



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.

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| A | फाइल संख्या/ File No. | S/10-59/Adj/ADC/KXOL/2018-19 |
| B | आदेश में मूल सं./ Order-in-Original No. | KDL/ADC/AK/12/2019-20 |
| C | पारित कर्ता/ Passed by | SH. AJAY KUMAR, ADDITIONAL COMMISSIONER |
| D | आदेश की दिनांक/Date of order | 11.09.2019 |
| E | जारी करने की दिनांक/Date of issue | 11.09.2019 |
| F | एस.सी.एन. सं. एवं दिनांक/ SCN No. & Date | S/10-59/Adj/ADC/KXOL/2018-19, dated 14.03.2019 |
| G | नोटीसी/ पार्टी Noticee/Party | 1. M/s. Kitchen Xpress Overseas Ltd, KASEZ, Ganhidham. 2. M/s R.M. Trading Co., Ahmedabad |

- यह अपील आदेश संबन्धित को नि प्रदान शुल्क:किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
- यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

"सीमा शुल्क आयुक्त (अपील), कांडला

मंजिल वी 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड, अहमदाबाद 380 009"

"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA

7th Floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad - 380 009."

- उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.
- उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by -
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule - I, Item 6 of the Court Fees Act, 1870.
- अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), अधिनियम शुल्क सीमा और 1982, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

- इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

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

BRIEF FACT OF THE CASE

M/s. Kitchen Xpress Overseas Limited, (herein after also referred to as 'KXOL')(IEC No. AADCK1847R)[GSTIN No. 24AADCK1847R1Z3(24)] is situated at Plot No.623, Shed No. 402, New Area, Kandla Special Economic Zone, Gandhidham, Kutch to whom Letter of Approval (LOA) dated 24.06.2010 was granted vide F.No. KASEZ/IA/006/2010-11 by the Joint Development Commissioner, Kandla SEZ under Section 15 of the SEZ Act, 2005 read with Rule 18 of the SEZ Rules, 2006 to operate as an SEZ Unit and carry out authorized operations of manufacturing and trading activity of processed Grains and Spices. The said LOA was further extended till 31.05.2021 vide letter dated 29.08.2016 by the Development Commissioner, Kandla Special Economic Zone, Gandhidham, Kutch.

1.1 On scrutiny of the documents for the period 2012-13 to 2016-17, it was learnt that, KXOL cleared/removed Bhusi /Waste of Pulses valued at Rs.4,54,62,863/- to various customers into Domestic Tariff Area (DTA) by mis-classifying the same under Chapter Heading 07139099 of the Customs Tariff Act,1975 (hereinafter also referred to as "CTA,1975"), at Nil rate of duty, by claiming full duty exemption under Notification No.12/2012-Customs dated 17.03.2012 under Sr. No.21. At the relevant time, the Bhusi / Waste of Pulses were classifiable under tariff item 23025000 and attracted BCD @ 30%, CESS @ 3% and SAD @ 4% (aggregate 36.136%). This mis-classification resulted in to evasion of Customs Duty of Rs.1,64,28,460/- during the above said period for which Show Cause Notice for demanding the above said duty was served upon the 'KXOL'.

1.2 In this course, details for the further period from 01.04.2017 to 31.12.2017 were called for from the unit which were submitted by them vide their letter dated 22.02.2018. Details of such clearances and evasion of Customs duty is shown in the Annexure-A attached to the SCN dated 14.03.2019.

1.3 The tariff Head 0713 covers only "Dried leguminous vegetables, shelled, whether or not skinned or split" and Sr. No. 21 of the Notification No. 12/2012-Customs dated 17.03.2012, as amended, covers "pulses except chickpeas(garbanzos) and lentils".

The relevant part of the notification 12/2012-Customs dated 17.03.2012 reads as below:

| Sr. No. | Chapter or Heading or Sub-heading or tariff item | Description of Goods | Standard Rate | Additional Duty rate | Condition No. |
|---------|--|--|---------------|----------------------|---------------|
| 20 | 0713 | Pulses except chickpeas (garbanzos) | 10% | - | - |
| 21 | 0713 except 0713 2000 and 0713 4000 (old-0713) | Pulses except chickpeas (garbanzos) and lentils [Old-Pulses] | NIL | - | - |
| 21A | 0713 2000 | Chickpeas (garbanzos) | NIL | - | - |
| 21B | 0713 4000 | Lentils | NIL | - | - |

1.4. The tariff item 07139099 covers only "Dried leguminous vegetables, shelled, whether or not skinned or split". The serial number 20 extended exemption to pulses except chickpeas (garbanzos). The Sr. No. 21 of the said notification extended exemption to "Pulses except chickpeas (garbanzos) and lentils". The Sr. No. 21A extended exemption to "Chickpeas (garbanzos)". The Sr. No. 21B extended exemption to Lentils. Thus, only pulses, chickpeas (garbanzos) and Lentils, covered under CTH 0713 of CTA, 1975 were exempted under the above entries. Whereas, Bhusi is outer layer/skin of pulses. The exemption under serial no. 21 of the notification No.12/2012-Customs dated 17.03.2012, as amended, was not available to Bhusi / Waste of Pulses. Therefore, under the said entry at serial number 21 of the notification No. 12/2012-Customs dated 17.03.2012, as amended, duty exemption was available only to pulses covered under CTH 0713 of CTA,1975 and it did not cover "*Bhusi / Waste of Pulses*"

1.5 The Customs Tariff Head 0713 of CTA,1975 covers "*Dried leguminous vegetables, shelled, whether or not skinned or split*" which is more generally termed as pulses as described in the said exemption notification No.12/2012-Customs dated 17.03.2012. The Bhusi / Waste of Pulses cleared/removed by KXOL are not classifiable under CTH 0713. The Bhusi / Waste of Pulses cleared/removed by the said unit are appropriately classifiable under tariff item 23025000 of CTA, 1975 . At the relevant time, Bhusi / Waste of Pulses attracted BCD @ 30%, CESS @ 3% and SAD @ 4% (aggregate 36.136%). This mis-classification has resulted in evasion of Customs Duty of Rs.15,50,735/- (detailed in Annexure-A to the Show Cause Notice)

1.6 The activities of admission and clearance of goods by SEZ Units having valid approval granted under Section 15 of the SEZ Act, 2005 and Rule 18 of the SEZ Rules, 2006 are regulated as per the provisions and procedures contained in SEZ Act, 2005, and Rules made there under. The relevant legal provisions under SEZ Act, 2005 and SEZ Rules 2006 are reproduced as under:

(i) **Section 30 of SEZ Act, 2005:-** *Subject to the conditions specified in the rules made by the Central Government in this behalf:-*

(a) *any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of Customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 (51 of 1975), where applicable, as leviable on such goods when imported; and*

(b) *the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.*

(ii) **Chapter V: Conditions subject to which Goods may be removed from a Special Economic Zone to the Domestic Tariff Area ;**

Rule 47 of SEZ Rules,2006: Sales in Domestic Tariff Area

(1) *A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by products arising during the manufacturing process or in connection therewith, in the Domestic Tariff Area on payment of Customs duties under Section 30, subject to the following conditions, namely :-*

(a) Domestic Tariff Area sale under sub-rule (1), of goods manufactured by a Unit shall be on submission of import licence, as applicable to the import of similar goods into India, under the provisions of the Foreign Trade Policy :

Provided that goods imported or procured from the Domestic Tariff Area and sold as such without being subjected to any manufacturing process shall be subject to the provisions of the Foreign Trade Policy as applicable to import of similar goods into India.

(b) Domestic Tariff Area sale under sub-rule (1) of rejects or scrap or waste or remnants arising during the manufacturing process or in connection there-with by the Unit shall not be subject to the provisions of Import Trade Control (Harmonized System) of classification of Export and Import Items:

(2)-----

(3)-----

(4) Valuation and assessment of the goods cleared into Domestic Tariff Area shall be made in accordance with Customs Act and rules made thereunder:

Rule 48 of SEZ Rules, 2006 : Procedure for Sale in Domestic Tariff Area

(1) Domestic Tariff Area buyer shall file Bill of entry for home consumption giving therein complete description of the goods and / or services namely, make and model number and serial number and specification along with invoice and packing list with the Authorised Officers:

Provided that the Bill of Entry for home consumption may also be filed by a Unit on the basis of authorization from a Domestic Tariff Area Buyer.

(2) Valuation of the goods and / or services cleared into Domestic Tariff Area shall be determined in accordance with provisions of Customs Act and rules made there under as applicable to goods when imported into India:

1.7 The subject goods cleared by KXOL from SEZ Unit into DTA are subjected to levy of Customs duty under Section 30 of Special Economic Zone Act, 2005. The Bills of Entry were filed on self assessment basis for the clearance of subject goods into Domestic Tariff Area by KXOL on the basis of authorization given by the DTA buyer namely M/s R.M. Trading Co.(IEC No. AAMFM1928P)[GSTIN No. AAMFM1928P1Z5(24)],1454, Mahukant Complex, Nava Madhupura, Ahmedabad, Gujarat-380004, under Rule 48(1) of the Special Economic Zone Rules (SEZ Rules), 2006 .

1.8 The valuation of the said goods removed / cleared under the subject Bills of Entry filed by KXOL on self-assessment basis, into Domestic Tariff Area for and on the basis of authorizations from respective DTA buyers, was done under Rule 48(2) of the Special Economic Zone Rules (SEZ Rules), 2006.

1.9 Section 17 of the Customs Act, 1962 provides for self-assessment of duty on imported and export goods by the importer or exporter himself by filing a Bill of entry or Shipping Bill, as the case may be. Under self-assessment, the importer or exporter has to ensure correct classification, applicable rate of duty, value and exemption notifications, if any, in respect of the

imported/ export goods while presenting Bill of Entry or Shipping Bill. Further, Rule 75 of the SEZ Rules, 2006 also provides that unless otherwise specified in these Rules all inward or outward movement of goods into or from the zone by the Unit or Developer shall be based on self-declaration made by the Unit/Developer. While clearing the goods to Domestic Tariff Area, KXOL was bound for true and correct declaration and assessment. As KXOL was engaged in the business of the Bhusi / Waste of Pulses, they were fully aware of specifications, characteristics, nature and description of the goods cleared by them in domestic tariff area. However, it appears that KXOL deliberately suppressed specifications and characteristics of the goods and wrongly declared the classification of the said product / goods under tariff head 0713 of CTA,1975 with an intention to evade the payment of Customs Duty. They were aware of the fact that the subject goods were not classifiable under CTH 0713 and therefore, not eligible for exemption under Customs Notification No.12/2012-Customs dated 17.03.2012, as amended. Though, the subject goods viz., Bhusi / Waste of Pulses were classifiable under tariff item 23025000 and at the time of clearance into DTA attracted Basic Customs Duty @ 30% + CESS @ 3% + SAD @ 4% (total 36.136%), by suppressing the material facts of nature, specifications , characteristics and description of the subject goods, KXOL wrongly availed the benefit of exemption under Notification No.12/2012-Customs dated 17.03.2012 with an intention to evade Customs Duty totally amounting to **Rs.15,50,735/-**, as detailed in Annexure-A to the notice.

1.10 The said unit and the above mentioned importer did not disclose the material facts relating to the actual specifications, characteristics, nature and description of the subject product cleared into DTA. The above discussed facts reveal that while clearing the subject goods i.e., Bhusi / Waste of Pulses to DTA on behalf of the above named importer, KXOL have mis-declared the subject goods, totally valued at Rs. 45,13,000/-, as detailed in Annexure-A to the notice by deliberately suppressing the material facts relating to specifications and characteristics of the same. They mis-classified the subject goods with an intention to evade the payment of appropriate duty on the same during clearance to DTA. For the said act of suppression of material facts and mis-declaration of description, the goods mentioned in Annexure-A to the Notice, totally valued at Rs.45,13,000/-, are liable to confiscation under Section 111(m) of the Customs Act, 1962, though the same are not physically available. For the act of suppression of material facts and mis-declaration, KXOL and above mentioned importer have rendered themselves liable to penalty under Section 112(a) of the Customs Act, 1962. By the act of knowingly evading Customs duty by suppressing the material facts and mis-declaration of the subject goods, KXOL and the importer mentioned above have also rendered themselves liable to penalty under Section 114A of the Customs Act, 1962. Since, KXOL have prepared and used invoices and packing lists showing false information about the subject goods, this act on their part have rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962.

2. In view of the above discussions and facts M/s Kitchen Xpress Overseas Limited, and the Importer viz., M/s. R.M. Trading Co. were called upon to Show Cause vide Notice No. S/10-59/Adj./ADC/KXOL/2018-19 dated 14.03.2019 by the Additional Commissioner of Customs, Custom House, Kandla as to why:

- a) The classification declared as Customs Tariff Item 07139099 of Customs Tariff Act, 1975 in the Bills of Entry appearing in Annexure-A to the notice should not be rejected and the goods detailed in Annexure-A to the notice should not be classified under the Customs Tariff Item 23025000 of Customs Tariff Act, 1975 and the respective Bills of Entry be assessed accordingly;
- b) the exemption availed under Notification No.12/2012-Customs dated 17-03-2012, as amended, should not be denied to the goods detailed in the Annexure-A to the notice;
- c) the Customs duty totally amounting to Rs.15,50,735/- on the goods detailed in Annexure-A to the notice should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with interest thereon under Section 28AA ibid;
- d) the goods mentioned in Annexure-A to the notice, totally valued at Rs.45,13,000/-, should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962, though the same are not physically available.
- e) Penalty under Section 112(a) & 114A of the Customs Act, 1962 should not be imposed on each of them for reasons discussed above.
- f) Penalty under Section 114AA of the Customs Act, 1962 should not be imposed upon M/s. KXOL for using the false and incorrect material resulting in evasion of total Customs Duty of Rs.15,50,735/-.

DEFENCE REPLY AND PERSONAL HEARING

3. M/s. Kitchen Xpress Overseas Limited acknowledged the receipt of Show Cause cum Demand Notice issued vide F.No S/10-59/Adj/ADC/KXOL/2018-19 vide letter dated 01.04.2019, wherein they have stated that they are not in agreement to the facts stated therein and that the subject consignments were duly assessed and cleared after due preventive supervision of the products as well as their classifications.

3.1 For the sake of natural justice, date of personal hearing in the matter was fixed on 09.05.2019 vide this office letter dated 26.04.2019. M/s. R.M. Trading Co. vide their letter dated 08.05.2019 have informed that KXOL had already filed a petition bearing Special Civil Application No.3374 of 2019 before Hon'ble High Court of Gujarat in respect of SCN F. No. S/10-43/Adj/Commr/KXOL/2017-18 dated 20.03.2018 and corrigendum dated 01.01.2019 issued in the similar issue. The said petition is pending for hearing. In the meantime the department has issued the SCN No. S/10-59/ADJ/ADC/KXOL/2018-19 dated 14.03.2019 for further period from 01.04.2017 to 31.12.2017. KXOL had already given instruction to his lawyer

to amend the SCN dated 14.03.2019 in the above pending petition in High Court. As and when the lawyer of KXOL will prepare the amendment and will file in Hon'ble High Court, they will inform them, but due to the Summer Vacation KXOL will file the amendment challenging the said SCN of S/10-59/Adj./ADC/KXOL/2018-19 dated 14.03.2019 after reopening of the Court. M/s R.M Trading Co. requested to adjourn the P.H. for two months in the interest of the justice.

KXOL, vide letter dated 07.05.2019, has informed that they have filed a petition bearing Special Civil Application No.3374 of 2019 in respect of SCN F. No. S/10-43/Adj/Commr/KXOL/2017-18 dated 20.03.2018 and corrigendum dated 01.01.2019 before Gujarat High Court, wherein the Hon'ble Court has passed the Order on 25.02.2019 that

"it would be open to the petitioner to seek adjournment in respect of the hearing of the notice and hearing shall be adjourned and posted after returnable date".

During the pending of the above matter, the department has issued the SCN No. S/10-59/Adj./ADC/KXOL/2018-19 dated 14.03.2019 for further period from 01.04.2017 to 31.12.2017. They had already given instruction to their lawyer for amendment in the above said petition to include the instant SCN S/10-59/Adj./ADC/KXOL/2017-18, dated 14.03.2019 which pertains to similar issue for further period from 01.04.2017 to 31.12.2017. They further submitted that their lawyer would file the amendment challenging the instant SCN on reopening of Court after Summer Vacation. Therefore, they requested to adjourn the Personal Hearing after 20th June, 2019.

3.2 The noticees, with reference to their above said letters dated 07.05.2019 and 08.05.2019, were requested vide this office letter dated 10.05.2019 to submit the copy of amended petition bearing Special Civil Application No.3374 of 2019 challenging the instant SCN. Further date of personal hearing in the matter was fixed on 05.07.2019 vide this office letter dated 21.06.2019 with a request to submit the copy of amended petition bearing Special Civil Application No.3374 of 2019.

KXOL vide their letter dated 03.07.2019 has reiterated the facts already informed vide their above said earlier letter dated 07.05.2019 with further addition that the said petition was came up for hearing on 26.06.2019 before Hon'ble High Court but due to un-served respondent i.e. Additional Commissioner of Customs, the Hon'ble Court has passed order that *"Fresh Notice to un-served respondent returnable on 24.07.2019. Direct Service is permitted."*

Further, they have informed that they would serve the notice before 24.07.2019 and requested to adjourn the Personal Hearing till 25.07.2019 in the interest of justice.

M/s. R.M. Trading Co. vide their letter dated 04.07.2019 have reiterated the facts already informed vide their above said earlier letter dated 08.05.2019 with addition that the lawyer of KXOL will file the amendment in the Hon'ble Court by the end of the week. They have requested to adjourn the Personal Hearing for two months.

3.3 M/s Kitchen Xpress Overseas Limited were again request vide this office letter dated 09.07.2019 to provide copy of amendment in petition within a period of 15 days without fail. Again vide this office letter dated 18.07.2019, the noticees were informed that two

opportunities have already been given and as per the provisions of Section 122A of the Customs Act, 1962 no such adjournment shall be granted more than three times during adjudication proceedings. Further date of personal hearing in the matter was fixed on 01.08.2019 with a request to submit the copy of amended petition bearing Special Civil Application No.3374 of 2019.

KXOL vide their letter dated 29.07.2019 have again reiterated the facts already informed vide their above said earlier letters dated 08.05.2019 and 03.07.2019 with addition that the said petition was came up for hearing on 24.07.2019 before Hon'ble High Court and Govt. Advocate had taken time, so now Hon'ble High Court has kept the matter on 08.08.2019. They further submitted that their advocate has given a copy of amendment to Govt. advocate. They have requested to adjourn the Personal Hearing till the final hearing of the above said SCA. M/s. R.M. Trading Co. have neither attended the Personal Hearing nor submitted any written submission.

3.4 Vide this office letter dated 09.08.2019, last and final personal hearing in the matter was fixed on 21.08.2019 with a request to submit the copy of amended petition bearing Special Civil Application No.3374 of 2019. Further, their (noticees) attention was also drawn towards the provisions of Section 28 of Customs Act, 1962. As per the provisions stipulated under Section 28 ibid all cases, except the cases covered by the following reasons/grounds provided under Section 28(9A) of Customs Act, 1962, are to be decided within the prescribed time period:-

- (a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court of the Supreme Court; or*
- (b) an interim order of stay has been issued by the Appellate Tribunal or the High Court of the Supreme Court; or*
- (c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or*
- (d) the Settlement Commission has admitted an application made by the person concerned.*

In view of above provisions, the instant Show Cause Notice cannot be kept pending for adjudication on the basis of Special Civil Application No.3374 of 2019 filed under Article 226 of the Constitution of India by you in similar issue before Hon'ble High Court of Gujarat unless it is amended and specifically ordered by Hon'ble High Court to keep pending the SCN as the above said SCA cannot be considered as an appeal. Therefore, the noticees were requested to submit their reply within 7 days or at the time of last and final hearing which was scheduled to be held on 21.08.2019.

M/s Kitchen Xpress Overseas Limited vide their letter dated 16.08.2019 have informed that they have moved Amendment of the said Show Cause Notice before Hon' ble High Court in Special Civil Application No.3374 of 2019 in respect of SCN F.No.S/10-43/Adj/Commr/KXOL/2017-18 dated 20.03.2018 and corrigendum dated 01.01.2019 before Gujarat High Court. The said SCA was come up for hearing on 24.07.201 but Govt. Advocate had

taken time, hence, the matter was kept on 08.08.2019. Their Advocate has given the copy of Amendment to Govt. advocate. On 08.8.2019, the Govt. advocate was on leave; therefore, Hon'ble High Court has kept the said SCA on 09.09.2019. They have requested to adjourn the Personal Hearing till the final hearing of the above said SCA.

M/s. R.M. Trading Co. have neither attended the Personal Hearing nor submitted any written submission.


3.5. Considering the request of M/s Kitchen Xpress Overseas Limited in view of hearing on 09.09.2019 in SCA No.3374 of 2019, the adjudication process of the case were kept pending. But, as per the present status of the above said SCA obtained on today i.e. 11.09.2019 from the website of Hon'ble High Court, the matter has been adjourned and next hearing is fixed on 07.10.2019. Therefore, in view of the provisions of Section 28 of Customs Act, 1962, the Instant Show Cause Notice dated 14.03.2019 is to be decided within stipulated time limit as the same cannot be kept pending on the basis of SCA No.3374 of 2019 filed by M/s Klitchen Xpress Overseas Limited in SCN dated 20.03.2018 and Corrigendum dated 01.01.2019.

DISCUSSION AND FINDINGS

4. I have carefully gone through the records of the case, the written request from the both the noticees to adjourn or cancel the Personal Hearing till the final hearing of Special Civil Application No.3374 of 2019 filed by them under Article 226 of the Constitution of India before Hon'ble High Court of Gujarat in respect of SCN F. No. S/10-43/Adj/Commr/KXOL/2017-18 dated 20.03.2018 and corrigendum dated 01.01.2019 issued in the similar issue and the relevant provisions of law and I find that enough opportunities have been given to them vide this office letter dated 09.05.2019, 05.07.2019, and 21.08.2019, however neither M/s KXOL nor M/s R.M.Trading Co. appeared for personal hearing, rather they presented their excuses repeatedly that they have filed a writ petition for amendment of the petition. They were given enough opportunity to present their amended petition and its Order for this Show Cause Notice dated 14.03.2019 vide this office letter dated 10.05.2019, 09.07.2019, 18.07.2019 and 09.08.2019, however nothing fruitful has come out. They always emphasized that Hon'ble High Court Gujarat vide its Order dated 25.02.2019 has passed an Order as under:

"It would be open to the petitioner to seek adjournment in respect of the hearing of the notice and hearing shall be adjourned and posted after returnable date"

This Order has been passed by the Hon'ble High Court, Gujarat in Civil Writ Petition No. 3374 of 2019 in respect of SCN No. F.No.S/10-43/Adj/Commr/KXOL/2017-18 dated 20.03.2018 and the Show Cause Notice was not taken up for Adjudication as per the direction of Hon'ble High Court, Gujarat.

As no stay was granted by the Hon'ble Court on Show Cause Notice No. S/10-59/ADC/KXOL/2018-19 dated 14.03.2019, hence they were informed by this Office letter dated 

09.08.2019 regarding the existing provisions of Section 28 of the Customs Act, 1962 that all cases are to be decided within the stipulated time period except the cases covered by the reasons/ground as provided under Section 28(9A) of the Act, which are as under:

(a) *an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court of the Supreme Court; or*

(b) *an interim order of stay has been issued by the Appellate Tribunal or the High Court of the Supreme Court; or*

(c) *the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or*

(d) *the Settlement Commission has admitted an application made by the person concerned.*

It was categorically stated and informed to them, that the SCN cannot be kept pending for adjudication on the basis of Special Civil Petition Application No. 3374 of 2019 filed by you in a similar matter before Hon'ble High Court, Gujarat unless it is amended and specifically ordered by Hon'ble High Court to keep pending the SCN dated 14.03.2019 as the SCA No. 3374 of 2019 cannot be considered as an appeal. But they repeated their argument in the same manner as in their earlier replies. Hence, I am bound to decide the Show Cause Notice dated 14.03.2019 in terms of provisions of sub-section 9 (a) of the section 28 of the Customs Act, 1962.

I find that the process of natural justice under Section 122 A of the Customs Act, 1962 (as amended time to time) has been completed and therefore, I proceed to decide the case on the basis of available records and applicable provisions of the law of the land. I find that the following are main issues, which are involved in the subject Show Cause Notice and are required to be decided -

- a. Whether the goods are correctly classified under CTH 23025000 of Customs Tariff Act, 1975 instead of the CTH 07139099 of Customs Tariff Act, 1975 as declared in the Bills of Entry or not.
- b. Whether the exemption availed under Notification No.12/2012-Customs dated 17-03-2012 is correct or not.
- c. Whether the Customs duty of Rs.15,50,735/- should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with interest thereon under Section 28AA ibid;
- d. Whether the goods valued at Rs.45,13,000/-, should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962, though the same are not physically available.
- e. Whether penalty under Section 112(a) & 114A of the Customs Act, 1962 should not be imposed on each of them.
- f. Whether Penalty under Section 114AA of the Customs Act, 1962 should not imposed upon M/s. KXOL for using the false and incorrect material resulting in evasion of total Customs Duty of Rs.15,50,735/-.

4.1 I find that M/s. KXOL had cleared/removed the goods into Domestic Tariff Area declaring goods as "Bhusi / Waste of Pulses" under CTH 07139099. During the test check of records of the Office of the KASEZ from the period from 2012-13 to 2016-17 by CRA Audit Team, the objection was raised that M/s. KXOL has cleared/removed the goods namely "Bhusi / Waste of Pulses" to M/s. R.M. Trading Co. They have classified the goods under CTH 07139099 and claimed exemption of duty vide Sl. No. 21 of the Notification No. 12/2012-Customs dated 17th March, 2012. However, CRA Audit (C&AG) observed and raised the para stating that noticee has cleared Bhusi / Waste of Pulses and classified under Chapter heading 07139099 covers only "Dried leguminous vegetable, shelled, whether or not skinned or split" and claimed full duty exemption under Sl. No. 21 of the Notification No. 12/2012-Customs dated 17th March, 2012 as amended which covers only Dried leguminous vegetable (pulses). Whereas, the Bhusi / Waste of Pulses cleared/removed by the said unit are appropriately classifiable under tariff item 23025000 of CTA, 1975 (Bran, Sharps and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants) and attract, at the relevant time, BCD @ 30%, CESS @ 3% and SAD @ 4% (aggregate 36.136%).

From the above, it is clear that chapter head 07139099 does not cover Bhusi / Waste of Pulses. I find that chapter heading 07139090 includes various type of Pulses, Dried leguminous vegetable, shelled, whether or not skinned or split other than put up in unit container and Chapter Sub-Heading 23025000 covers the Bhusi / Waste of Pulses. Chapter - 23 - Residues and Waste from the Food Industries; Prepared Animal Fodder; Prepared Animal Fodder reads as follows:-

| HS Code | Item Description |
|----------|---|
| 2302 | Bran, Sharps and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants |
| 23025000 | of leguminous plants |

The goods declared in the Bill of Entry were "Bhusi / Waste of Pulses", which are correctly classifiable under CTH 23025000. As per Rule 3(a) of the General Rules for Interpretation of the Schedule, the heading which provides the most specific description shall be preferred to headings providing a more general description. The Bhusi / Waste of Pulses have more specific Customs Tariff Heading under CTH 23.02 than the general heading under CTH 07.13. Hence the goods, which were declared in the Bill of Entry as "Bhusi / Waste of Pulses" are correctly classifiable under CTH 23025000.

4.2 I find that Noticee being a SEZ unit have imported various type of pulses for the purpose of re-export after processing as per requirement of foreign buyers. However, they have removed the goods "Bhusi / Waste of Pulses" in domestic tariff area under tariff heading 07.13 availing benefits of Sr. no. 21 of Customs Notification no. 12/2012 dated 31.03.2012. I

find that tariff heading 07.13 classified the goods viz. Dried Leguminous, shelled, whether or not skinned or split. The same tariff heading does not classify any Bhusi / Waste of Pulses form of goods. I find that they have wilfully/intentionally cleared the goods in DTA by way of mis-classification to evade the customs duty, therefore, the goods under question are liable for confiscation under section 111(m) of the Customs Act, 1962, in as much as, the classification in the Bills of Entry were not true and correct with an intention to evade duty of customs. Since they removed/cleared goods are not physically available for confiscation, but the said goods are liable for confiscation. I find that there is a difference between "confiscation" and "liable to confiscation". It is settled law that the goods which are liable to confiscation can be ordered for to be confiscated. Mis-classification is one of the modality to evade the Customs duty and less payment of duty. In cases where classification is not correctly stated for some purpose, that is to say not mentioning correct classification of the goods, then it would amount to violation of the conditions for import of the goods. The purpose of changing of description/classification may be for some other purpose, but it would certainly amount to illegal/ unauthorized and against the statute.

4.3 Further I find that Section 17 of the Customs Act, 1962 provides for self-assessment of duty on imported and exported goods by the importer or exporter himself by filing a Bill of entry or Shipping Bill, as the case may be. Under self-assessment, the importer or exporter has to ensure correct classification, applicable rate of duty, value and exemption notifications, if any, in respect of the imported/ export goods while presenting Bill of Entry or Shipping Bill. Further, Rule 75 of the SEZ Rules, 2006 also provides that unless otherwise specified in these Rules all inward or outward movement of goods into or from the zone by the Unit or Developer shall be based on self-declaration made by the Unit/Developer. While clearing the goods to Domestic Tariff Area, KXOL was bound for true and correct declaration and assessment. As KXOL was engaged in the business of importing the pulses and export of the same after due process as per foreign buyers. They were fully aware of specifications, characteristics, nature and description of the goods cleared by them in domestic tariff area. However, I find that KXOL deliberately suppressed specifications and characteristics of the goods and wrongly declared the classification of the said product / goods under tariff item 07139099 of CTA,1975 instead of CTH 23025000 with an intention to evade the payment of Customs Duty. They were aware of the fact that the subject goods were not classifiable under CTH 07.13 and therefore, not eligible for exemption under Customs Notification No.12/2012-Customs dated 17-03-2012, as amended. From the description of the goods viz., Bhusi / Waste of Pulses, I find that these goods were correctly classifiable under tariff item 23025000. By suppressing the material facts of nature, specifications, characteristics and description of the subject goods, KXOL wrongly availed the benefit of exemption under Notification No.12/2012-Customs dated 17-03-2012 with an intention to evade Customs Duty as detailed in Annexure-A of the notice.

4.4 The SCN proposes imposition of penalty under Section 112(a) of the Customs Act, 1962 on both the Noticees. I find that Section 112(a) of the Customs Act, 1962, stipulates that any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable for confiscation under Section 111, or abets the doing or omission of such an act is liable to penalty as prescribed under the said Section. I find that the goods have already been made liable for confiscation for violation of Section 111 of the Customs Act, 1962, persons are also liable for penal action under Section 112 of the Customs Act, 1962.

4.5 I further find that the goods were imported by M/s. KXOL being a SEZ unit to re-export the same after processing and on the other hand they have removed the goods into Domestic Tariff Area to M/s R.M. Trading Co. by way of mis-classifying the goods in wrong chapter head with intension to evade the Customs duty and wrongly availed the benefit of Notification No. 12/2012 dated 17.03.2012, as amended, which is not admissible to them. I find that both the noticees have mis-led to the Department; therefore they cannot run away from the responsibility of removal of the goods by mis-classification of the goods. Section 114A provides that any penalty has been levied under section 114A, no penalty shall be levied under section 112 or section 114 of Customs Act, 1962, hence I propose to impose penalty under Section 114A of the Customs Act, 1962 on M/s. R.M Trading Co. and penalty under section 112 of the Customs Act, 1962 on M/s KXOL for violation of the provisions of Section 111(m) of the Customs Act, 1962.

4.6 The SCN also proposes penalty under Section 114AA of the Customs Act, 1962 on M/s. KXOL.

Section 114AA. Penalty for use of false and incorrect material. –If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for purpose of this Act, shall be liable to a penalty not exceeding five times the value of goods.

I Find that M/s. KXOL have prepared the invoices and packing list and filed Bill of Entry on behalf of M/s. R.M. Trading Co. showing false information about the subject goods, this act on their part have rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962. Hence, I hold that M/s KXOL is also liable for penalty under Section 114AA of the Customs Act, 1962.

5. In view of the foregoing discussions and findings, I pass the following order-

ORDER

- a. I reject the classification of the goods under CTH 07139099 and order to classify the goods under CTH 23025000 of Customs Tariff Act, 1975 and to assess the Bills of Entry accordingly.
- b. I deny the benefit of exemption of the Notification No. 12/2012-Customs dated 17.03.2012, as amended, which was availed by M/s R.M.Trading Co. and order to

recover Customs duty of Rs. 15,50,735.00 (Rupees Fifteen Lakh Fifty Thousand Seven Hundred Thirty Five only) from M/s R.M. Trading Co, 1454, Mahukant Complex, Nava Madhupura, Ahmedabad, Gujarat-380004 under Section 28(4) of the Customs Act, 1962 along with interest thereon under Section 28AA ibid;

- c. I order to confiscate the goods valued at Rs.45,13,000/-, under Section 111(m) of the Customs Act, 1962, however as the goods are not physically available, I do not impose redemption fine under Section 125 of the Customs Act, 1962;
 - d. I impose penalty of Rs. 8,00,000.00 (Rupees Eight Lakh only) on M/s. KXOL under Section 112(a) of the Customs Act, 1962;
 - e. I impose penalty of Rs. 15,50,735.00 (Rupees Fifteen Lakh Fifty Thousand Seven Hundred Thirty Five only) on M/s. R.M.Trading Co. under Section 114A of the Customs Act, 1962. However, I give an option, under proviso to Section 114A, to the Noticee, to pay 25% of the amount of total penalty imposed at (e) above, subject to payment of total amount of duty confirmed at (b) above, interest confirmed at (b) above and the amount of 25% of penalty imposed at (e) above within 30 days of receipt of this order;
 - f. I impose penalty of Rs. 2,00,000.00 (Rupees Two Lakh only) on M/s. KXOL under Section 114AA of the Customs Act, 1962.
6. The said order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the Customs Act, 1962 and/or the Rules made there under and/or any other law for the time being in force.



(AJAY KUMAR)
Additional Commissioner,
Custom House, Kandla

F.No. S/10-59/Adj./ADC/KXOL/2018-19

Dated 11.09.2019

To,

1. M/s Kitchen Xpress Overseas Limited,
Plot No. 623, Shed No. 402,
New Area, Kandla Special Economic Zone,
Gandhidham, Kutch
2. M/s R.M. Trading Co.,
1454, Mahukant Complex, Nava Madhupura,
Ahmedabad, Gujarat-380004

Copy to :-

1. The Principal Commissioner of Customs, Kandla,
2. The Development Commissioner, KASEZ, Gandhidham.
3. The Deputy Commissioner (RRA) Customs Kandla.
4. The Assistant Commissioner (Recovery), CH, Kandla.
5. Guard File