence of non-export in the form of Export General Manifests which were part of RUDs - Penalty upheld in view of gravity and nature of such blatant fraud - Rule 26 of Central Excise Rules, 2002".

Mr. Manmohan Singh had accepted that the non-declared goods found in the consignment were not covered under the Letter of Approval (LOA), he stated that this was supplied by mistake which appeared to be an afterthought after the detection made during examination. The ignorance feigning in respect of load port report that he was not aware of any such load port report is because the same was with him but not submitted with the Bills of Entry while filing them with the Department and submitted only during the inquiry. There is no reason to believe him on this count as it was a practice to supply load port report alongwith each container, as admitted by other contemporary importers. Mr. Manmohan Singh was at the centre of the events and was in-charge of import, knows the imported cargo, inter alia, contain 'leather jackets, used school bags, used bags, purses and Synthetic 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. Thus the argument put forth by the Noticee do not hold any water and I propose to impose penalty on both firm and its Additional Director who has played the vital role.

35. 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. 60747 /- for 6480 Kgs of non-declared goods contained in 6 containers is hereby rejected under Rule 12 and the value is re-determined in terms of the Custom Valuation Rules, 2007.

(ii) (Rupees Three lakh fifty seven thousand eight hundred ninety six only) in terms of the Rule 9 of Customs Valuation Rules, 2007.

(iii) I order absolute confiscation of the imported 'leather jackets, used school bags, used bags, purses and Synthetic carpets which were mis-declared as 'Old and Used clothes' valued at Rs. 3,57,896/- (Rupees Three lakh fifty seven thousand eight hundred ninety six only) under Section 111 (d) and (m) of the Custom Act, 1962 in as much as 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.50,000/- (Rupees Fifty thousand only) under Section 112(a) of the Custom Act, 1962 on M/s. Safari Fine Clothing P Ltd.

(v) I also impose a penalty of Rs.25,000/- (Rupees Twenty five thousand only) under Section 112(a) of the Customs Act, 1962 on Mr. Manmohan Singh, Additional Director of M/s. Safari Fine Clothing P Ltd

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)
PRICIPAL COMMISSIONER

By Registered Post AD / Hand Delivery :

F .No. S/10-20/ADJ-COMMR/DENOVO/15-16 Date: 29.10 .2015

(1) M/s Safari Fine Clothing P. Ltd.,
Shed No.280-A, 281-A, Sector-III, KASEZ,
Gandhidham.

(2) Mr. Manmohan Singh,
Additional Director of M/s Safari Fine Clothing P. Ltd.,
Shed No.280-A, 281-A, Sector-III, 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.