



OFFICE OF THE COMMISSIONER OF CUSTOMS

CUSTOM HOUSE KANDLA

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A	File No.	S/10-53/Adj/Commr/NOCIL/2018-19
B	Order-in-Original No.	KND-CUSTM-000-COM-12-18-19
C	Passed by	Shri Sanjay Kumar Agarwal Commissioner, Custom House, Kandla.
D	Date of order	20.12.2018
E	Date of issue	20.12.2018
F	Show Cause Notice No. & Date	DRI/KZU/CF/ENQ-80(INT-24)/2017/3419 dated 15.06.2018 issued by Additional Director General, DRI Zonal Unit, Kolkata
G	Noticee(s)/Co-Noticee(s)	M/s NOCIL Ltd, Mafatlal House, H.T. Parekh Marg, Backbay Reclamation, Churchgate, Mumbai-400020

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,**

2nd Floor, Bahumali Bhavan Asarwa,
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

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 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:

Intelligence was received by the Directorate of Revenue Intelligence, Kolkata Zonal Unit (hereinafter referred to as DRI), to the effect that M/s NOCIL Ltd, have imported various chemicals under cover of several Bills of Entry without payment of duty of Customs on the strength of Advance Authorization Nos. 0310450977 & 0310450982 both dated 21-11-2007 & 0310578263 dated 10-06-2010 issued by Directorate General of Foreign Trade (hereinafter referred to as 'DGFT'), Mumbai. The importer availed benefit of exemption extended by Notification Nos. 93/2004-Cus, dated 10-09-2004 & 96/2009 dated 11-09-2009, as amended, and did not pay any Customs duty on such input materials at the time of import on condition of using those materials for the purpose of manufacture of export goods. Intelligence further indicated that the importer could not fulfill their export obligation within the original EO period in respect of the Advance Authorization No. 0310578263 dated 10-06-2010. It was also found that the importer despite their failure to complete EO, did not pay the amount of Customs duty as stipulated under the Policy and the subject Customs Notifications, which was otherwise payable. Imports were made through three ports, namely Nhava Sheva, Mumbai Sea Port & Kandla.

1.2 M/s NOCIL Ltd imported various chemicals under cover of several Bills of Entry without payment of duty of Customs on the strength of Advance Authorization Nos. 0310450977 & 0310450982 both dated 21-11-2007 & 0310578263 dated 10-06-2010. All the three Advance Authorizations were issued with export obligation period of 36 months. The importer also exported considerable quantity of all 7 (Seven) export products against respective Advance Authorizations. Details of such imports & exports are given as under,-

Summary of Imports/Exports under Advance Authorization No. 0310450982 dt: - 21-11-2007							
Eligible as per Authorization		Actual Imports		Export Obligation		Export made	
Qty (Kgs)	CIF (USD) / CIF (Rupees)	Qty (Kgs)	Assessable value (Rs)	Qty (Kgs)	FOB Rs.	Qty (Kgs)	FOB Rs.
15962175	\$18666371 / Rs.748521450/-	8044444	409717234	8420000	938089375	7477430	1100551002

Summary of Imports/Exports under Advance Authorization No. 0310450977 DT: - 21.11.2007							
Eligible as per Authorization		Actual Imports		Export Obligation		Export made	
Qty (Kgs)	CIF (USD) / CIF (Rupees)	Qty (Kgs)	Assessable value (Rs)	Qty (Kgs)	FOB Rs.	Qty (Kgs)	FOB Rs.
16016050	\$ 18720697 / Rs.750699932/-	8860125	505670318	8445000	941096875	6943010	1058969780

Summary of Imports/Exports under Advance Authorization No. 0310578263 dt. 06-10-2010							
Eligible as per Authorization		Actual Imports		Export Obligation		Export made	
Qty (Kgs)	CIF (USD) / CIF (Rupees)	Qty (Kgs)	Assessable value (Rs)	Qty (Kgs)	FOB Rs.	Qty (Kgs)	FOB Rs.
12797478	\$16259075 / Rs.777996772/-	8105577	534249383	6528500	969298647	4418500	684211954

1.3 In case of the first mentioned two Authorizations, the importer imported less quantity of goods but exported more than the quantity required to fulfill export obligation, whereas, in case of the third Authorization, they imported most of the goods allowed in the Advance Authorization, but exported lesser quantity than the quantity required to fulfill the export obligation.

1.4 Even before the EOP of the third Authorization was over, the importer approached the Directorate General of Foreign Trade for allowing them to club all three Advance Authorizations. The Policy Relaxation Committee (PRC) No. 2/AM16 dated 24-04-2015, considered the request of the importer and allowed clubbing, but imposed certain conditions. It was stated that exports made within 48 months from the date of issuance of the first Authorization, should be taken into account for the purpose of regularization. In addition they were required to pay composition Fees also. However, they were also given the liberty to regularise these Advance Authorizations individually.

1.5 Being aggrieved by the decision, M/s NOCIL Ltd applied for review of the decision. The matter was again taken up by the Policy Relaxation Committee (PRC) in the meeting No. 03/AM17 dated 26-04-2016 and the committee decided to reiterate the earlier decision. M/s NOCIL Ltd, applied for personal hearing in terms of Para 2.59 of the Foreign Trade Policy (2015-20). In the Policy Relaxation Committee (PRC) meeting No. 11/AM17 dated 13/14-07-2016, the committee observed that request for clubbing cannot be allowed as per PN No. 79 dated 13-01-2012. It was further observed that policy relaxation is not a matter of right.

1.6 Further, being aggrieved by the decision and by the fact that DRI had initiated action against them by issuance of Summons, the importer filed a Writ Petition No. 8324 of 2016 before the High Court of Delhi, challenging the decision of the Policy Relaxation Committee (PRC) as well as authority of DRI to investigate the matter. However, the Petition was dismissed. They also filed Appeal before the Supreme Court, which was not admitted and further filed review Petition, which was rejected and the issue attained finality.

1.7 Authorized Representative Shri Rakesh Srivastava, Assistant Vice President (Exports) Of M/s NOCIL Ltd, appeared on 23-02-2018 & 07-03-2018 and recorded his statement under Section 108 of the Customs Act, 1962. Excerpt of his statement is as follows:-

- a. They obtained three advance authorizations for import of various chemicals which were used for the purpose of manufacture of Rubber Chemicals.
- b. Their application for allowing benefit of PN no. 79 was rejected by the PRC as well as the Hon'ble High Court of Delhi.
- c. They could not fulfill their export obligation in full and it was not possible for them to submit evidence of export to the Customs authority.
- d. Understanding their failure they decided to deposit Customs duty proportionate to the unfulfilled export obligation and accordingly deposited the amounts towards their Customs duty liability.
- e. All three Advance Authorizations were redeemed and Bonds were cancelled by the Customs Authority.

1.8 In terms of Para 4.22 of the Hand Book of Procedures, an importer is required to fulfill export obligation within a period of 36 months from the date of issue of the Authorization. It appears that M/s NOCIL Ltd could not complete their export obligation liability within that stipulated period in respect of the Advance Authorizations under consideration.

1.9 Para 4.24 of the Hand Book of Procedures (2004-09) & (2009-14) of Foreign Trade Policy, makes it mandatory on the part of the Authorization holder to submit requisite evidence in support of discharge of export obligation within a period of two months from the date of expiry of EO. It is evident from the record as well as from the admission of the authorized representative of the importer that they did not and could not furnish any documents, whatsoever, evidencing such exports. It appears that their failure to furnish evidences in support of fulfillment of export obligation resulted in violation of the provision of the Para 4.24 of the Hand Book of Procedures, Volume-I.

1.10 Condition (iii) of the Notification No. 93/2004-Cus, dated 10-09-2004 and Condition No. (iv) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, stipulates that in respect of the imports made before the discharge of export obligation, the importer should execute a bond at the time of clearance of the imported goods with such surety or security and in such form as may be specified by the jurisdictional Customs authority binding himself to pay on demand an amount equal to the duty leviable, on the materials in respect of which the conditions specified in the notification are not complied with, together with interest.

1.10.1 By executing Bonds at the time of import the importer undertook to pay the amount of duty attributable to the imported goods with appropriate

interest, in respect of which they failed to observe the conditions of the notification. The Bond, so executed, extends authority to the Customs, to demand duty in case of failure on the part of the importer, to comply with the conditions of the notification, and at the same time makes it obligatory for the importer to pay any duty of Customs, that becomes payable for non-observance of the conditions of the notification with interest.

1.11 Condition (v) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition (viii) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, requires an importer to discharge the export obligation as specified in the Authorization, both in terms of value and quantity, within the period as specified in the Authorization. The said Conditions have made it mandatory on the part of the importer, to discharge their export liability, within the stipulated period. In the instant case M/s NOCIL Ltd, they could not discharge their export liability in full within the EO period.

1.12 Condition (vi) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition (ix) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, requires an importer to produce evidence of discharge of export obligation to the satisfaction of the of Customs authority, within a period of thirty / sixty days from the expiry of period allowed for fulfillment of export obligation.

1.13 Therefore, it appears that the importer by their act of non-compliance of the aforesaid provision of law has contravened the conditions of the subject Notification. The importer was duty bound to pay the amount of duty, on pro-rata basis for the unfulfilled portion of EO in compliance with the provisions of the Notification, which they did not do. Failure on the part of the subject importer to furnish such particulars indicates that they could not fulfill export obligation which led to outright violation of the conditions of the notification, read with the Policy in vogue, rendering goods so imported duty free, liable to confiscation under Section 111(o) of the Customs Act, 1962.

1.14 Authorized representative of the importer in his statements admitted failure of the company to comply with the condition, and accepted that after the original EO period of 36 months was over from the date of issuance of the Advance Authorization, they could not fulfill export obligation and that they also failed to furnish requisite documents in support of EO discharge to the Customs authority.

1.15 It appears that the onus was on the importer to bring it to the notice of the Customs authority within one/ two months from expiry of EO period about their inability to discharge export liability in full and at the same time they should have paid the differential amount of Customs duty attributable to the materials imported in proportion with the unfulfilled EO. The Port specific Customs duty and interest payable in respect of AA No. 0310578263 dtd. 10-06-2010 & AA Nos. 0310450977 & 0310450982 both dtd: -21.11.2007 comes as under,-

Port specific Customs duty and interest payable in respect of AA No. 0310578263 dtd. 10-06-2010				
Item	Kandla			
	Qty (Kgs)	Value (Rs)	Duty (Rs)	Interest (Rs)
Aniline	929508	73686874	18998791	18562242
MIBK	713058	64495358	16109387	15998942
Total	1642566	138182232	35108178	34561184
Item	Mumbai Port			
	Qty (Kgs)	Value (Rs)	Duty (Rs)	Interest (Rs)
Acetone	8539	414452	190657	209874
Total	8539	414452	190657	209874
Item	Nhava Sheva			
	Qty (Kgs)	Value (Rs)	Duty (Rs)	Interest (Rs)
Carbon Di Sulphide	16957	503179	120234	141069
Caustic Potash	13812	843843	201635	211816
CHA	1200	119746	30957	31009
Cyclohexyl Mercaptan	1429	274499	70965	70804
Di Butyl amine	1854	247909	64091	64166
Morphoniline	10658	1753819	419073	462553
Phthalic Anhydride	5355	470733	121696	120279
Potassium Carbonate	610839	32833729	8373320	8305069
Total	662104	37047457	9401971	9406765
Grand Total		175644141	44700804	44177824

Port specific Customs duty and interest payable in respect of AA Nos. 0310450977 & 0310450982 dtd: -21.11.2007				
Item	Nhava Sheva			
	Qty	Value (Rs)	Duty (Rs)	Interest (Rs)
Platinum Catalyst	14.41	1147272	328570	505061
Total	14.41	1147272	328570	505061

1.16 Admitting their failure, the importer agreed to pay the Customs duty along with interest in respect of the entire quantity of input materials imported in excess without payment of duty under the subject Advance Authorizations, against which no exports could be made. Accordingly, they paid an amount of

Rs 4, 50, 29, 374/- towards Customs duty and Rs 4, 46, 82, 885/- towards interest.

1.17 The DGFT vide their letter dated 31.01.2018, communicated to M/s NOCIL Ltd, confirmed about fulfillment of export obligation and that the respective case has been redeemed. The Export Obligation Discharge Certificates (EODC) was submitted before the Customs authority, who in turn, cancelled the Letter of Undertaking / Bonds executed in respect of the aforementioned three Advance Authorizations on 06/07.02.2018.

1.18.1 In view of the above, show cause notice F. No. DRI/KZU/CF/ENQ-80(INT-24)/2017 dated 15.06.2018 was issued by the Additional Director General, DRI, Zonal Unit, Kolkata, calling upon M/s NOCIL Ltd to Show Cause in writing to the Principal Commissioner/ Commissioner of Customs, Custom House, Near Balaji Temple, Kandla-370210 as to why:-

- a) Duty of Customs amounting to Rs 3, 51, 08, 178/-, payable on the goods, so imported through Kandla Sea Port, without payment of Customs duty by availing the benefit of exemption of Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, for non-observance of the various conditions stipulated in the said notifications and also for contravening the provisions of the Foreign Trade Policy read with the Hand Book of Procedures, in respect of which no export obligation was fulfilled by the importer, should not be demanded and recovered from them under Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended;
- b) Subject goods having assessable value of Rs 13, 81, 82, 232/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported under the exemption Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, without observing various post import conditions laid down under the said notifications as well as for contraventions of the provisions of the Foreign Trade Policy read with the Hand Book of Procedures as discussed in detail above;
- c) Interest at appropriate rate under provision of Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended should not be demanded and recovered from them;
- d) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods wrongfully availing exemption of notification No. 96/2009-Cus, dated 11-09-2009, as amended, and without observance of the conditions set out in the notification, resulting in non-payment of Customs duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.
- e) Amount of Rs 4, 50, 29, 374/-, paid towards Customs duty against the imports so made, should not be appropriated towards payment of Customs duty of Rs 3, 51, 08, 178/-.

- f) Amount of Rs 4, 46, 82, 885/- paid towards interest against delayed payment of Customs duty, should not be appropriated towards payment of appropriate amount of interest.

1.18.2 Vide the said show cause notice F. No. DRI/KZU/CF/ENQ-80(INT-24)/2017 dated 15.06.2018 issued by the Additional Director General, DRI, Zonal Unit, Kolkata, was also calling upon M/s NOCIL Ltd to Show Cause in writing to the Principal Commissioner/ Commissioner of Customs (Exports-II), New Custom House, Ballard Estate, Mumbai-400001 as to why:-

- a) Duty of Customs amounting to Rs 94, 01, 971/-, payable on the goods, so imported through Mumbai Sea Port, without payment of Customs duty by availing the benefit of exemption of Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, for non-observance of the various conditions stipulated in the said notifications and also for contravening the provisions of the Foreign Trade Policy read with the Hand Book of Procedures, in respect of which no export obligation was fulfilled by the importer, should not be demanded and recovered from them under Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended;
- b) Subject goods having assessable value of Rs 3, 70, 47, 457/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported under the exemption Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, without observing various post import conditions laid down under the said notifications as well as for contraventions of the provisions of the Foreign Trade Policy read with the Hand Book of Procedures as discussed in detail above;
- c) Interest at appropriate rate under the provision of Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended should not be demanded and recovered from them;
- d) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods wrongfully availing exemption of notification No. 96/2009-Cus, dated 11-09-2009, as amended, and without observance of the conditions set out in the notification, resulting in non-payment of Customs duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.
- e) Amount of Rs 4, 50, 29, 374/-, paid towards Customs duty against the imports so made, should not be appropriated towards payment of Customs duty of Rs 94, 01, 971/-.
- f) Amount of Rs 4, 46, 82, 885/- paid towards interest against delayed payment of Customs duty, should not be appropriated towards payment of appropriate amount of interest.

1.18.3 Further, vide the said show cause notice F. No. DRI/KZU/CF/ENQ-80(INT-24)/2017 dated 15.06.2018 issued by the Additional Director General, DRI, Zonal Unit, Kolkata, was also calling upon M/s NOCIL Ltd to Show Cause

in writing to the Additional / Joint Commissioner of Customs, Customs (Nhava Sheva-IV), Jawaharlal Nehru Custom House, Nhava Sheva, Taluk - Uran, Dist:- Raigad, Maharashtra-400707 as to why:-

- a) Duty of Customs amounting to Rs 1, 90, 657/-, payable on the goods, so imported through Nhava Seva Sea Port, without payment of Customs duty by availing the benefit of exemption of Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, for non-observance of the various conditions stipulated in the said notifications and also for contravening the provisions of the Foreign Trade Policy read with the Hand Book of Procedures, in respect of which no export obligation was fulfilled by the importer, should not be demanded and recovered from them under Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended;
- b) Subject goods having assessable value of Rs 4, 14, 452/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported under the exemption Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, without observing various post import conditions laid down under the said notifications as well as for contraventions of the provisions of the Foreign Trade Policy read with the Hand Book of Procedures as discussed in detail above;
- c) Interest at appropriate rate under the provision of Section 143(3) of the Customs Act, 1962, in terms of the Bonds executed by them, read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended should not be demanded and recovered from them;
- d) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods wrongfully availing exemption of notification No. 96/2009-Cus, dated 11-09-2009, as amended, and without observance of the conditions set out in the notification, resulting in non-payment of Customs duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.
- e) Amount of Rs 4, 50, 29, 374/-, paid towards Customs duty against the imports so made, should not be appropriated towards payment of Customs duty of Rs 1, 90, 657/-.
- f) Amount of Rs 4, 46, 82, 885/- paid towards interest against delayed payment of Customs duty, as detailed in Table-11 above, should not be appropriated towards payment of appropriate amount of interest.

2. APPOINTMENT OF COMMON ADJUDICATING AUTHORITY:

2.1 The SCN was answerable to the Principal Commissioner/ Commissioner of Customs, Kandla, the Principal Commissioner/ Commissioner of Customs (Exports-II), New Custom House, Ballard Estate, Mumbai & the Additional / Joint Commissioner of Customs, Customs (Nhava Sheva-IV), Jawaharlal Nehru Custom House, Nhava Sheva, Taluk - Uran, Dist:- Raigad, Maharashtra. Vide

Notification No. 10/2018 – Cus (N.T./CAA/DRI) dated 24.07.2018, the CBEC (now CBIC) has appointed the Principal Commissioner / Commissioner of Customs, Kandla as the common adjudicating authority for the purpose of adjudication of the subject notice.

2.2 Accordingly, the case is taken up for adjudication.

3. DEFENCE REPLY:

3.1 Vide letter dated 30.08.2018, the noticee has filed their defense reply and submitted that:

3.1.1 They deny the allegations made in the notice and submitted that they have not violated any provision of law including the Foreign Trade (Development And Regulation) Act, 1992 (FTDR Act) or the Customs Act, 1962 ('Act') or any rules, regulations or notifications issued there-under. They deny that they are liable for payment of any differential duty of customs, as demanded in the notice. They also submitted that the imported goods are not liable for confiscation and that penalty is not imposable on them.

3.1.2 Further, submitted that they are the largest manufacturer of Rubber Chemicals in India and have been involved in the rubber chemicals business since over 4 decades. They are a regular exporter of rubber chemicals, since over two decades. Their products are being exported to major international tyre producers, such as Goodyear, Bridgestone, Yokohama, Michelin, Pirelli, etc. The exports constitute nearly 30% to 35% of their total sales, and they have been granted the status of Trading House under the Foreign Trade Policy.

3.1.3 On November 21, 2007, two Advance Authorizations, for the export of various rubber chemicals, were obtained by them. While, the export obligation under the said authorizations was met in full, duty free imports could not be made, during the validity of the authorizations. As a result, the benefit under the Authorizations could not be availed and the import licences remained largely unutilised. A third Authorization was obtained by them in 2010. As the exports effected under the third authorisation were not commensurate to the imports, a request for clubbing of the 3 authorizations was made to the DGFT, so that the excess exports made under the first two authorizations could be offset against the shortfall, if any, under the third Authorization.

3.1.4 The request for extension of the validity period for making imports under the first two authorizations as well as the request for clubbing was rejected by the DGFT. The Policy Relaxation Committee (PRC), in the Ministry of Commerce, however, permitted clubbing of the three Authorizations, subject to payment of composition fees. As the composition fees were substantial, and as

they believed that they were eligible for clubbing by the Circulars of the DGFT including PN 79, the decisions of the PRC were challenged before the Hon'ble High Court of Delhi. The challenge was made by them before the High Court and later before the Supreme Court, which were unsuccessful and the Supreme Court dismissed their appeal in limine, by an order dated 27.10.2017.

3.1.5 After exhausting the legal remedies available to them, they requested the DGFT to allow clubbing of the first two authorizations. As regards, the third authorization, a request for regularisation, in terms of Para 4.48 of the Handbook of Procedures was made. A provisional deposit of Rs. 8.5 Crore was also made, pending the decision of the DGFT on their request.

3.1.6 While they were pursuing the matter before the DGFT, they kept the customs authorities informed. In fact, the Assistant Commissioner of Customs, granted extensions, from time to time for submissions of the Export Obligation Discharge Certificate (EODC). The last extension granted time till 31.03.2018 for submission of EODC. On submission of the EODC, in February 2018, the bond was cancelled and returned to them by the proper officer of customs. The EODC was submitted within the permitted period, which is upto 31.03.2018. The requirements of the FTDR Act and the Customs Act, were fully complied with.

Section 143 wrongly invoked in Notice:

3.1.7 They submitted that since the duty, as determined by the proper officer of customs was paid, much before the issuance of the notice, the question of raising a demand for short levy or short payment of duty of customs does not arise. In any case, since the bond has been discharged long before issuance of the notice, the proposal for invoking the bond, is an impossibility. Without prejudice, to the aforesaid contentions, it is submitted that a demand can only be raised under Section 28 of the Act, and Section 143 is only for recovery, of the duty determined. In the absence of a notice under Section 28, the bond can even otherwise not be invoked.

3.1.8 The discharge of the bond by the proper officer, implies that all their obligations under the Customs Act and the Foreign Trade Policy have been met and no further proceedings are required. The proposal for appropriation of the amount paid, towards the relevant Bills of Entry is also not warranted, since the payments have been made as customs duty, with regard to the specific Bills of Entry, and already stand appropriated to the imports.

3.1.9 The jurisdictional Assistant Commissioner only on being satisfied that the terms of the bond have been met, has discharged the bond, therefore, the

question of proceeding in terms of the bond under 143(3) does not arise, as there is no bond in force. Moreover, once the bond officer, who is aware of the complete background discharges the bond, Section 143 of the Act cannot be invoked, especially when there is no challenge to the discharge of the bond.

Condition of the exemption notification not violated:

3.1.10 The subject imports have been made in terms of Notification 93/2004 – Cus dated 10.09.2004 and Notification 96/2009 dated 11.09.2009. The notifications provide that imports shall be made in terms of the authorization issued by the Licensing Authority or Regional Authority i.e., the Director General of Foreign Trade appointed under Section 6 of the Foreign Trade (Development & Regulation) Act, 1992 or an officer authorized by him to grant a licence under the said Act. One of the conditions of the notification, is that the export obligation, as specified in the said authorization is discharged, within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India. The Regional Authority (DGFT) regularized the default by virtue of Para 4.28 of the Handbook of Procedures. It may be noted, that the option of regularization is available only for bonafide cases of default in fulfilment of export obligation. The DGFT being satisfied that this was a case of bonafide default, regularized the matter and the Export Obligation Discharge Certificate (EODC) was issued. The default, if any having been regularised and condoned by the proper officer, the requirements of the Foreign Trade Policy, and the Authorization issued thereunder and the notification are met. They submitted that the conditions of the exemption have been duly complied with, and duty has been paid on the imports, to the satisfaction of the proper officer. Since the discharge certificate is not under question and the same has been accepted by the proper officer, there is no violation of the Notification.

Confiscation not attracted:

3.1.11 They deny that the imported goods are liable for confiscation, and submitted that Section 111(o) of the Act is not attracted, on the facts of the case. In any event, the imported goods are not available for confiscation, as they have been used in the manufacture of export goods. Further, they have submitted that where the non-observance of any condition is sanctioned by the proper officer, applicability of Section 111(o) of the Act would stand excluded. Acceptance of the EODC and discharge of the bond by the jurisdictional officer, indicates that non – observance of the condition, if any, has been sanctioned by

the proper officer. The imported goods are, therefore, hence not liable for confiscation under Section 111(o) of the Act.

No penalty imposable:

3.1.12 They deny that any penalty is liable to be imposed on them, under Section 112(a) of the Act. They submitted that the goods are not liable to confiscation, for the reasons mentioned earlier. They have also not done any act or omission, which has rendered the goods liable for confiscation.

3.1.13 The Authorisations, were obtained with the intention and expectation, that they would be able to effect exports, to the extent of the obligation under the Authorizations. While the exports made under the first two Authorisations, were far in excess of the imports; in respect of the third Authorisation, they were unable to make the requisite exports, due to adverse conditions in the international market. From mid-2010 onwards, there was a significant surge in the prices of natural rubber, on account of which the demand for rubber and rubber products declined globally. Soaring rubber prices also dented the tyre industry, as natural rubber prices constitute about half the cost of a tyre. Many global players of rubber industry were forced to shutdown shop, due to extreme volatility in prices. EU Automobile sector also had a poor performance during this period and the market showed a prominent downward trend across all vehicles. As the Rubber chemical business is largely dependent on the Automobile industry, the slump in the demand for vehicles, further impacted the sale of tyres. This rise in prices of natural rubber, coupled with a decline in the sale of automobile tyres, had a significantly adverse effect on the demand for rubber chemicals, in the international market, which affected their ability to make exports, in spite of their best efforts. However, during the validity period of the third Authorization, the conditions in export markets, were not conducive, and the shortfall, was a result of factors beyond their control.

3.1.14 The complete facts were placed before the DGFT and treating this default as bonafide, the matter was regularized. The default was on account of unforeseen market conditions. It is further submitted that once the duty along with interest is paid, it cannot be said that the conditions of the exemption notification were violated. The notice also does not make any allegations for imposition of penalty, except to state that there was a delay in regularization of the matter, and submission of the certificate to the proper officer of customs.

3.1.15 It is important to consider, that even the Bond executed merely provides, that in the event of failure to fulfil all or a part of the obligations thereunder, the undertaking is to pay duty of customs along with interest and

there is no mention of payment of any penalty. Accordingly, they have paid the duty and interest on the goods imported against which there was shortfall. Penal provisions are not envisaged in cases of bonafide default.

3.1.16 In this context, they have placed reliance on the decision in the case of Hotel Surya Continental Vs. Commissioner of Customs (ICD), New Delhi reported in 2014 (314) E.L.T. 564 (Tri. - Del.),

“4. Aggrieved, the appellant preferred an appeal before the Commissioner of Customs, New Delhi. Before the appellate authority the appellant relied on certain decisions of this Tribunal to the effect that mere non-performance of the export obligation does warrant imposition of penalty and that while the duty component and the interest thereon could be levied, levy of penalty was not justified unless an intention to consciously avail deferment of duty under the guise of a promise of fulfilment of export obligation is disclosed, from the conduct of the assessee. The adjudicating authority rejected this contention by observing that though the Tribunal may not impose penalty in its discretion in the facts of the case, the appellant was required to remit penalty as well. The appellate authority however reduced the penalty to Rs. 2,00,000/-; and to that extent modified the adjudication order.

5. In Philips (India) Ltd. v. CC, Mumbai - 2001 (137) E.L.T. 697 (Tri.-Mumbai); Meirs Pharma (India) Pvt. Ltd. v. CC, Chennai - 2004 (167) E.L.T. 53 (Tri.-Chennai) and in Sun Knitwear Pvt. Ltd. v. CC, Bangalore - 2007 (207) E.L.T. 85 (Tri.-Bang.), this Tribunal has consistently taken the view that in the absence of any allegation that an importer had wilfully availed benefits of a Notification for exemption from customs duty, so as to gain a financial benefit without intending to comply with the export obligation; or where it cannot be established that there was a deliberate attempt to avail benefits of deferred payment of duty, it would not be improper to apply the provisions of confiscation or of penalty and on the sole ground that the export obligation was not fulfilled. These decisions were cited before the Commissioner (Appeals) as well but were brushed aside by that authority, by jejune reasoning.

5. In the light of the precedents adverted to, the levy of penalty by the adjudicating authority as modified by the Commissioner of Customs (Appeals), by the order dated 12-10-2009 is therefore quashed. The appeal is allowed. No costs however”.

3.1.17 Reliance is also placed on the decision in the case of M/s Touch Stone Mining Vs. Commissioner of Customs, New Delhi reported in 2004 (163) E.L.T. 398 (Tri. - Del.), it has been held that the provisions of Section 111(o) were not attracted where after availing the exemption from duty under exemption notification, the importer only failed to fulfil the export obligation, especially

when he had discharged the duty liability. Hence, penalty is also not imposable under Section 112 of the Customs Act, 1962.

3.1.18 Further, in the case of M/s Meirs Pharma (India) Pvt Ltd Vs. Commissioner of Customs, Chennai reported in 2004 (167) E.L.T. 53 (Tri. - Chennai), it has been held that

“7. So far as the confiscation of the goods and imposition of penalty is concerned, it is settled law that mens rea is a necessary requirement for imposition of penalty under Section 112 of the Customs Act, 1962. We have noted above that in the instant case, there was sincere efforts on the part of the appellants to fulfil the export obligations but the circumstances were beyond their control and they could not fulfil the export obligations in spite of their best efforts. It is not the case of the Department that appellants have made any deliberate attempt to avail of the benefit of Notification. The machinery was in fact installed at the factory, as noted by the adjudicating authority, in Para 4 of the impugned order. Production of the goods was also started some time in March, 1994 and they could only meet the export obligation to the extent of 1.5% only. There is no material to doubt their bona fides.

8. In view of above, while we uphold the duty liability on the goods, we set aside the order of confiscation of the goods and imposition of redemption fine and penalty and so also the order for charging interest. The impugned order is modified to the extent indicated above. The appeal is thus partially allowed in the above terms”.

3.1.19 They have also cited the similar decisions in favour of the noticee, that in the cases of M/s Aviquipo of India Ltd Vs. Commissioner of Customs (Exports), New Delhi reported in 2005 (190) E.L.T. 274 (Tri. - Del.) & Y. Kamesh Vs. Commissioner of Customs, Chennai reported in 2009 (234) E.L.T. 489 (Tri. - Chennai) held that there is no warrant for imposition of penalty when failure to fulfil the export obligation on bonafide reasons.

3.1.20 Also cited that in the case of M/s Oswal Paper & Allied Industries Vs. Commissioner of Customs, Amritsar reported in 2006 (206) E.L.T. 991 (Tri. - Del.), it has been held that when there was no impropriety at the time of import. Therefore, confiscation of the goods and imposition of penalty were not attracted.

3.1.21 They have also relied in the case of M/s Philips (India) Ltd Vs. Commissioner of Customs, Mumbai reported in 2001 (137) E.L.T. 697 (Tri. - Mumbai), it has been held as that unless it is established that there was a deliberate attempt to avail of the benefit of deferred payment of duty provided in this notification, it would not be proper to apply the provisions relating to

confiscation and penalty only on the ground that the export obligation has not been fulfilled. It is held that confiscation of the goods or imposition of penalty is not called for, and set aside the confiscation and penalty.

3.1.22 Further, they submitted that they have made number of correspondences with the DGFT as well as the Customs Authorities from the stage of application for authorization to the issuance of the present notice. Hence, all the facts have been disclosed to the Department from the very beginning. They have been transparent in making disclosures to both the DGFT and Customs Authorities, and have kept them apprised of the steps being taken by them. Therefore, the allegation that they have not promptly informed the Department regarding status of the authorizations is not correct. Further, with regard to in the notice that there was some intelligence due to which the authority come to know of the non fulfilment of the export obligation under the authorization. This is not correct as both Departments were having complete knowledge of all the facts, as is evident from the various correspondences made with them.

3.1.23 In view of the above, the demand under Section 143 read with the bond is not justified on merits, and also for the reason that there is presently no bond in force. In the absence of any violation of the notification, Foreign Trade Policy, and as the assessment has already been finalized by the proper officer, after consideration all relevant facts, the present notice is not sustainable on facts or in law. Therefore, they have submitted that the notice proposing confiscation of the goods, imposition of penalty and recovery in terms of the bond is required to be quashed with consequential relief.

4. PERSONAL HEARING:

4.1 Personal hearing in the matter was fixed on 22.11.2018 before the Commissioner of Customs, Kandla. Ms. Reena Khair, Advocate, Shri Sanjiv D Bidkar, Sr. Manager – Export Operations of M/s NOCIL Ltd, Mumbai & Shri R V Salian, Consultant have attended the hearing and reiterated the submissions already made in their written reply dated 30.08.2018. Further, they have stated that even before issuance of SCN, they have paid the duty along with interest on inputs in excess of exports made. On that basis, DGFT office issued EODC and Customs discharged the bonds. They have submitted that once bonds are discharged, such bonds cannot be referred to demand duty. They have also submitted that period of submission of EODC was duly extended by the Customs authorities. They stated that after payment of duty on excess inputs, there is no violation of condition of notification and therefore confiscation under Section 111 and consequent penalty under Section 112 is not called for

and referred to some case laws in this regard. The following case laws were submitted as under,-

1. M/s Oswal Paper & Allied Industries Vs. Commissioner of Customs, Amritsar reported in 2006 (206) E.L.T. 991 (Tri. - Del.)
2. Commissioner of Customs, Bangalore Vs. Sun Knit Wear Pvt. Ltd. - 2012 (278) E.L.T. 165 (Kar.)
3. Touch Stone Mining Vs. Commissioner of Customs, New Delhi reported in 2004 (163) E.L.T. 398 (Tri. - Del.)
4. Hotel Surya Continental Vs. Commissioner of Customs (ICD), New Delhi reported in 2014 (314) E.L.T. 564 (Tri. - Del.)
5. Y. Kamesh Vs. Commissioner of Customs, Chennai reported in 2009 (234) E.L.T. 489 (Tri. - Chennai)

4.1.1 Except at Sr.No. 2 above, all other case laws have already been relied by them in their written submission dated 30.08.2018.

5. DISCUSSION AND FINDINGS:

5.1 I have carefully gone through the Show Cause Notice, records of the case, written submissions filed by the Noticee as well as submissions made at the time of Personal Hearing.

5.2 In the instant case following issues are to be decided:

1. Whether in the facts and circumstances of this case, duty and interest can be demanded and recovered from the noticee against the Bonds executed by them at the time of clearance of imported inputs under Section 143(3) of the Customs Act, 1962 read with the provisions of the Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Customs dated 11-09-2009, as amended?
2. Whether the impugned goods are liable for confiscation under Section 111(o) of the Customs Act, 1962 for breaching the terms of bonds/notifications and its consequent penalty imposable under section 112(a) *ibid*?

5.3 From the impugned SCN, defense submissions of the noticee and records available before me, I find that M/s NOCIL Ltd have imported various chemicals under cover of several Bills of Entry without payment of Customs duty on the strength of Advance Authorization Nos. 0310450977 & 0310450982 both dated 21-11-2007 & 0310578263 dated 10-06-2010 issued by Directorate General of Foreign Trade (hereinafter referred to as DGFT), Mumbai. The importer availed benefit of exemption extended by Notification Nos. 93/2004-Cus, dated 10-09-2004 & 96/2009 dated 11-09-2009, as amended, and did not pay any Customs duty on such input materials at the time of import on condition of using those materials for the purpose of manufacture of export goods.

5.3.1 I find that in terms of Para 4.22 of the Hand Book of Procedures (2004-09) & (2009-14), Volume-I, an importer was required to fulfill export obligation under an Advance Authorization within a period of 36 months from the date of issue of the Authorization. Further, Condition (v) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition (viii) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, requires an importer to discharge the export obligation as specified in the Authorization, both in terms of value and quantity, within the period as specified in the Authorization or within the extended period as may be granted by the Regional Authority by exporting resultant products manufactured out of the duty free materials imported.

5.3.2 Para 4.24 of the Hand Book of Procedures (2004-09) & (2009-14) of Foreign Trade Policy, Volume-I, makes it mandatory on the part of the Authorization holder to submit requisite evidence in support of discharge of export obligation in accordance with law within a period of two months from the date of expiry of EO. Further, Condition (vi) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition (ix) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, requires an importer to produce evidence of discharge of export obligation to the satisfaction of the of Customs authority, within a period of thirty / sixty days from the expiry of period allowed for fulfillment of export obligation.

5.3.3 Sub Para (iii) of Para 4.28 of the Hand Book of Procedures (2004-09) & (2009-14) of Foreign Trade Policy, Volume-I, demands that if export obligation is not fulfilled both in terms of quantity and value, the Authorization holder shall, for the regularization, pay to Customs authorities, Customs duty on unutilized value of imported/ indigenously procured material along with interest as notified; which implies that the Authorization holder is legally duty bound to pay the proportionate amount of Customs duty corresponding to the unfulfilled export obligation. Similar provision has been made in Sub Para 4.49(d) of the Foreign Trade Policy (2015-20) which provides for payment of Customs duty with appropriate interest in case of failure on the part of the importer to fulfil EO in terms of value and quantity. Further, Condition (iii) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition No. (iv) of the Notification No. 96/2009-Cus, dated 11-09-2009, as amended, stipulates that in respect of the imports made before the discharge of export obligation, the importer should execute a bond at the time of clearance of the imported goods with such surety or security and in such form as may be specified by the jurisdictional Customs authority binding himself to pay on demand an amount equal to the duty leviable, but for the exemption on the materials in

respect of which the conditions specified in the notification are not complied with, together with interest. The Bond, so executed, extends authority to the Customs, to demand duty along with interest in case of failure on the part of the importer, to comply with the conditions of the notification.

5.4 I find that in respect of Advance Authorization Nos. 0310450977 & 0310450982 both dated 21-11-2007, the noticee imported less quantity of goods but exported more than the quantity required to fulfill export obligation. Whereas, in case of the third Authorization No. 0310578263 dated 10-06-2010, they imported most of the goods allowed in the Advance Authorization, but exported lesser quantity than the quantity required fulfilling the export obligation. A request for clubbing of the 3 authorizations was made to the DGFT by the noticee, so that the excess exports made under the first two authorizations could be offset against the shortfall, if any, under the third Authorization. Their application for allowing benefit of PN no. 79 was rejected by the Policy Relaxation Committee (PRC) as well as the Hon'ble High Court of Delhi. Further, after exhausting all legal remedies including in the Hon'ble Supreme Court and understanding their failure, they have deposited Customs duty along with interest in proportionate to the unfulfilled export obligation.

5.5 The noticee has argued that duty, as determined by the proper officer of customs was paid, much before the issuance of the notice and the bonds executed were discharged long before issuance of the notice, therefore, the proposal for invoking the bond at this stage is not possible. Further, the question of proceeding in terms of the bond under 143(3) does not arise especially when there is no challenge to the discharge of the bonds. The noticee has further contested that demand can only be raised under Section 28 of the Act and Section 143 is only for recovery, of the duty determined. Further, argued that the proposal for appropriation of the amount paid, towards the relevant Bills of Entry is also not warranted, since the payments have been made as customs duty, with regard to the specific Bills of Entry, and already stand appropriated to the imports.

5.6 Vide the impugned show cause notice, the duty has been demanded under section 143(3) of the Customs Act, 1962 which reads:

“SECTION 143. Power to allow import or export on execution of bonds in certain cases. –

(3) If the thing is not done within the time specified in the bond, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall, without prejudice to any other action that may be taken under this Act or any other law

for the time being in force, be entitled to proceed upon the bond in accordance with law.”

5.6.1 On plain reading of section 143(3) read with the Bonds executed in terms of Condition (iii) of the Notification No. 93/2004-Cus, dated 10-09-2004, and Condition No. (iv) of the Notification No. 96/2009-Cus, dated 11-09-2009 stipulates that the noticee is bound to pay on demand an amount equal to the duty leviable, but for the exemption on the materials in respect of which the conditions specified in the notification are not complied with, together with interest.

5.6.2 I rely in case of *Bombay Hospital Trust v. Commissioner of Customs, Sahar, Mumbai* [2005 (188) E.L.T. 374 (Tri. - LB)] wherein it has been held that *“Since the duty demand does not relate to short levy or non levy at the time of initial assessment on importation, but has arisen subsequently on account of failure to fulfil the post-importation conditions under the Notification No. 64/88-Cus., the said Section 28 has no application to a duty demand of this kind.”* Therefore, the issue is well settled judicially that demand of duty is made in such cases in terms of the bond read with relevant notification executed to avail of the exemption. Therefore, the department is entitled to proceed upon the bond in accordance with law.

5.7 The noticee by admitting their failure, they paid an amount of Rs 4, 50, 29, 374/- towards Customs duty and Rs 4, 46, 82, 885/- towards interest. Finally, vide letter dated 31.01.2018, all the three Advance Authorizations were regularised/redeemed by the DGFT and the Bonds executed were cancelled by the Customs Authority on 06/07.02.2018 before the issuance of Show Cause Notice. Thereafter, vide the impugned show cause notice duty has been demanded under section 143(3) *ibid* i.e. by enforcing the bonds. Thus, the customs duty has been demanded against the bonds which were already cancelled by the jurisdictional Customs authorities and the cancelled bonds were returned to the noticee. In view of the provisions of section 143(3) *ibid*, duty and interest cannot be demanded after cancellation of the bonds and thus section 143(3) *ibid* is not applicable in the instant case. As the noticee had made due payments of duty and interest prior to cancellation of bonds, there was no necessity to demand the duty and interest by issuance of a show cause notice invoking section 143(3) *ibid*. Since the noticee has made payments as Customs Duty against the specific Bills of Entry and the same was already been appropriated against the demand of Customs Duty against the concerned Bills of Entry under which excess imports were effected without fulfilling the export obligation, therefore, in the instant case, appropriation of Customs Duty at this stage in terms of bond is also not warranted. However, I find that the

amount paid by the noticee prior to cancellation of the bonds in terms of the condition of the notification is liable to be appropriated against their liability of duty and interest as proposed in the show cause notice.

5.8 Now, coming to the next issue regarding the confiscation of the goods under Section 111(o) of the Customs Act, 1962 and its consequent penalty under Section 112(a) of the Customs Act, 1962, though the noticee has not challenged demand of duty and interest since they have voluntarily paid before the issuance of this impugned show cause notice, however, they have vehemently contested the proposal of confiscation and penalty.

5.9 The noticee argued that the Regional Authority (DGFT) regularized the default by virtue of Para 4.28 of the Handbook of Procedures and that the option of regularization is available only for bonafide cases of default in fulfilment of export obligation. They submitted that the conditions of the exemption have been duly complied with. Further, they have submitted that where the non-observance of any condition is sanctioned by the proper officer, applicability of Section 111(o) of the Act would stand excluded and the goods are not liable to confiscation. Further, submitted that once the duty along with interest is paid, it cannot be said that the conditions of the exemption notifications were violated and that even the Bond executed merely provides, that in the event of failure to fulfil all or a part of the obligations there-under, the undertaking is to pay duty of customs along with interest and there is no mention of payment of any penalty. They submitted that they have made number of correspondences with the DGFT as well as the Customs Authorities from the stage of application for authorization to the issuance of the present notice. Therefore, the allegation that they have not promptly informed the Department regarding status of the authorizations is not correct. They deny that any penalty is liable to be imposed on them, under Section 112(a) of the Act. Further, they have attempted to show that the failure to fulfill the export obligation within the stipulated period was not intentional but it was attributed to reasons beyond their control due to declined in demand for rubber and rubber products globally. In this regard, they have placed some case laws in support of their defence.

5.10 I proceed to consider applicability of section 111(o) of the Customs Act, 1962 in respect of proposal to hold the impugned goods liable for confiscation. In the instant case, the confiscation has been proposed in the show cause notice on the grounds that the noticee contravened the provisions of exemption Notification Nos. 93/2004 dated 10-09-2004 & 96/2009-Cus, dated 11-09-2009, as amended, without observing various post import conditions laid down

under the said notifications as well as for contraventions of the provisions of the Foreign Trade Policy read with the Hand Book of Procedures.

5.11 I find that the provisions of confiscation under section 111 of the Customs Act, 1962 are independent provisions and if a notification or FPT or HBP does not provide for situations of confiscation, it does not mean that provisions of section 111 are not attracted. Being independent legislative provision, section 111 *ibid* is applicable in all the situations which have been enumerated in it. Further, in view of the issuance of EODC against the said Authorizations by the DGFT, the importer seems to have complied with all the regulatory requirements in terms of Foreign Trade Policy/Handbook of Procedures since the DGFT is the final authority on administration of FTP/HBP.

5.12 I find that it is not a case of diversion of duty free imported goods against the provisions of the subject notification and provisions of the relevant FTP. I find that in respect of Advance Authorization Nos. 0310450977 & 0310450982 both dated 21-11-2007, the noticee imported less quantity of goods but exported more than the quantity required to fulfill export obligation. However, in case of the third Authorization No. 0310578263 dated 10-06-2010, they imported most of the goods allowed in the Advance Authorization, but exported lesser quantity than the quantity required for fulfilling the export obligation, they have contended that due to adverse international market condition they could not fulfill remaining export obligation. The show cause notice did not allege that the noticee has deliberately attempted to avail benefits. I find that the noticee also approached Policy Relaxation Committee (PRC), the Hon'ble High Court of Delhi & the Hon'ble Apex Court, when they could not get relief they have paid Customs duty along with interest even before issuance of Show Cause Notice.

5.13 I find that the clause (o) of section 111 *ibid* provides for confiscation of the imported goods which are exempted subject to any condition and such condition is not observed, unless the non observance of the condition is sanctioned by the proper officer. In this case, the noticee made payments of applicable duty with interest and the DGFT authorities issued EODC. The EODC was also submitted to customs authorities before 31.03.2018, the time allowed by the concerned Customs authorities. The Bonds executed were cancelled and returned to the noticee. Therefore, I find that the non observance of the condition in this case, i.e. non-fulfillment of export obligation was sanctioned by the proper officers by accepting the duty payment, issuance of EODC and cancellation of bonds. In this regard, I rely in the case of Motorola

India Ltd. Vs. Commissioner of Customs, Bangalore 2001 (138) ELT 870 (Tri. – Bang.)), wherein it was held that:

“5.(e) On the date of issue of this notice i.e. 8-4-2000, there was no offence of Import Control Regulations as on that date the DGFT had issued the necessary waiver of Bond/ LUT condition/ Redemption of Bank Guarantee/ LUT Condition against the said licence on 2-2-2000 by issuing a certificate of discharge of the export obligation in full, after scaling down the export obligation. Therefore, on the date of issue of this notice, there was no export obligation outstanding as per the proper officer of the DGFT. Following their certificate, the Commissioner has observed in his finding that Assistant Commissioner has withdrawn the notice issued demanding duty on goods cleared on the Bills of Entry duty free as demanded vide his notice dated 5-2-2000. Assistant Commissioner is admitted by the Commissioner to be the ‘proper officer’ to monitor the Export in DEEC scheme of goods allowed exemption. Therefore, on 8-3-2000, the proper officers of DGFT and Customs had permitted the relaxation of the export obligation under Notification 30/97-Cus., dated 1-4-1997. Section 111(o) of the Customs Act, 1962 reads as follows –

“(o) Any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer”.

When the non-performance of the obligation have been relaxed and settled by the proper officers as in this case, before 8-3-2000 it will be deemed to be sanctioned by the proper officer. Therefore, there was no cause for the Commissioner to have issued a show cause notice on 8-4-2000 and confirmed the confiscation of the goods under Section 111(o) of the Customs Act, 1962, when duty and interest have been duly discharged. We therefore, do not uphold the confiscation of the goods as arrived at by the Commissioner. Therefore, there is no cause to impose any redemption fine. The same is required to be set aside.”

5.14 In view of the above observations, I find that the impugned goods are not liable to confiscation under section 111(o) of the Customs Act, 1962.

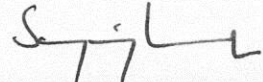
5.15 I proceed to consider whether penalty under section 112(a) of the Customs Act, 1962 is liable to be imposed upon the noticee. The above provision provides for penalty on a person who does or omits to do any act or abets the doing or omission of such an act, which would render imported goods liable to confiscation under section 111 ibid. Since in the instant case it has been found that the goods are not liable to confiscation under section 111 ibid, I find that penalty under section 112(a) ibid is not attracted.

6. In view of the above, I pass the following order:

ORDER

- (i) I confirm the demand of customs duty amounting to Rs 3, 51, 08, 178/- & interest at appropriate rate thereon, payable on the goods, imported through Kandla Sea Port.

- (ii) I confirm the demand of customs duty amounting to Rs 94, 01, 971/-, & interest at appropriate rate thereon, payable on the goods, imported through Mumbai Sea Port.
- (iii) I confirm the demand of customs duty amounting to Rs 1, 90, 657/- & interest at appropriate rate thereon, payable on the goods, imported through Nhava Seva Sea Port.
- (iv) As the total amount of duty of Rs 4, 50, 29, 374/- and total amount of interest of Rs 4, 46, 82, 885/- towards duty and interest at Sr. No. (i), (ii) & (iii) has already been paid by M/s NOCIL Ltd, I order to appropriate the same against their Customs duty/interest liability.
- (v) I drop the proceedings in respect of confiscation of the impugned goods and imposition of penalty on M/s NOCIL Ltd.


[SANJAY KUMAR AGARWAL]
COMMISSIONER

BY RPAD/ SPEED POST:

F.No. S/10-53/Adj/Commr/NOCIL/2018-19

Dated 20.12.2018

To,

M/s NOCIL Ltd, Mafatlal House, H.T. Parekh Marg, Backbay Reclamation, Churchgate, Mumbai-400020

COPY TO:

- (1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
- (2) The Additional Director General, DRI Kolkata Zonal Unit, 8, Ho Chi-Minh Sarani, Kolkata- 700071
- (3) The Principal Commissioner/ Commissioner of Customs (Exports-II), New Custom House, Ballard Estate, Mumbai-400001
- (4) The Additional / Joint Commissioner of Customs, Customs (Nhava Sheva-IV), Jawaharlal Nehru Custom House, Nhava Sheva, Taluk - Uran, Dist:- Raigad, Maharashtra-400707
- (5) The Deputy/Assistant Commissioner (Recovery), CH, Kandla.
- (6) The Deputy/ Assistant Commissioner (Gr.II), CH, Kandla.
- ✓(7) Guard file.