



**OFFICE OF THE PRINCIPAL COMMISSIONER
CUSTOMS COMMISSIONERATE KUTCH
CUSTOM HOUSE KANDLA
NEAR BALAJI TEMPLE, NEW KANDLA**

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A	File No.	S/10-207/Adj/COMMR/Denovo-Shivam/2016-17
B	Order-in-Original No.	KDL-CUSTM-000-COM-021-17-18
C	Passed by	SHRI P.V.R. REDDY Principal Commissioner, Custom House, Kandla.
D	Date of order	30.05.2017
E	Date of issue	30.05.2017
F	Show Cause Notices No. & Date	FTZ/CUS/4/41/97-98 Dated 20.04.1998 (Denovo Proceeding)
G	Noticee(s)/Co- Noticee(s)	M/s Shivam Scrap Re-cycling P Ltd. Shed No. 1/18, Sector No. 1, Kandla Special Economic Zone, Gandhidham (Kutch)

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.
4. Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise 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.

OIO No.: KDL-CUSTM-000-COM-021-17-18 DATED 30.05.2017

1.1 Present proceedings have arisen out of CESTAT Order No. 10079/2017 dated 16.01.2017, whereby the Order-In-Original No. KDL/COMMR/46 /Denovo/2008 dated 21.11.2008 was set aside and the matter was remanded back to for *de novo* decision to the adjudicating authority namely Commissioner of Customs, Kandla with direction to decide the matter within four months of communication of the order after giving necessary opportunity of personal hearing and submissions of evidence as per law.

1.2 Stated in brief the issue involved is that M/s Shivam Scrap Re-cycling P Ltd., a unit of Kandla Free Trade Zone, Gandhidham (hereinafter referred to the Noticee) was engaged in manufacturing of metal scrap from unserviceable scrap machinery items. The Assistant Development Commissioner of Kandla Free Trade Zone, Gandhidham granted a permission to the Noticee for clearance of 25% of their production in DTA as advance DTA sales out of trial production subject to adjustment of the facility against exports during next years production, against which the Noticee had executed Bond before the Development Commissioner undertaking therein to fulfil the prescribed export obligation for the first production year as well as achieving the value addition and to pay duty on the goods cleared in DTA in the event the Noticee failed to fulfil prescribed export obligation and/or failed to achieve prescribed value addition. The Noticee cleared goods valued at Rs. 20,95,614/- into DTA and availed benefit of concessional exemption Notification No. 2/95-CE dated 04.01.1995. As reported by the Development Commissioner, KFTZ that the Noticee have failed to fulfil export obligation and failed to achieve prescribed value addition and action may be taken to recover the differential duty leviable on the goods cleared in DTA, as the Noticee have violated the provisions of the Letter of Permission as well as terms of Bond executed by the Noticee.

1.3 Therefore the Noticee was called upon, vide Show Cause Notice No. FTZ/CUS/4/41/97-98 dated 20.04.1998, to show cause as to why duty of Rs. 4,47,094/- should not be recovered under Section 11 of the Central Excise Act, 1944 along with interest @20% and the goods valued at Rs. 20,95,614/- should not be confiscated under Rule 173Q of the Central Excise Rules, 1944 with consequential penal action under Rule 173Q of the Central Excise Rules, 1944.

2.1 The Show Cause Notice dated 20.04.1998 was adjudicated by the Commissioner of Customs, Kandla vide Order-in-Original No. KDL/COMMR/53/2000 dated 22.08.2000, whereby confirmed the demand of Rs. 4,47,094/- along with interest as well as order for confiscation of goods valued at Rs. 20,95,614/- under Rule 173Q of the Central Excise Rules, 1944 and gave an option to pay redemption fine of Rs. 2,25,000/- in lieu of confiscation and a penalty of Rs. 1,00,000/- was imposed upon Noticee under Rule 173Q of the Central Excise Rules, 1944.

2.2 The Noticee preferred an appeal before CESTAT. Hon'ble CESTAT vide order No. A/459/WZB06-C-II (CSTB) dated 08.06.2006 ordered that the provisions of Rule 173Q of the Central Excise Act, 1944 excludes the applicability of Rule 173Q to an assessee covered under Chapter VA of the Central Excise Act, 1944 and as the status of the appellant, the liability to confiscation & penalty under Rule 173 Q therefore cannot be upheld. Accordingly, the liability to confiscation & penalty as ordered was set aside

and the matter remitted to the original adjudicating authority to re-determine the duty liability & interest after hearing.

2.3 The Commissioner of Customs Kandla in denovo proceeding vide Order-in-Original No. KDL/COMMR/46/Denovo/2008 dated 21.11.2008 adjudicated the SCN a fresh whereby confirmed the duty of Rs. 4,47,094/- along with interest@20% by denying the benefit of Notification No. 2/95-CE dated 04.01.1995 with an order to enforce the Bond executed by the Noticee.

2.4 The Noticee once again preferred an appeal before the CESTAT. Hon'ble CESTAT vide Order No. 10079/2017 dated 16.01.2017 passed an order as under:

"5. After careful consideration of the facts of the case, the submissions of both sides and the case law cited, it appears that the appellant's submission that the demand of Central Excise Duty against them has to be considered in proportion to the value addition (export obligation) not made by them as per the guideline of CBEC Circular dated 19.08.1992(supra) has not been dealt with by the original adjudicating authority. There is no consensus about the quantum of value addition (export obligation) made or not made by the appellant during the relevant period. Therefore, the subject matter needs to be remanded for de novo decision to the adjudicating authority namely Commissioner of Customs, Kandla who is directed to decide the matter within four months of communication of this order after giving necessary opportunity of personal hearing and submissions of evidence as per law to the appellant.

6. In the result, the appeal is allowed by way of remand in the above terms."

2.5 Personal hearing in the matter was fixed on 11.04.2017 and 27.04.2017 and no one appeared for hearing on the said dates. However, on 23.05.2017, Shri Vaibhav Sharma, Advocate appeared at Custom House Kandla and he was informed to appear before the Principal Commissioner at Custom House Mundra for personal hearing, as the Principal Commissioner was at Mundra office due to an urgent work, but he was not ready to appear at Mundra office. He vide email dated 23.05.2017 submitted that Show Cause Notice NO. KFTZ/IA/G-78/2000/7576 dated 30.11.2000 issued by the Development Commissioner, KASEZ was not received by them till date and the same is mentioned at para 5.5. of the OIO issued in 2008. He also submitted that the SCN dated 30.11.2000 is not available in the file of Adjudication, Customs Kandla.

3.1.1 I have carefully gone through the entire case, submissions made by the Noticee, material available on record and directions given by the Hon'ble CESTAT.

3.1.2 Present proceedings have arisen out of CESTAT Order No. 10079/2017 dated 16.01.2017, whereby the Order-In-Original No. KDL/COMMR/46/Denovo/2008 dated 21.11.2008 was set aside and the matter was remanded back to for de novo decision to the adjudicating authority namely Commissioner of Customs, Kandla with direction to decide the matter within four months of communication of the order after giving necessary opportunity of personal hearing and submissions of evidence as per law. Considering time limit specified by the Hon'ble CESTAT, present matter is to be decided by end of May 2017

3.1.3 Even having specific direction to decide the matter in time bound manner, the Noticee did not file/submit any reply. Personal hearing in the matter was fixed on 11.04.2017, 27.04.2017 and on 23.05.2017. On 23.05.2017, Shri Vaibhav Sharma visited the Kandla office on 23.05.2017 and he was informed to appear before the Principal Commissioner at Custom House Mundra for personal hearing, but he was not ready to appear at Mundra. Thus in the present case, the Noticee neither submitted any submission/reply nor they appeared for personal hearing when the case was posted for hearing. They have been given sufficient opportunities in a very time bound manner in view of the specific time lines imposed by Hon'ble CESTAT.

3.1.4 In the present proceeding, I find that all Noticee did not file any reply as well as, though various opportunities were granted for personal hearing, but the Noticee did not avail the same.

3.1.6 In view of the above, I am of the view that sufficient opportunities have been granted to the Noticee to adhere principles of natural justice as well as direction of the Hon'ble CESTAT, therefore, I proceed to adjudicate the case ex-parte, based on the material available on record.

3.2.1 The Noticee vide email dated 23.005.2017 submitted that Show Cause Notice No. KFTZ/IA/G-78/2000/7576 dated 30.11.2000 issued by the Development Commissioner, KASEZ is mentioned in para 5.5 of the OIO issued in 2008 and SCN dated 30.11.2000 is not received by them till date. He also submitted that the SCN dated 30.11.2000 is not available in the file of Adjudication, Customs Kandla.

3.2.2 In this regard, I find that the Show Cause Notice No. KFTZ/IA/G-78/2000/7576 dated 30.11.2000 was forwarded by the Deputy Commissioner of Customs, KASEZ to this office vide letter FTZ/CUS/4/41/97-98 dated 24.09.2008 well before issuance of the OIO dated 21.11.2008, wherein, there is mention of said SCN. The SCN was issued on 30.11.2000 to the Noticee and OIO mentioning the said SCN was issued on 24.11.2008. The Noticee was aware of mentioning the said SCN since November 2008, but the Noticee did not bother to find the fact of the SCN. Also the Noticee preferred appeal before the Hon'ble CESTA against the OIO, wherein there is mention of said SCN, however, the Noticee did not raise the issue of non receipt of said SCN before the Hon'ble CESTAT. Raising the non receipt of SCN dated 30.11.2000 first time on 23.05.2017, that too at the last movement of process of time bound adjudication process is not acceptable. The issue which were not raised before the Tribunal cannot be raised at the stage of denovo adjudication as the scope of this adjudication is limited only to examine the issues as ordered by the Tribunal. NO new ground can be raised at this stage nor will be entertained.

3.3.1 The issue in the present proceeding is to decide the demand of differential Duty of Excise leviable on the goods cleared in DTA, in case where the Noticee failed to fulfil export obligation as well as failed to achieve prescribed value addition.

3.3.2 The Noticee was granted Letter of Permission No. FTZ/IA/1502/93/5038 dated 08.06.1993 by the Development Commissioner, Free Trade Zone, Kandla to manufacture ferrous and non-ferrous metal scrap from un-serviceable scrap machineries items in Free Trade Zone of Kandla and export thereof subject to conditions imposed therein such as to fulfil export obligation by exporting 100% resultant production except permitted to

sell in DTA as well as to achieve a prescribed minimum value addition i.e. 20%.

3.3.3 The Assistant Development Commissioner, Free Trade Zone, Kandla granted a permission vide letter F. No. KFTZ/IA/1502/93/6630 dated 25.08.1995 to the Noticee for clearance of ferrous and non-ferrous metal scrap manufactured from un-serviceable scrap machineries items, valued at Rs. 21,04,489/-, into Domestic Tariff Area (DTA) as advance DTA sales, out of trial production operation carried out from 27.03.1995 for a period of three months as per value celling. The permission was granted subject to certain conditions that advance DTA sales was subject to adjustment of the facility against exports during next years production; that in case the Noticee failed to fulfil the requirement within next year period action shall be initiated to enforce the undertaking given in form of Bond dated 14.08.1995 etc.

3.3.4 The Noticee had executed Bond dated 14.08.1995 before the Development Commissioner whereby undertaken to fulfil the prescribed export obligation for the first production year as well as achieving the value addition and to pay duty on the goods cleared in DTA in the event the Noticee failed to fulfil prescribed export obligation and/or failed to achieve prescribed value addition.

3.4 The Noticee cleared ferrous and non-ferrous metal scrap manufactured from un-serviceable scrap machineries items, valued at Rs. 20,95,614/- into DTA [Rs. 15,99,450/- during 1995-96 and Rs. 496164 during 1996-97] and paid central excise duty by availing benefit of concessional exemption Notification No. 2/95-CE dated 04.01.1995.

3.5 A Show Cause Notice No. KFTZ/IA/G-78/2000/7576 dated 30.11.2000 was issued to the Noticee under Section 13 read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 by the Development Commissioner, KASEZ, wherein it was mentioned that export performance of the Noticee as on 31.03.1998 was reviewed for the period from 25.05.1995 to 31.03.1998 on the basis of progress report of the Noticee, which revealed that the Noticee had made export to the extent of Rs. 17.15 Lakhs as against the stipulated export obligation of Rs. 1566.00 Lakhs, consequently a shortfall in export obligation was of Rs. 1548.85 Lakhs. Further as against the prescribed value addition of 20% (industry norm) the Noticee achieved (-)114.22% value addition, thus the Noticee failed to fulfil the minimum value addition, in terms of Legal Undertaking executed by them.

3.6 Hon'ble CESTAT directed that Central Excise Duty against the Noticee has to be considered in proportion to the value addition (export obligation) not made by the Noticee, as per the guideline of CBEC Circular No. 305/178/92-FTT dated 19.08.1992. It is useful to refer the relevant text of the Circular as under:

"Export — Sale of goods in the Domestic Tariff Area (DTA) by Export Oriented Units (EOUs) and units in Export Processing Zones (EPZs)

F. No. 305/178/92-FTT, dated 19-8-1992

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Guidelines for sale of goods in the Domestic Tariff Subject : Area (DTA) by Export Oriented Units. (EOUs) and units in Export Processing Zones (EPZs).

I. DTA sale entitlement up to 25%/ 15%

Paragraph 102 (b) of the Export and Import Policy and paragraphs 181, 182 and 183 of the Handbook of Procedures (1992-97) provide for sale of goods in the DTA by EOUs and units in EPZs upto 25% or 15% as the case may be, of the value of their production. Such sales in the DTA will be governed by the following guidelines :

- (a) The sale of goods in the DTA will be subject to the payment of the applicable duties as notified from time to time by the Department of Revenue, Ministry of Finance, Government of India.
- (b) DTA sale entitlement will be applicable only to those goods that are approved for manufacture and export in the Letter of Permission/Letter of intent. No DTA sale will be permissible if such sale is specifically prohibited in the Letter of Permission/ Letter of Intent.
- (c) Units may opt for DTA sales on a quarterly, half yearly or annual basis by intimation to the Development Commissioner of the EPZ concerned.
- (d) Applications for DTA sales should be submitted within one year of the period of entitlement. The Development Commissioner of the EPZ concerned, may, if he deems it fit, extend this period by six months.
- (e) An application for DTA sale shall be accompanied by a statement indicating the ex-factory value of the goods produced (excluding rejects); ex-factory value of the goods actually exported; and the value of indigenous raw materials, components and consumables used in the manufacture of the exported goods. The statement shall be certified by an independent Cost/Chartered Accountant and endorsed by the Customs/Central Excise Officer having jurisdiction over the unit. The Development Commissioner of the EPZ concerned will determine the extent of the DTA sale admissible and issue an authorisation for removing a specified quantity of the goods to be sold in the DTA.
- (f) If the goods sought to be sold in the DTA requires any quality control certificate under any Act/Rule/Regulation, the DTA sale will be allowed only after the production of such a certificate.
- (g) DTA sale entitlement shall accrue only after the goods are exported during the relevant period as indicated under sub-para (c) above. However, this requirement may be waived in the case of such goods which, in the opinion of the Development Commissioner of the EPZ concerned, require trial production in order to produce goods of exportable quality.
- (h) Advance DTA Sale permission in respect of trial production shall not exceed 25% or 15% (as the case may be) of the ex-factory value of the production envisaged in the first year. Such advance DTA sale shall be adjusted against the subsequent entitlement for DTA Sale. The unit shall be required to execute a bond with the Development Commissioner of the EPZ concerned to cover the difference between the amount of duties paid on the advance DTA Sale and the full duties applicable on such goods.
- (i) The maximum DTA Sale entitlement of 25% or 15% as the case may be, is permissible if the value addition achieved by the unit is not less than the value addition stipulated in the Letter of Permission/Letter of Intent. In case the unit fails to achieve the value addition stipulated in the Letter of /Permission/Letter of Intent, the DTA sale entitlement will be determined as follows:
 - (i) If the value addition achieved is not less than 90% of the value addition stipulated in the Letter of Permission/Letter of Intent, the unit will receive the full DTA sale entitlement of 25% or 15%, as the case may be.
 - (ii) If the value addition achieved is less than 90% of the value addition stipulated in the Letter of Permission/Letter of Intent, the DTA sale entitlement will be determined according to the following formula:

Percentage achieved	
-----	X 25% or 15% (as the case may be)
Value addition percentage stipulated in the Letter of Permission/ Letter of Intent	

The DTA sale in both the cases mentioned above will be Permissible only if the value addition achieved is not less than the minimum level of value addition specified for the item in Appendix-II of the Export and Import Policy or where no such percentage is specified in that Appendix, the minimum value addition of 20% stipulated in paragraph 97 of the Export and Import Policy."

3.7.1 In the present case, the Noticee applied for advance DTA Sale permission in respect of trial production i.e. 25% of the ex-factory value of the production envisaged in the first year. The Assistant Development Commissioner, Free Trade Zone, Kandla granted a permission vide letter F. No. KFTZ/IA/1502/93/6630 dated 25.08.1995 to the Noticee for clearance of ferrous and non-ferrous metal scrap manufactured from un-serviceable scrap machineries items, valued at Rs. 21,04,489/-, into Domestic Tariff Area (DTA) as advance DTA sales, out of trial production operation carried out from 27.03.1995 for a period of three months as per value ceiling. The permission was granted subject to certain conditions that advance DTA sales was subject to adjustment of the facility against exports during next years production; that in case the Noticee failed to fulfil the requirement within next year period action shall be initiated to enforce the undertaking given in form of Bond dated 14.08.1995 etc.

3.7.2 In view of the permission granted to the Noticee for advance DTA sales the Noticee cleared the goods into DTA on payment of the applicable duties in terms of concessional exemption notification No. 2/1995-CE dated 04.01.1995.

3.7.3 In terms of the above circular the maximum DTA Sale entitlement of 25% is permissible if the value addition achieved by the unit is not less than the value addition stipulated in the Letter of Permission/Letter of Intent (i.e. 20%).

3.7.4 In the instant case the Noticee failed to achieve the value addition stipulated in the Letter of Permission, therefore, the DTA sale entitlement will be determined in terms of circular as under::

- (i) If the value addition achieved is not less than 90% of the (i) value addition stipulated in the Letter of Permission/Letter of Intent, the unit will receive the full DTA sale entitlement of 25% or 15%, as the case may be.
- (iii) If the value addition achieved is less than 90% of the value addition stipulated in the Letter of Permission/Letter of Intent, the DTA sale entitlement will be determined according to the formula given in the circular.

3.7.5 In the present case, the value addition achieved by the Noticee is (-) 114.22% which is less than 90% of the value addition stipulated in the Letter of Permission i.e. 20%, as per the guideline of the circular dated 19.08.1992, DTA sale entitlement is required to be determined according to the following formula:

Percentage achieved			
-----	X	25% (DTA entitlement)	
Value addition percentage			
Stipulated on LOP			
<i>Applying actual figures:</i>			
(-) 114.22			
-----	X	25%	=
20			(-) 1.43

3.7.6 By adopting the above formula, the DTA entitlement of the Noticee is comes to (-) 1.43%. Therefore, all the clearances into DTA are

4,47,094/- is required to be recovered from the Noticee under Section 11 of the Central Excise Act, 1944 (erstwhile position as in 1995) along with interest @20% by denying the benefit of exemption notification No. 2/1995-CE dated 04.01.1995 as well as by enforcing the Bond executed by the Noticee. The Noticee has failed to produce any evidence of exports made by them to substantiate their claims made before Hon'ble Tribunal.

4.0 In view of the above, I pass the following order:

ORDER

- (i) I confirm and order to recover duty of excise of Rs. 4,47,094/- under Section 11 of the Central Excise Act, 1944 (erstwhile position as in 1995) by denying the benefit of exemption notification No. 2/1995-CE dated 04.01.1995 as well as by enforcing the Bond executed by the Noticee. The confirmed duty shall be paid forthwith by M/s Shivam Scrap Re-cycling P Ltd.
- (ii) I order to charge and recover interest @20% on the confirmed duty, which should be paid forthwith by M/s Shivam Scrap Re-cycling P Ltd.

 30/5/17
[P.V.R. REDDY]
PRINCIPAL COMMISSIONER

BY RPAD/SPEED POST TO:

M/s Shivam Scrap Re-cycling P Ltd.
Shed No. 1/18, Sector No. 1,
Kandla Special Economic Zone,
Gandhidham (Kutch)

COPY TO:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Development Commissioner, KASEZ, Gandhidham
3. The Deputy Commissioner of Customs, KASEZ, Gandhidham
4. The Asstt./Deputy Commissioner (Recovery), CH, Kandla.
- ✓ 5. Guard file.